

## Missouri Attorney General's Opinions - 1934

Opinion	Date	Topic	Summary
<a href="#">1-34</a>	Feb 16	DISTRICTS.	Book Fund can only be used for the purchase of free textbooks.
<a href="#">1-34</a>	Mar 1	VOTING.	Members of Citizens Conservation Camp are entitled to vote in Missouri. When?
<a href="#">1-34</a>	Mar 5	DEPOSITIONS.	State not compelled to pay cost of depositions taken at a preliminary hearing when defendant is discharged. Depositions taken outside state by defendant for use at trial are legal costs to be paid by State if defendant is discharged.
1-34	July 12	Hon. Herbert M. Adams	WITHDRAWN
<a href="#">1-34</a>	July 28	ELECTIONS.	Candidate is not entitled to have name printed on official ballot unless he complies with Sections 10257 and 10258 at least sixty days before the primary.
<a href="#">1-34</a>	Oct 15	CORPORATIONS. COMPANIES.	Cooperative organizations cannot be organized under Article XXIX, Chapter 87, R. S. Mo. 1929, for the sole purpose of operating a cooperative oil company, but may so operate under Article IX, Chapter 32, R. S. Mo. 1929.
<a href="#">1-34</a>	Oct 23	TRADE-MARK. ABANDONMENT.	Evidence not sufficient to constitute abandonment of Trade-Mark.
<a href="#">1-34</a>	Oct 31	ELECTIONS.	Moving of election place from general store to basement of Methodist Parsonage would not invalidate returns unless fraud existed. It is illegal for candidate to remain in voting booth or voting precinct and electioneer for themselves or anyone else.
<a href="#">2-34</a>	Mar 3	SCHOOLS. SCHOOL DISTRICTS.	Child whose parents do not support her and who is making a permanent or temporary home with her grandmother, is entitled to be educated in the district in which she lives, without the payment of tuition.
<a href="#">2-34</a>	May 8	COUNTY COLLECTOR.	After Dec. 31, 1936 in counties of less than 40,000 inhabitants, the county collector is to assume duties of county treasurer and is to receive no additional compensation therefor.
<a href="#">2-34</a>	June 1	MUNICIPALITIES.	Construction of Charter provisions of Maplewood, Mo.
<a href="#">2-34</a>	June 13	LIQUOR CONTROL ACT.	Licensed wholesale distributor may employ agent and agent need not obtain a license.
<a href="#">2-34</a>	June	COUNTY COLLECTOR.	Costs collectible from the taxpayer, when.



	28	COUNTY CLERK.	Collector entitled to pay for making list of delinquent taxes although not collected until term of office expires.
2-34	July 10	Hon. E. W. Allison	WITHDRAWN
<a href="#">2-34</a>	July 18	SCHOOL DISTRICTS. SCHOOL MONEYS. DEPOSITORIES.	Board of Education of school district required to select a depository in the same manner as county courts, and treasurer of school district is liable for loss of funds not deposited in such depository.
<a href="#">2-34</a>	Aug 20	HOME OWNERS' LOAN CORPORATION.	County Court cannot make a compromise settlement of loans made out of county school fund, nor accept what can be loaned by H. O. L. C. thereafter.
<a href="#">2-34</a>	Aug 21	LOTTERIES. PROSECUTING ATTORNEY.	"Suit Club" whereby weekly amount paid for certain period with a chance to get suit before end of period held violation of section 4314 R.S. Mo. 1929 against lotteries.
<a href="#">3-34</a>	Mar 23	NEPOTISM.	Under Section 8026, R. S. Mo. 1929, Mayor, City Council and Judges of the County Court elect Commissioners. If one member of City Council participates in the election of relative within prohibited degree, such election would be illegal.
<a href="#">3-34</a>	Sept 11	CRIMES AND PUNISHMENT.	Under Section 4287, R. S. Mo. 1929, it is unlawful to operate slot machines.
<a href="#">3-34</a>	Sept 12	LOTTERIES.	Relating to the subject of lotteries as defined by our statutes and constitution.
<a href="#">3-34</a>	Oct 31	ELECTIONS.	Members of Federal Transient Camps are entitled to vote in the general election providing they possess the other necessary qualifications.
<a href="#">4-34</a>	Feb 27	TOWNSHIP CLERK.	Section 12293-12298, inclusive, or other sections of Chapter 86, R. S. Mo. 1929, do not require Clerk to itemize individual warrants in making report.
<a href="#">4-34</a>	May 16	TAXATION.	Collection of delinquent city taxes under Senate Bill 94 in cities.
<a href="#">4-34</a>	Aug 31	CORPORATIONS, FOREIGN. SECRETARY OF STATE.	Secretary of State cannot issue a license to a foreign corporation without statement of such corporation as to its capital stock authorized in Missouri.
<a href="#">5-34</a>	Jan 29	PURCHASING AGENT ACT.	Inapplicable to the University of Missouri.
<a href="#">5-34</a>	Feb 22	COUNTY COURTS. TAXES.	A County Court is without power to consolidate general revenue levy with county road and bridge levy; must make separate levies for each.
<a href="#">5-34</a>	June 28	ELECTIONS.	Under Section 10267a not necessary for the Board of Election Commissioners to print ballots for the Socialist Party in the County of St. Louis.

<a href="#">5-34</a>	June 29	ELECTIONS.	Judges of election may be appointed, even though a member of their family be a candidate for county office or central committee.
<a href="#">5-34</a>	Nov 27	ROADS.	Taxability of public roads and inclusion of land on which such roads are located in Assessor's books.
<a href="#">6-34</a>	Jan 9	NEPOTISM.	Grain Sealer, whose duties are defined in House Bill No. 79, is subject in his appointment to the provisions of Section 13 of Article XIV of the Constitution of Missouri.
<a href="#">6-34</a>	Feb 2	LIQUOR CONTROL ACT.	Corporations may be licensed and Section 27 not applicable to them.
<a href="#">6-34</a>	Feb 23	ELECTIONS.	Absentee voters may vote in the city primary and at the city general election by absentee ballot providing laws of Mo. 1933 p. 219-224 are complied with.
<a href="#">6-34</a>	Feb 26	BOARD OF ELECTION COMMISSIONERS.	Authority to remove judges and clerks of election.
<a href="#">6-34</a>	Apr 12	LIQUOR CONTROL ACT.	No license necessary for a druggist to sell intoxicating liquor on prescription; it is unlawful for a pharmacist to refill any such prescriptions.
<a href="#">6-34</a>	Apr 24	LIQUOR CONTROL ACT.	Sec. 11, Art. 2, Constitution of Mo. has no application to a crime being committed in officer's presence; when peace officer has reason to believe that an automobile is being used to transport intoxicating liquors in violation of laws of Mo., his search and seizure of liquors without a search or other warrant is not a violation of Sec. 11, Art. 2, Constitution of Mo.
<a href="#">6-34</a>	May 24	LIQUOR CONTROL ACT.	If retail dealer sells intoxicating liquor without obtaining license from County Court, it is violation of Sec. 24 of Liquor Control Act. County Court not authorized to license wholesalers, distillers, manufacturers or brewers.
<a href="#">6-34</a>	June 14	LIQUOR CONTROL ACT.	It is unlawful for holder of permit under Non-intoxicating Beer Act to have or allow another person to have, upon premises described in permit, any intoxicating liquor with alcoholic content in excess of 3.2 by weight, and holder of 3.2 permit is prohibited from obtaining license under Liquor Control Act.
<a href="#">6-34</a>	Sept 6	MERCHANT TAXES. PERSONAL PROPERTY. TAXATION.	Clause 11, Section 9756, R.S. Mo. 1929, excludes only such merchandise from personal property tax as shall have been actually returned for taxation under the merchants tax law. (Section 10081, R.S. Mo. 1929).
<a href="#">6-34</a>	Sept 7	TAXATION.	Agencies of State Government required to pay both State and municipal gasoline taxes.

<a href="#">6-34</a>	Oct 12	PROBATE COURTS.	Nominee for Probate Judge of Pike Co. nominated by Democratic Party at primary was nominated for the regular term. County Democratic Committee should select someone to run for the special term.
<a href="#">6-34</a>	Dec 5	COUNTY TREASURER.	Laws Mo. 1933, p. 357 do not apply to Randolph County.
<a href="#">6-34</a>	Dec 22	OFFICER. SURETY BOND. COUNTY COURT.	County Court must require new surety bond when newly elected member of the County Court is on the old bond, but this contingency does not make the new judge ineligible to the oath of office.
<a href="#">7-34</a>	Jan 25	COUNTY TREASURER.	An opinion on question of whether present county treasurers are eligible as candidates for office of county collector in election of 1934.
<a href="#">7-34</a>	May 12	BANKS & BANKING.	Right of subrogation of Federal Deposit Insurance Corporation in event of failure of banks in Missouri.
<a href="#">7-34</a>	Aug 25	COUNTY TREASURER.	County treasurer cannot serve as deputy to County Collector while remaining Treasurer.
8-34	Oct 2	Hon. Louis W. Block	WITHDRAWN
<a href="#">9-34</a>	Jan 23	COUNTY COURTS. COLLECTORS' BONDS.	Authorized to examine collector's bonds. May be examined by County Court. "Additional Bond" means a new bond.
<a href="#">9-34</a>	Jan 23	COUNTY FINANCIAL STATEMENT.	Opinion relating to the annual financial statement of counties as provided under section 12165. Laws 1933, page 353.
<a href="#">9-34</a>	Jan 24	SCHOOLS.	An Opinion relating to payment of delinquent school warrants.
<a href="#">9-34</a>	Dec 20	ELECTIONS.	Necessity of registrar elect having property qualification in order to receive certificate of election.
<a href="#">10-34</a>	Jan 18	DEPARTMENT OF AGRICULTURE - FARM - WAREHOUSE AT - HOUSE BILL NO. 79.	Act requires insurance to be carried on grain in Warehouse but may be waived by Federal Government.
<a href="#">10-34</a>	Jan 19	FUNDS.	"County public school fund", "seminary fund" and "public school fund" discussed.
<a href="#">10-34</a>	Jan 22	OPTOMETRY BOARD. OFFICERS. COMPENSATION. FEES.	Members of State Board of Optometry are entitled to per diem for days necessarily used in travel to and from necessary meetings of the board, when travel is made by the usual and most direct route. Fraction of day spent in service at meeting taken as a whole day.
<a href="#">10-34</a>	Mar 10	LIQUOR CONTROL ACT.	County Court may charge for licenses issued to retail dealers.
<a href="#">10-34</a>	Mar 12	LIQUOR CONTROL ACT.	Country Club is not entitled to a license to sell intoxicating liquor by the drink unless located in city where sale by drink is authorized.

<a href="#">10-34</a>	Mar 12	PROSECUTING ATTORNEY.	Township assessor who fills a vacancy after a change in law as to compensation is entitled only to compensation under the old law until end of term.
<a href="#">10-34</a>	Mar 15	STATE ATHLETIC COMMISSION.	Has no authority to waive collection of tax provided by Sec. 12999, R.S. '29.
<a href="#">10-34</a>	May 16	SANATORIUM.	Transportation of Patients to Missouri State Sanatorium and Compensation therefor.
<a href="#">10-34</a>	June 1	COUNTY DEPOSITARIES.	Rate of Interest to be paid by County Depositary for County funds.
<a href="#">10-34</a>	July 9	LICENSES FOR CREAM STATIONS.	Are milk and cream gathering routes entitled to be licensed as milk stations?
<a href="#">10-34</a>	Aug 9	CRIME AND PUNISHMENT.	Obtaining a signature to promissory note by false pretenses.
<a href="#">10-34</a>	Aug 24	JACKSON COUNTY BOARD OF ELECTION COMMISSIONERS.	May conduct intermediate registration in any manner they deem advisable.
<a href="#">10-34</a>	Sept 4	LIQUOR CONTROL ACT.	Intoxicating malt liquor is excepted from provisions of Sec. 13-a and may be sold by the drink providing other qualifications of act are complied with.
<a href="#">10-34</a>	Sept 12	ICE CREAM.	Manufacturer of ice cream operating chain of stores and selling ice cream at retail through said stores with no element of resale is a retail manufacturer and subject only to the \$5.00 license tax under section 13071, Laws 1933, page 254.
<a href="#">10-34</a>	Sept 18	OFFICERS OF COUNTY.	One cannot be candidate for both the office of Justice of the Peace and Probate Judge at same time.
10-34	Oct 18	Hon. W. L. Bradford	WITHDRAWN
<a href="#">10-34</a>	Oct 23	UNCLAIMED MONEY.	Who has right to money seized with gambling device when no claim is made therefor?
<a href="#">10-34</a>	Nov 9	SCHOOLS.	Right of non-resident pupils to attend in district where parent pays taxes.
<a href="#">10-34</a>	Nov 16	OPTOMETRY, STATE BOARD OF.	One who has passed state examination but has waited over five years before applying for a certificate of registration is not entitled thereto.
<a href="#">11-34</a>	Jan 10	CORPORATIONS.	A Foreign corporation incorporated to make loans, secured by real estate, chattel mortgages, or otherwise than to carry on a general mortgage business in all its forms may be domesticated in the State of Mo.
<a href="#">11-34</a>			

<a href="#">11-34</a>	Jan 16	SECRETARY OF STATE. LAND DEPARTMENT.	Right to patent land granted to Cairo and Fulton Railroad.
<a href="#">11-34</a>	Jan 24	SECURITIES. GUARDIAN FOUNDATION. TRADE ACCEPTANCE CERTIFICATES.	Right to service on cost plus basis and subscription to education magazine if securities within R. S. Mo. 1929, Sec. 7734c.
<a href="#">11-34</a>	Feb 14	TRADE-MARKS.	Ownership and right to use trade-mark not to be determined by Secretary of State or this office; Secretary of State not required to make investigation to ascertain whether trade-mark registered will be used solely, and Act does not provide for cancellation of registration.
<a href="#">11-34</a>	Mar 7	CIRCUIT CLERKS.	Compensation beginning in 1935 – Pay of Deputies, and constitutional question of Laws 1933, p. 369.
<a href="#">11-34</a>	Mar 19	BANKS AND BANKING.	National Banks in Missouri have authority to pledge their assets to secure deposits of public funds to Secretary of State under Section 7784 R.S. 1929.
<a href="#">11-34</a>	Mar 19	COUNTY SURVEYORS.	Vacancy in office for failure to give bond within 60 days.
<a href="#">11-34</a>	Mar 22	CITIES OF THIRD CLASS.	Officers failing to comply with Sec. 6738, R.S. Mo. 1929 subject to an action in nature of mandamus.
<a href="#">11-34</a>	Mar 22	COURT COSTS.	Neither State nor county liable for expert witness fees.
<a href="#">11-34</a>	Apr 12	TRADEMARK.	Descriptive words not subject to registration.
<a href="#">11-34</a>	Apr 17	NEPOTISM.	A teacher whose grandmother is a half-sister to a director's wife's mother is not related within the fourth degree.
<a href="#">11-34</a>	May 17	SECRETARY OF STATE. PRINTING CONTRACT. STATE PURCHASING AGENT.	State Purchasing Agent has no control over printing for Missouri Commission for the Blind but such printing is entitled to be done by the State Printing Commission.
<a href="#">11-34</a>	May 31	ELECTIONS.	Relating to the method by which absentee electors may cast their ballot in a general election or a primary.
<a href="#">11-34</a>	May 31	CORPORATIONS.	A person cannot act as director and vote in a corporation if he has executed his note for capital stock. If the note is executed for treasury stock such person can vote or act as a director.
<a href="#">11-34</a>	June 18	ELECTIONS. PRIMARY.	County clerk should publish election notices under provisions of Section 10262 independently of Sec. 10267A.
<a href="#">11-34</a>	July 12	SECRETARY OF STATE.	Trade mark must appear on design or article.
<a href="#">11-34</a>	July 12	PENAL INSTITUTIONS.	Sentences imposed at different terms of court run concurrently unless

			otherwise directed by the court.
<a href="#">11-34</a>	July 18	ELECTIONS. PRIMARY.	Whether or not candidates actually signed declaration a question of fact upon which the Secretary of State has no power to pass.
<a href="#">11-34</a>	July 30	ELECTIONS.	Necessity for Candidates of Minor Political Parties to File in Primaries.
<a href="#">11-34</a>	Aug 3	SOLDIERS' BONUS.	Right of veteran to receive bonus with what exemption.
<a href="#">11-34</a>	Aug 13	SHERIFF.	Sheriff is entitled to ten cents a mile for execution of commitment where conviction had out in county in Justice Court where the distance if more than five miles.
<a href="#">11-34</a>	Aug 21	TRADE-MARK.	Articles need not be classified in application for registration.
<a href="#">11-34</a>	Sept 18	ELECTIONS.	Title to Constitutional Amendment.
11-34	Sept 21	Hon. Dwight H. Brown	WITHDRAWN
<a href="#">11-34</a>	Sept 27	COLLECTORS.	Fees allowed under Sections 10880 and 10881 R.S. '29.
<a href="#">11-34</a>	Oct 1	CORPORATIONS.	Loan and investment companies – right of incorporators of loan and investment company to include in original charter specific powers authorized for business and manufacturing companies by R. S. Mo. 1929, Sec. 4940.
<a href="#">11-34</a>	Oct 6	ELECTIONS.	State Socialist Committee may not fill county vacancy.
<a href="#">11-34</a>	Nov 1	SECRETARY OF STATE. BLUE SKY LAW. SECURITIES ACT.	Certificate of interest in profit-sharing agreement defined.
<a href="#">11-34</a>	Nov 12	COUNTY COURT.	Must care for the poor of the county – cannot turn over funds to local representatives of Mo. Relief and Reconstruction Commission to be dispensed by them.
<a href="#">11-34</a>	Nov 15	ELECTIONS.	Beginning of terms of Senator and Congressmen elect.
<a href="#">11-34</a>	Nov 29	ELECTIONS. SECRETARY OF STATE.	Secretary of State to certify name of candidate receiving highest vote to Governor. No authority to pass on residence qualifications.
<a href="#">11-34</a>	Dec 8	SECRETARY OF STATE. RECORDER OF DEEDS. OFFICERS.	Commissions should not issue to persons claiming to have been elected to the office of Recorder of Deeds in counties having less than 20,000 population.
<a href="#">11-34</a>	Dec 12	ELECTIONS. SECRETARY OF STATE.	Officer, such as county clerk, must pay over and account for all moneys received before eligible to office, Article II, Sec. 19, Missouri Constitution.
<a href="#">12-34</a>	Jan 20	GAME AND FISH DEPARTMENT.	Hunting license not required to kill rabbits on own premises.

<a href="#">12-34</a>	Mar 16	ELECTIONS.	Relating to election to fill office of marshal and collector at Ellington, Mo. in April, 1934. City marshal of city of 4th class, when elected at special election, is entitled to fill out unexpired term of his predecessor.
<a href="#">12-34</a>	May 2	GAME AND FISH COMMISSIONER. RIVERS.	Fences may be built in navigable streams, when.
<a href="#">12-34</a>	May 4	RIVERS.	Relating to navigable rivers in this state.
<a href="#">12-34</a>	May 15	FISH AND GAME.	Wild game (birds) cannot be sold or possessed under a special license from the Fish and Game Department.
<a href="#">12-34</a>	July 23	VOTING.	Members of Citizens Conservation Camp are entitled to vote in county and state elections, both as resident voters.
<a href="#">12-34</a>	Sept 20	CONSTITUTIONAL LAW. FEDERAL INSTRUMENTALITIES.	Applicability of Missouri motor fuel tax to sales to Farm Credit Administration.
<a href="#">12-34</a>	Oct 12	GAME AND FISH COMMISSIONER.	The word "householder" as used in Section 8246 defined. Election under Section 8246 could not be enjoined or prohibited.
<a href="#">13-34</a>	Nov 1	CITIES, TOWNS & VILLAGES.	Publication of notice to contractors for bids must be in accordance with Section 13745, R. S. Mo. 1929.
<a href="#">13-34</a>	Nov 3	TAXATION.	Publication for sale must be made in reasonable time before date of sale under Senate Bill 94, Laws of Mo. 1933, page 445.
<a href="#">13-34</a>	Dec 19	NEPOTISM. SCHOOL DISTRICTS.	Death of wife of director terminates the relationship by affinity, unless there are children of the marriage now living.
<a href="#">14-34</a>	Jan 30	SCHOOLS.	Under Section 9261, R. S. Mo. 1929, the maximum levy for school purposes is sixty-five cents in districts other than town districts.
<a href="#">14-34</a>	Jan 30	AUTOMOBILE DEALERS.	Automobile dealer opening branch offices in other towns must register each place of business maintained under a different dealer's registration number.
<a href="#">14-34</a>	Jan 31	MOTOR VEHICLE REGISTRATION.	Shall tractors as defined in the Missouri motor vehicle law, operated in connection with road construction work on highway, be required to carry registration plates?
<a href="#">14-34</a>	Feb 28	TAXATION.	Last assessment defined. Formula for determining 1934 rate for county purposes.
<a href="#">14-34</a>	Dec 18	MOTOR VEHICLES.	Caterpillar tractor using highways as "motor vehicle" under R. S. Mo. 1929, Chap. 41, and operator thereof as "chauffeur" or "operator" under such chapter.

<a href="#">14-34</a>	Dec 31	MOTOR VEHICLES.	Who must register where exclusive use granted by legal title holder to another for a period greater than ten days successively.
<a href="#">15-34</a>	Feb 14		Relating to authority of other states to prohibit sale of “prison made” goods within such states. Determined in the light of the commerce clause as affected by the power conferred under the Hawes-Cooper Law.
<a href="#">15-34</a>	May 7	STATE BOARD OF HEALTH.	Supervision of School of Cosmetology. Sections 9089 and 9092 R. S. Mo. 1929 not applicable to public schools.
15-34	June 12	City Committee, St. Louis, Missouri	WITHDRAWN
<a href="#">15-34</a>	Dec 14	MOTOR VEHICLE FUEL TAX.	Consular agents and employees of a consulate are not exempt from the provisions of the Motor Vehicle fuel tax of Mo.
<a href="#">15-34</a>	Dec 15	COUNTY COURT. CONTRACTS AND APPROPRIATIONS.	1. No statutory authority for county court to contract for two years. 2. Can appropriate funds and employ county nurse on certain conditions. 3. Can appropriate for County Farm Bureau on certain conditions.
<a href="#">16-34</a>	Feb 16	COSMETOLOGIST. HEALTH, BOARD OF.	Relating to fee for registration of hairdressing cosmetologists or manicurists establishment or school.
<a href="#">16-34</a>	June 4	SENATE BILL 94.	Taxation and collection of delinquent taxes in cities of the second class; unaffected by Senate Bill 94, Laws of Missouri, 1933.
<a href="#">16-34</a>	June 12	SCHOOL DISTRICTS.	District organized under Sections 9325 and 9326, R. S. Mo. 1929, may, by vote, increase tax levy not to exceed \$1.00 on the \$100 valuation, and where district contains incorporated village the requirements of Section 9194, R. S. Mo. 1929, are fully met, even if it be held that said Section applies in respect to the amount of levy.
<a href="#">16-34</a>	June 20	SCHOOL DISTRICTS.	District organized under Sections 9325 and 9326, R. S. Mo. 1929, whether containing incorporated or unincorporated village, may increase tax levy by vote not to exceed \$1.00 on \$100.00 valuation.
<a href="#">17-34</a>	Apr 12	TAXATION.	County Board of Equalization must equalize assessments to reflect true values.
<a href="#">17-34</a>	Oct 25	ELECTIONS.	Party living in county for number of years, leaving for purpose of teaching school, but who has always voted in said county and claimed same as his residence, is eligible to become candidate for County Sup’t. of Schools.
<a href="#">18-34</a>	May 9	BANKS & BANKING.	National Bank not permitted to pledge its asset to secure deposits of Northeast Missouri State Teachers College.
<a href="#">18-34</a>	July 20	WATERWORKS	Cities of the Third Class – Power to use Surplus Earnings for other



		OWNED BY MUNICIPALITY.	Municipal Purposes.
<a href="#">18-34</a>	Oct 13	SCHOOL DISTRICTS.	Under Section 9607, R. S. Mo. 1929, a person holding a diploma conferring A. B. Degree from State Teachers' College is entitled to teach without further examination.
<a href="#">18-34</a>	Nov 9	STATE HIGHWAY PATROL.	Responsibility in cases where automobile strikes live stock on highway.
<a href="#">19-34</a>	Jan 18	TAXATION.	Back tax collections to be apportioned to various funds, cannot be lumped in school fund.
<a href="#">19-34</a>	Jan 23	SHERIFFS.	Opinion relating to fees of sheriffs for services rendered.
<a href="#">19-34</a>	Feb 13	COUNTY COURTS. OSTEOPATHIC PHYSICIANS.	Right to fill office of Deputy State Commissioner of Health under amended law. Eligibility as Deputy State Commissioner of Health.
<a href="#">19-34</a>	Feb 23	ASSESSORS.	Duties; when paid; out of what year's revenue paid; compensation under County Budget Law.
<a href="#">19-34</a>	Feb 26	LABOR AND INDUSTRIAL INSPECTION DEPARTMENT.	Right to collect license fee imposed solely upon shipping bedding into Missouri.
<a href="#">19-34</a>	Mar 12	LABOR.	Section 13267, R. S. Mo. 1929, providing for the building of shelter sheds by railroads, having been declared unconstitutional by the Federal Court, this provision cannot be enforced.
<a href="#">19-34</a>	Mar 20	LABOR DEPARTMENT.	Under National Bedding Code certain State regulations are still effective and may be enforced by the Commissioner.
<a href="#">19-34</a>	Mar 20	LABOR DEPARTMENT.	Under Section 13219, R. S. Mo. 1929, whether shelter sheds built by railroads are within section is purely question of fact.
<a href="#">19-34</a>	Mar 20	BANKS AND BANKING. COUNTY DEPOSITORIES.	Banks selected as County Depositories are obligated to pay interest on public funds so deposited and are not relieved of the obligations by being placed under restrictions.
<a href="#">19-34</a>	Apr 7	LABOR.	Fee paid either by applicants or employer determines status as to whether one is operating an employment agency or office.
<a href="#">19-34</a>	Apr 21	LABOR AND INSPECTION DEPARTMENT.	Persons engaged in using sterilizing or exterminating processes on mattresses would not come under Section 13308, R. S. Mo. 1929, unless, as a matter of fact, they were rebuilding or renovating mattresses.
<a href="#">19-34</a>	May 22	LIVESTOCK.	One who ships, transports, drives, or otherwise moves livestock

		STATE VETERINARIAN.	contrary to Governor's quarantine proclamation is chargeable with a crime.
<a href="#">19-34</a>	May 24	MUNICIPALITIES.	Powers of mayor of Louisiana, Missouri. Construction of city charter.
<a href="#">19-34</a>	June 7	SCHOOLS.	Duties of treasurer in six-director school districts of first, second and third class cities must keep financial records and reports.
<a href="#">19-34</a>	June 9	LABOR.	Electric Line Crews, Leaking Crews, Meter Men, etc., are not to be included in fixing the amount of inspection fees of buildings or shops, as they are not employed within such buildings or shops.
19-34	June 15	Hon. Joseph C. Crain	WITHDRAWN
19-34	June 19	Mr. Joseph C. Crain	WITHDRAWN
<a href="#">19-34</a>	June 20	GUARDIANS. WARDS.	Estates of World War Veterans under guardianship. Invested how?
<a href="#">19-34</a>	July 3	LABOR.	Inspection by Commissioner of Labor under R. S. Mo. 1929, Secs. 13218 and 13219, and applicability thereof to municipally owned utility companies.
<a href="#">19-34</a>	July 23	NEPOTISM.	Assessor may receive gratuitous service from son or pay him out of his own salary or fee without violating Section 13 of Article XIV of the Constitution.
<a href="#">19-34</a>	Aug 15	RELIEF COMMISSION.	Governor has right to direct expenditure of \$5,000,000.00 appropriation and to enforce self-insurance plan.
<a href="#">19-34</a>	Aug 15	LABOR AND INSPECTION.	Labor Commissioner has no right to require Federal Relief Administrator to take out license and pay permit fee.
<a href="#">19-34</a>	Aug 15	LABOR DEPARTMENT.	Under Section 13190, R. S. Mo. 1929, any person, firm or corporation maintaining an employment office where their services are charged for must obtain license from Labor and Industrial Inspection Department.
<a href="#">19-34</a>	Aug 30	CORPORATIONS.	Relief Activities.
<a href="#">19-34</a>	Sept 21	COUNTY WARRANTS.	(1) Warrants are acceptable in payment of taxes. (2) County Treasurer should accept and give credit to collection for all such warrants. (3) Section 9911 R. S. 1929 not repealed by section 22 Laws of Missouri, 1933, page 351.
<a href="#">19-34</a>	Oct 2	SCHOOL DISTRICTS. TRANSPORTATION.	Under Sections 9197 and 9354, R. S. Mo. 1929, and Section 16, Laws of 1931, page 334, a two-thirds majority vote is required where the question is voted upon by the taxpayers of the district.

19-34	Oct 10	Mrs. Mary Edna Cruzen	WITHDRAWN
19-34	Oct 13	Mrs. Mary Edna Cruzen	WITHDRAWN
<a href="#">19-34</a>	Oct 17	LABOR COMMISSIONER.	Under Section 13221, R. S. Mo. 1929, commissioner has right to require report of industrial accidents even though employers are also required to make report of accidents to Workmen's Compensation Commission.
<a href="#">19-34</a>	Dec 7	LABOR AND INDUSTRIAL INSPECTION.	(1) Board of Permanent Seat of Government only required to furnish office space to Department of Labor and Industrial Inspection if same be available in State Capitol. (2) Rent for office space at Jefferson City not chargeable to appropriations made for Labor and Industrial Inspection.
19-34	Dec 19	Mr. Paul M. Culver, Steward	WITHDRAWN
<a href="#">19-34</a>	Dec 21	COUNTY COURT.	Right to employ assistant counsel.
<a href="#">19-34</a>	Dec 21	DOG TAX.	Operation of Local Option Law.
<a href="#">20-34</a>	Jan 17	TAXATION.	County Court has no right to accept taxes in escrow from taxpayer to avoid penalties, where taxpayer, by suit seeks to avoid the taxes.
<a href="#">20-34</a>	Jan 18	COUNTY BUDGET LAW. PROBATE JUDGE.	County budget law governs payment of expenditures of probate court for supplies purchased.
<a href="#">20-34</a>	Jan 30	ROAD DISTRICTS.	District organized under article 9 of chapter 42, may, under Section 8059, R. S. Mo. 1929, extend boundaries to twelve miles square.
<a href="#">20-34</a>	Feb 20	ROAD DISTRICTS.	Under Article X of Chapter 42, creation and dissolution of road district is under jurisdiction of the County Court, and a proceeding for change in the boundaries must be taken up through the Court.
<a href="#">20-34</a>	Feb 22	SPECIAL ROAD DISTRICTS.	Trustees have authority to collect debts due the district and to pay debts owing by the district, upon dissolution.
20-34	Mar 9	Mr. Elliott Dampf	WITHDRAWN
<a href="#">20-34</a>	Mar 12	TAXATION. COUNTY COLLECTORS.	County Collectors have no right to charge counties for indexing tax books.
<a href="#">20-34</a>	Mar 28	FEE BILLS.	When Constable is entitled to a fee bill and his right to mandamus when fee bill is refused.
<a href="#">20-34</a>	May 9		Relating to power of cities of the third class to levy a license tax on

			barber shops, beauty parlors, etc.
<a href="#">20-34</a>	May 11	CEMETERIES.	City of the fourth class may own a public cemetery and support same from general revenue of the city.
<a href="#">20-34</a>	May 12	COUNTY BOUNDARIES.	Boundary line of Cole and Osage Counties.
<a href="#">20-34</a>	May 21	NURSERIES.	Municipally owned nurseries subject to inspection under Mo. Plant Act; municipally owned nurseries subject to pay inspection fees.
<a href="#">20-34</a>	June 9	ELECTIONS, PRIMARY.	Declaration of candidate must be filed 60 days prior to primary.
<a href="#">20-34</a>	June 26	MOTOR VEHICLES.	Private use of motor vehicle operating under dealer license plates unwarranted and in violation of the law.
<a href="#">20-34</a>	July 17	COUNTY CLERK.	Must publish title to office for primary election.
<a href="#">20-34</a>	Aug 2	OFFICERS. JUSTICES OF THE PEACE. COUNTY COURT.	County Court has the right to declare the office of Justice of the Peace vacant upon finding certain facts.
<a href="#">20-34</a>	Aug 2	DEPARTMENT OF AGRICULTURE. STATE PLANT OFFICER.	Reciprocal arrangement between states whereby filing fees for Nursery Permit Certificates are to be the same in one state as are charged by the other state for similar certificates is permissible under Article 3, Chapter 87, of Revised Statutes of Missouri, 1929.
<a href="#">20-34</a>	Aug 29	COUNTY COURT.	Amount of levies for county purposes and road funds discretionary; 10% limitation under Section 9873, R. S. 1929, applies to road tax.
<a href="#">20-34</a>	Sept 1	STATE HIGHWAY PATROL.	Patrolman cannot arrest party suspected of possessing intoxicating liquor or seize the liquor. Patrolman has equal powers with any peace officer except power to execute civil process and right of search and seizure. Patrolman is not subject to suit for false arrest.
<a href="#">21-34</a>	Mar 21	COUNTY OFFICERS.	Shall forfeit office and be remove, when?
<a href="#">21-34</a>	Apr 16	NEPOTISM.	Teacher's contract becomes illegal only where related director participates in teacher's election, or where there was collusion or fraud.
<a href="#">21-34</a>	July 14	ELECTIONS. CLERKS.	Only two clerks allowed in precincts casting less than three hundred votes.
<a href="#">22-34</a>	Feb 19	PROHIBITION.	An Indictment obtained before repeal may be prosecuted after repeal.
<a href="#">22-34</a>	Apr 7	TAXATION.	Postal Saving Deposits subject to taxation for state and local taxation.
<a href="#">22-34</a>	Apr 10	PROSECUTING ATTORNEY.	1. (a) Postal Savings Certificates held taxable. (b) Postmasters not required to give information concerning such to assessor. 2. (a) Failure to place revenue stamp on deed of conveyance is a misdemeanor with fine not more than \$100 for each offense. (b)

			Unstamped deed is neither invalid nor inadmissible in evidence.
<a href="#">22-34</a>	May 4	SPECIAL ROAD DISTRICT.	Incorporated city within special road district not entitled to part of general road funds.
<a href="#">22-34</a>	Aug 24	TAXATION.	Costs and attorney's fees and dismissal of suits by collectors, under House Bill No. 124, discussed.
<a href="#">22-34</a>	Sept 4	POWERS OF MEMBERS OF STATE PATROL.	(1) Have power to arrest without warrant when; (2) If person in custody no warrant shall issue.
<a href="#">22-34</a>	Sept 18	MOTOR VEHICLES.	Government employee delivering parcels in Government service not required to have chauffeurs or any other license.
<a href="#">22-34</a>	Oct 15	SCHOOLS.	Federal money used to pay teachers may not be considered as a bonus, but is to be applied as part of salary.
<a href="#">22-34</a>	Oct 25	CIRCUIT CLERK.	Compensation at present time – up to Jan. 1, 1935.
<a href="#">23-34</a>	Jan 10	BANKS AND BANKING.	Stock in National Banks after receivership not exempt from taxes, if of any value.
<a href="#">23-34</a>	Feb 7	SCHOOLS. CONSOLIDATED SCHOOL DISTRICTS. NEPOTISM.	Appointment or employment by school board of one of its members to office or employment of profit. Right of citizen to information of affairs of board and district.
<a href="#">23-34</a>	Sept 4	PROBATE JUDGE. PUBLICATION.	Where a newspaper misses only one issue it is not necessary that said paper be published continuously for another year before any legal notices can be published in it under the terms of Section 13775, R. S. Mo. 1929.
<a href="#">25-34</a>	Feb 16	COUNTY TREASURER.	1. To consolidation of offices of County Treasurer and Collector in certain counties. 2. To time of election of party county committee.
<a href="#">25-34</a>	Feb 27	COUNTIES. COUNTY CLERK.	Under Section 12165, Laws of 1933, pages 355-356, county clerk, where he becomes a designated person under said section, may receive compensation for furnishing financial statement, but cannot collect compensation for preparing financial statements for years 1930, 1931 and 1932, as statutes then in force did not authorize such compensation and clerk cannot prove contract with county court to pay him for such services.
<a href="#">25-34</a>	Mar 12	BUILDING AND LOAN.	Shares of stock owned by one in Building and Loan Association to be assessed and returned as property – how?
<a href="#">25-34</a>	Mar 15	STATE BOARD OF HEALTH.	Pointing out sections relating thereto.

<a href="#">25-34</a>	Apr 3	OFFICERS. JUSTICES OF THE PEACE.	Removal from township where Justice is appointed or elected disqualifies such Justice of the Peace from holding such office.
<a href="#">25-34</a>	May 15	ELECTIONS.	Board of registration as now constituted in Jefferson City should meet at least ten days before the primary in August and make up an alphabetical list of voters for each precinct.
<a href="#">25-34</a>	Nov 14	SCHOOLS.	Restrictions on use by consolidated school districts of funds received from the State, (a) as income from the State school fund, and, (b) as State aid derived from the ordinary revenue of the State.
<a href="#">26-34</a>	Mar 7	MOTOR VEHICLE LAW.	Sufficiency of statutory penalty for operating a motor vehicle on highways without license plates.
<a href="#">26-34</a>	Mar 15	COUNTY WARRANTS.	Acceptable in payment of taxes – supplemental to opinion rendered to M.E. Montgomery 10/17/33.
<a href="#">26-34</a>	Mar 20	AUCTIONEERS.	Only residents of the State may engage in business or trade of auctioneering.
<a href="#">26-34</a>	Apr 26	NOTARIES PUBLIC.	Acknowledgments executed by said notary in the name in which she was commissioned, but who was at the time married, are legal, valid and binding.
<a href="#">26-34</a>	Sept 21	NEPOTISM. SCHOOLS.	Under Section 13 of Article XIV of the Constitution, director who appoints relative related within the fourth degree forfeits office and teacher so elected cannot enforce contract against the district.
<a href="#">26-34</a>	Oct 25	WEIGHTS AND MEASURES.	Right of county court to appoint scale inspector.
<a href="#">26-34</a>	Nov 30	COUNTY BUDGET ACT.	County warrants should be paid according to protest and classes should be paid in order of protest.
<a href="#">27-34</a>	Jan 27	COUNTY PRINTING.	Charges for printing election notices should be computed under Sec. 13773, R. S. Mo. 1929.
<a href="#">27-34</a>	Feb 26	EMERGENCY RELIEF FUNDS.	No provision in Article 4 of Chapter 90, R. S. Mo. 1929, which prohibits the County, if they so desire, to discuss a portion of their relief funds through the Federal Relief Committee.
<a href="#">27-34</a>	Apr 12	NEPOTISM.	Member of Board who does not exercise his right to vote in favor of prohibited relative will not forfeit office in the absence of fraud or collusion.
<a href="#">27-34</a>	June 30	ESCHEATS.	Foreign administrator not entitled to Escheat Fund.
<a href="#">27-34</a>	Sept 27	COUNTY WARRANTS.	There is no conflict in the County Budget Law and Sections 9911 and 12140, R.S. Mo. 1929 and collector is not forbidden to accept county

			warrants in payment of taxes.
<a href="#">27-34</a>	Oct 2	TAXES. MERCHANTS AND PEDDLERS.	An individual may be doing business as a merchant or a peddler or both at the same time, depending upon the manner in which his business is conducted, and may be required to pay merchant's tax or secure peddler's license, or both.
<a href="#">28-34</a>	Jan 22	SOLDIERS' BONUS.	Bona Fide resident entitled to bonus – when?
<a href="#">28-34</a>	Feb 9	BLIND PENSIONS.	Method of Application for.
<a href="#">28-34</a>	Feb 13	BLIND PENSIONS.	Right to Pension for Period of Suspension from Pension Roll by decision of Commission for the Blind.
<a href="#">28-34</a>	May 23	PHYSICIANS.	May also be druggists and fill own prescriptions.
<a href="#">28-34</a>	Sept 11	BLIND PENSIONS.	Receipt of blind pension by person receiving income from other sources sufficient for ineligibility for each pension as disqualifying such pensioner from future benefits under blind pension law.
<a href="#">28-34</a>	Sept 11	BLIND PENSIONS.	Right of Missouri Commission for the Blind to suspend payment of.
<a href="#">28-34</a>	Sept 12	BLIND PENSIONS.	Right of Missouri Commission for the Blind to investigate income qualifications of pensioner.
<a href="#">29-34</a>	Jan 11	ROAD DISTRICTS.	Surplus funds remaining after the full payment of the bond issue for which they were collected may be transferred to the general fund of the District.
<a href="#">29-34</a>	Feb 9	TOWNSHIP ORGANIZATION.	Relating to and defining county bridges and township bridges in counties under township organization.
<a href="#">29-34</a>	May 8	CHIROPRACTIC.	Qualifications for examination to secure license.
<a href="#">29-34</a>	May 23	CHIROPRACTORS.	One may be disbarred for immoral actions—immoral action discussed.
<a href="#">29-34</a>	June 4	SENATE BILL 94.	Taxation and collection of delinquent taxes in cities of the second class; unaffected by Senate Bill 94, Laws of Missouri, 1933.
<a href="#">29-34</a>	July 9	COUNTY BUDGET.	(1) Priority payment of classes. (2) Boarding of prisoners should be placed under Class 4 of the Budget Law.
<a href="#">29-34</a>	July 14	BUDGET LAW.	County Court cannot re-budget after budget is made up at the regular February term.
<a href="#">29-34</a>	Aug 10	NURSE EXAMINERS, STATE BOARD OF.	Where Board holds fees for application never completed for over three years and where applicant cannot be found Board may transfer fees to Nurse's Fund.
<a href="#">29-34</a>	Sept 19	CHIROPRACTIC.	(1) Women entitled to practice chiropractic. (2) Fees.

			(3) Names one may practice under.
<a href="#">30-34</a>	Jan 29	NEPOTISM.	Road Districts are political subdivisions under Section 13 of Article XIV; Commissioners have no right to contract for own benefit with the District.
<a href="#">30-34</a>	Mar 22	GAME AND FISH DEPARTMENT.	Right to forfeit lease on or recover possession of Big Spring Park, lease to Don B. Bales dated April 18, 1933.
<a href="#">30-34</a>	June 13	COUNTIES.	County Court must transfer unexpended balance in road fund to the general revenue fund to be expended under the provisions of the County Budget Act in the purchasing of right-of-ways.
<a href="#">30-34</a>	Sept 11	MUNICIPALITIES. PUBLIC SERVICE COMMISSION.	Public Service Commission cannot fix, regulate or control the rate of a municipally owned water plant.
<a href="#">31-34</a>	Jan 18	TAXATION.	Delinquent personal taxes collected by suit, Section 9940 R. S. Mo. 1929. No sale under Senate Bill 94 until November 1934.
<a href="#">31-34</a>	Sept 19	TAXATION. COLLECTOR.	Suits for delinquent real estate taxes instituted prior to the effective date of Laws of Missouri 1933, page 425, are governed by statutes in effect at the time suits were instituted and not by Laws Missouri 1933, page 425.
<a href="#">32-34</a>	Jan 17	FINGERPRINTING.	No liability incurred by Sheriff of Putnam County if officer used reasonable judgment, and if person under arrest was not coerced, threatened or compelled to submit to the taking of fingerprints.
<a href="#">32-34</a>	Jan 20	SURVEYORS.	For the surveying of accreted lands, such as river bars, the County Court need not necessarily employ the County Surveyor but may employ any surveyor.
32-34	June 18	Hon. J. R. Gideon	WITHDRAWN
32-34	July 3	Hon. J. R. Gideon	WITHDRAWN
<a href="#">32-34</a>	Sept 11	ASSESSORS.	Assessor need not view land to make assessment each year but may validly assess by reference to old assessment book.
<a href="#">32-34</a>	Dec 15	ASSESSORS. COUNTY CLERKS.	County clerks shall deliver Assessor's book to Assessor. When.
<a href="#">33-34</a>	Feb 9	STATE BOARD OF HEALTH.	Entitled to fee for transcription of "still birth" certificates. 13 U.S.C.A. 101.
<a href="#">33-34</a>	Sept 14	PUBLIC HEALTH. CONTAGIOUS DISEASES.	Power of said Board of Health to alter regulations for exclusion from attendance at public schools on account of.
<a href="#">33-34</a>			



<a href="#">34-34</a>	Jan 11	COUNTY WARRANTS.	(1) It is permissible to issue county warrants in payment of officers' salaries and accounts where warrants have already been issued to the amount of the anticipated revenue. (2) Officer who issues warrants in excess of anticipated revenue not civilly or criminally liable. (3) Claims against Co. for warrants issued in excess of anticipated revenue can be paid out of surplus of subsequent years.
<a href="#">34-34</a>	Mar 7	COUNTY.	Liability for Hospital expense as result of Sheriff's Act.
<a href="#">34-34</a>	Apr 19	LIQUOR CONTROL ACT.	Eagles Lodge must obtain license from Supervisor of Liquor Control to handle 5% beer for sale to its members; restriction in Sec. 15 and 15-a binding upon Eagles same as any other licensee.
<a href="#">34-34</a>	Apr 20	MUNICIPALITIES. CITIES. INSURANCE.	City does not have authority to insure its property in reciprocal or inter-insurance exchanges where the liability of the city under the policy is contingent or unlimited.
<a href="#">34-34</a>	Apr 26	SCHOOLS.	County Court may not accept Government Bonds in payment of school loan and retain the bond as investment.
<a href="#">34-34</a>	June 5	MUNICIPALITIES. CITIES. INSURANCE-RECIPROCAL.	City has authority to insure its property in reciprocal insurance exchanges where the liability of the city under the policy is not contingent or subject to assessments.
<a href="#">34-34</a>	June 15	BOARD OF PENAL INSTITUTIONS.	Board of convict in Missouri Training School for Boys to be charged to county where first conviction occurs.
<a href="#">34-34</a>	Aug 24	BUS AND TRUCK.	Prosecutions under Section 5275, R. S. of Mo. 1929.
<a href="#">34-34</a>	Sept 8	STATE—LIABILITY OF.	In absence of an express statute the State is not liable for damages either for non-performance of its powers or for their improper exercise by those charged with their execution.
<a href="#">34-34</a>	Oct 20	GAME AND FISH.	County court has power to rescind order made relating to Sec. 8246, R.S. Mo. 1929 previously made during August term providing no legal rights have accrued thereunder.
<a href="#">35-34</a>	Feb 16	PROSECUTING ATTORNEYS.	Prosecuting Attorney may only be removed under Section 7929 when notice to institute suit has been given by a road overseer, county or state highway engineer.
<a href="#">35-34</a>	July 12	INHERITANCE TAX.	(1) Real property and tangible personal property is subject to tax where located. (2) Intangible personal property is subject to tax by the State in which the owner maintained his legal domicile except where such personal property has acquired a "business situs" in the State where located.
<a href="#">35-34</a>	July 19	SCHOOL DISTRICTS.	Board of education of school district required to select a depository in

		SCHOOL MONIES. DEPOSITORIES.	the same manner as county courts, and treasurer of school district is liable for loss of funds not deposited in such depository.
<a href="#">35-34</a>	Dec 27	TAXATION AND REVENUE.	Taxation and Revenue method of computing bond of County Collector.
<a href="#">36-34</a>	Mar 28	DENTAL BOARD.	Construction of Section 13569 R. S. Mo. 1929.
<a href="#">36-34</a>	Sept 19	DENTAL BOARD.	Relating to the necessity of having an audit of the books of the Secretary-Treasurer of the Dental Board as required by law.
<a href="#">37-34</a>	Mar 9	BOARD OF PERMANENT SEAT OF GOVERNMENT.	Approval of contract for modernization of elevators in Capitol Building.
<a href="#">38-34</a>	Jan 12	COSTS. PRELIMINARY HEARING.	Neither state nor county liable for costs of preliminary hearing when defendant is discharged.
<a href="#">38-34</a>	Jan 26	COUNTY COURTS.	Salaries of county court judges, elected in 1930, 1932 and 1934 – how ascertained.
<a href="#">38-34</a>	Jan 31	ELECTIONS.	City election not a general election within the meaning of the Constitution.
<a href="#">38-34</a>	Feb 14	SPECIAL ROAD COMMISSIONERS.	County Court without authority to elect commissioners after City in District has ceased to exist as such.
38-34	Feb 23	Hon. Charles M. Hay	WITHDRAWN
<a href="#">38-34</a>	Mar 3	TAXATION.	Taxpayer, through his mistake, paying taxes on land which he does not own, may not recover back such taxes paid voluntarily.
<a href="#">38-34</a>	Mar 19	COUNTY BUDGET ACT. LIQUOR CONTROL ACT.	Funds derived from sale of county licenses to be paid into General Revenue Fund and appropriated to the different classes according to requirements of the budget.
<a href="#">38-34</a>	Apr 6	SCHOOL ELECTIONS.	Persons qualified to vote at annual school elections should possess same qualifications as those voting in county and state elections; Laws of 1933, p. 381 regulate the manner of conducting elections; persons kept in county poorhouse, or asylum at public expense cannot vote.
<a href="#">38-34</a>	Apr 9	TAXATION.	City Collector entitled to two per cent commission on delinquent tax collections.
<a href="#">38-34</a>	May 10	TAXATION.	Collection of delinquent city taxes under Senate Bill 94 in cities.
<a href="#">38-34</a>	May 29	COUNTY FUNDS.	Transfer under Sec. 7891, R.S. Mo. 1929 permissible if County Court has control over same, if not, transfer cannot be made.
<a href="#">38-34</a>	June	COUNTY COURT.	Working county prisoners – Discretionary – When. Compulsory.

	14	PRISONERS.	Prisoners subject to be worked – type of work. Employment of guards. Board of Prisoners and liability therefor.
<a href="#">38-34</a>	June 19	ASSIGNMENT OF LAND TO THE STATE.	Relating to manner in which it may be disposed of.
<a href="#">38-34</a>	June 22	TAXATION AND REVENUE.	Page 465 Laws of Missouri, 1933, not effective after 7-24-33 except as to delinquent tax attorney.
<a href="#">38-34</a>	Aug 17	SHERIFF.	1. To charge a person with carrying concealed weapons under the statute concealment is the gravamen of the offense whether such concealment is on, or near to, person. 2. Where person is intoxicated concealment not necessary. 3. Weapon found in car with illegal liquor, general law applies.
<a href="#">38-34</a>	Sept 4	TAXATION.	Senate Bill 94 modified by House Bill 44 Extra Session authorizing initial proceedings to be instituted within five years.
<a href="#">38-34</a>	Oct 5	RECORDER OF DEEDS.	It is not lawful for parties to nominate a candidate for office at this time.
<a href="#">38-34</a>	Oct 11	COUNTY CLERK.	Compensation of Clerk and Deputy limited by law and cannot be increased during term.
<a href="#">38-34</a>	Nov 14	COUNTY BUDGET LAW.	Expense of erecting shelves for law books in Prosecuting Attorney's library should be paid out of Class 5, Sec. 2; expense of purchasing chairs for circuit court room should be paid out of Class 2, Sec. 2.
38-34	Dec 11	Hon. E. C. Harper	WITHDRAWN
<a href="#">38-34</a>	Dec 27	CIRCUIT CLERK.	Not entitled to fee of 50 cents for attaching the court seal to each jury script under Secs. 8763, 8764, 8765 and 8766, R.S. 1929.
<a href="#">39-34</a>	Mar 1	STATE CHILDREN'S BUREAU.	Abandonment defined.
<a href="#">39-34</a>	Apr 26	ELECTIONS.	Relating to Certificate of Appointment and Notice of Judges of Election.
<a href="#">39-34</a>	June 5	PRIMARY ELECTIONS.	Candidates on Socialist ticket can file by paying five dollars to the County Treasurer if no county organization for Socialist party exists in the County.
<a href="#">39-34</a>	July 12	VOTING.	Citizens temporarily on relief rolls are not disfranchised.
<a href="#">39-34</a>	Oct 11	ELECTIONS.	Candidate for Circuit Judge should file his affidavit in detail regarding expenses of primary with Secretary of State.
<a href="#">40-34</a>	Apr 28	COUNTY BOARD OF EQUALIZATION.	Relating to power of county boards of equalization to make assessment of property omitted from assessor's books.
<a href="#">40-34</a>	May 25	SCHOOLS.	Non-resident pupil or parents do not have to pay tuition or other fees

			to attend high school, if the school receives state aid.
<a href="#">40-34</a>	Aug 9	SCHOOLS.	District where non-resident pupils reside must pay tuition of pupils.
<a href="#">40-34</a>	Aug 24	OCCUPATION TAX.	Contractors.
<a href="#">41-34</a>	Jan 17	SCHOOLS. SCHOOL DISTRICTS.	County Treasurer should not honor teacher's warrant where reports required by Section 9316, R. S. Mo. 1929, has not been made and filed with the Clerk.
<a href="#">41-34</a>	Mar 12	FINANCIAL STATEMENT OF COUNTIES.	Interpretation of Laws 1933, page 353.
<a href="#">41-34</a>	Apr 9	CHATTEL MORTGAGES.	The Recorder of Deeds shall release same, when and how?
<a href="#">41-34</a>	Apr 27		Relating to authority of county courts to make appropriation for repair of bridges in special road districts.
<a href="#">41-34</a>	May 1	SCHOOLS.	Under Section 9292, R. S. Mo. 1929, unless district contains three or more resident pupils eligible to take ninth and tenth grade work, board may not furnish teaching for ninth and tenth grades.
<a href="#">41-34</a>	May 8	DEPOSITORY.	Relating to security of depositories of cities of third class.
<a href="#">41-34</a>	May 23		Relating to question, whether present circuit clerks may retain fees earned in office and apply to salary.
<a href="#">41-34</a>	June 16	COUNTIES.	Purchases must now be made under the priorities and requirements of the County Budget Act.
<a href="#">41-34</a>	July 27	COUNTY OFFICERS.	Necessity of circuit clerks accounting with money and not in salary warrants for moneys collected and due and owing the county.
<a href="#">42-34</a>	Jan 9	GRAIN INSPECTION.	Method of weighing grain in elevators not considered a violation of the terms of the statute.
<a href="#">42-34</a>	Jan 12	WAREHOUSEMEN.	Existence of outstanding warehouse receipts unrepresented by grain in warehouse, and prosecution therefor.
<a href="#">42-34</a>	Feb 26	NEPOTISM.	Where relative is not appointed to hold an official position, relative may assist office-holder without being a violation of Section 13 of Article XIV of the Constitution of Missouri.
<a href="#">42-34</a>	Mar 10	CIRCUIT CLERKS. CRIMINAL COSTS.	Duty to include all costs in criminal costs bill. Duty of circuit clerk in making criminal costs bill.
<a href="#">42-34</a>	Apr 10	PAUPERS. COUNTIES.	Funeral expenses. Liable for funeral expenses of poor persons.
<a href="#">42-34</a>	June 9	STATE WAREHOUSE	Commissioner can, in his discretion, appoint an employee of a mill as a

		COMMISSIONER.	state weighmaster for said mill, providing said weighmaster is properly bonded for appointment.
<a href="#">42-34</a>	June 9	STATE WAREHOUSE COMMISSIONER.	Under the Statutes of Missouri the Grain Inspection and Weighing Department must furnish weighing and inspection service to all grain elevators and warehouses qualifying as public elevators or warehouse.
<a href="#">42-34</a>	June 11	GRAIN INSPECTIONS.	Money derived from sale of surplus grain must be paid into the State treasury to be withdrawn only on proper appropriation, and cannot be expended by the Grain Inspector for any purpose.
<a href="#">42-34</a>	July 31	ELECTION.	A. Under Section 10278 if candidate whose name is written in receives more votes than the printed name of the other candidate, the candidate whose name is written in is legally elected. B. Judges of the primary have no authority to write name of candidate whose name is not printed on ballot for committeeman or committeewoman and hand same to voter.
<a href="#">42-34</a>	Oct 18	GAME & FISH.	Signers on petition may make formal application and withdraw their names from petition before action has been taken on same.
<a href="#">42-34</a>	Dec 29	CIRCUIT CLERK.	Salary of Circuit Clerk of Polk County for last two years should be computed as to population on presidential vote of general election of 1932.
<a href="#">43-34</a>	Jan 12	COUNTY TREASURER.	In view of Section 12132a, Laws 1933, page 338, merging office of county treasurer and county collector in certain counties, where county treasurer before end of term runs for and is elected to office of county collector, he must resign as said treasurer when he qualifies and takes office as collector.
<a href="#">43-34</a>	Feb 14	SCHOOLS.	Relating to the apportionment of the moneys belonging to school districts. Who's duty?
<a href="#">43-34</a>	May 14	PENITENTIARY.	Director's right and duties relative to convicts used as servants in official residents.
<a href="#">43-34</a>	June 27	ELECTION.	When three hundred or less vote in a precinct, four judges may be appointed for said precinct instead of six.
<a href="#">43-34</a>	July 23	BOARD OF PENAL INSTITUTIONS.	Expense of return of escaped convicts payable from fund.
<a href="#">43-34</a>	Aug 24	LIQUOR CONTROL ACT.	Collection of county liquor license fees is the duty of the County Collector.
<a href="#">43-34</a>	Sept 8	STATUTES.	Effect of general repeal provision in state purchasing agent law on prior statutes.
<a href="#">43-34</a>	Sept 11	PENAL-PRISONS.	Relating to the liability of the depository bondsmen for the convict

			fund held by the prison board.
<a href="#">43-34</a>	Sept 25	LOTTERIES.	Relating to facts that constitutes a scheme or device whereby things of value are for a consideration allotted by chance constituting lottery.
<a href="#">43-34</a>	Sept 27	ABSENTEE BALLOTS.	In order for absentee ballots to be legal, procedure prescribed in Sec. 10186, Laws of Mo. 1933, p. 222-223 must be followed.
<a href="#">43-34</a>	Oct 10		I. To issue warrants monthly for salary of prosecuting attorney. II. Relating to paying or protesting warrants by County Treasurer.
<a href="#">43-34</a>	Oct 17	PENAL INSTITUTIONS.	Judgment bonds.
<a href="#">43-34</a>	Oct 29	ELECTIONS.	Notice of selection of election judges may be served by the sheriff.
<a href="#">43-34</a>	Nov 19	PENAL BOARD.	Judgment bonds of Buchanan County.
<a href="#">43-34</a>	Dec 19	COUNTIES. COUNTY CLERKS.	County Clerk not entitled to extra compensation for his services in connection with the preparation of county budget. Under Section 12165, Laws of Mo. 1933, pages 355 and 356, County Clerk, where he becomes the designated person under said section may receive compensation for furnishing financial statement. Amount received must not exceed the aggregate amount of fees set under Sec. 11811, Laws of 1933, page 370.
<a href="#">44-34</a>	Jan 12	SCHOOL FOR THE DEAF.	Board of Managers have exclusive and discretionary power to discharge persons enrolled therein.
44-34	Jan 12	Hon. Richard R. Nacy	WITHDRAWN
<a href="#">44-34</a>	Feb 1	INHERITANCE TAX.	General Assembly meant Sec. 573, R.S. 1929 to take advantage of the full 80% credit allowed by the Federal Government.
<a href="#">44-34</a>	May 24	INHERITANCE TAX LAW.	Waiver necessary on transfer of property from bank or trust company to executor; not necessary upon a transfer by the executor to the distributee.
<a href="#">44-34</a>	Aug 29	INHERITANCE TAX. LIFE ESTATE.	Life Estate of Widow and remainder should be taxed according to provisions of Sec. 595, R.S. Mo. 1929, and tax should be at highest rate possible under provisions of Inheritance Tax Law of Mo.
<a href="#">44-34</a>	Oct 18	INHERITANCE TAXATION.	Where property is devised to a legatee and said legatee dies before distribution two taxable transfers take place, one from the testator to the legatee and one from the legatee to the heirs.
<a href="#">44-34</a>	Nov 1	INHERITANCE TAX.	Closely held stock and Good Will – when carried as an asset, value cannot be determined by par value of stock or book value, but must be determined on basis of net earnings.
<a href="#">44-34</a>	Nov 2	INHERITANCE TAX.	Real property located in Missouri under executory contract of sale by non-resident not subject to inheritance tax upon death of the non-

			resident.
<a href="#">45-34</a>	Feb 7	STATE ELEEMOSYNARY INSTITUTIONS.	Laws 1933, page 191, abolishing old Missouri Commission for Blind and conferring duties on Board of Managers of Eleemosynary Institutions. Section 12-U of House Bill 127 appropriating funds out of Blind Pension Fund for prevention of blindness is unconstitutional.
<a href="#">45-34</a>	Feb 8	ELEEMOSYNARY INSTITUTIONS.	Relating to additional appropriations for maintenance of Eleemosynary Institutions for salaries etc., provided the earnings are sufficient.
<a href="#">45-34</a>	Feb 8	ELEEMOSYNARY INSTITUTIONS. STATE PURCHASING AGENT.	Relating to the distinction between “materials” mentioned in Class “C” and that Class “D” in Laws 1933 at pp. 133 et seq. Also H.B. No. 127, Special Session-Section 12T.
<a href="#">45-34</a>	Feb 8	STATE PURCHASING AGENT.	Cannot procure delivery of goods to departments with an agreement that the same may be considered as purchased when balance to pay therefor accumulates in State Treasury.
<a href="#">45-34</a>	Feb 22	ELECTIONS.	A village cannot call an election to become a city of the fourth class and at the same time call an election to vote on proposition of erecting a waterworks system.
<a href="#">45-34</a>	Feb 26	COUNTY WARRANTS.	If County Court has carried out its duties under the County Budget Law, warrants should be paid out of funds mentioned in warrants in the order in which they were protested.
<a href="#">45-34</a>	May 21	ELEEMOSYNARY BOARD.	Superintendent of Children’s Home Bond.
<a href="#">45-34</a>	June 5	CONVICTS. ELEEMOSYNARY BOARD.	Governor’s warrant necessary to transfer insane convict from penitentiary or other place of detention to insane hospital.
<a href="#">45-34</a>	June 23	ELEEMOSYNARY BOARD.	No authority to pay transportation expenses of non-resident patients.
<a href="#">45-34</a>	June 29	PURCHASING AGENT. COAL MINES.	Right of operator of truck line to bid wholesale prices to governmental agencies.
<a href="#">45-34</a>	July 12	ELEEMOSYNARY INSTITUTIONS.	Board of Managers have right to compromise judgment against county.
<a href="#">45-34</a>	July 13	ELEEMOSYNARY BOARD.	Board may accept bonds of county in lieu of judgments against the county.
<a href="#">45-34</a>	Sept 18	ELECTIONS.	Absentee Ballots – Voter may cast absentee ballot in office of County Clerk within time prescribed by law and leave the ballot with said Clerk to be opened and counted in manner prescribed by law.
<a href="#">45-34</a>	Nov 8	ELEEMOSYNARY	Lease of land for, made by State Purchasing Agent.

		BOARD.	
<a href="#">45-34</a>	Nov 9	COUNTY BUDGET LAW.	Costs in criminal case should be paid out of funds in Class 2, Sec. 2, Laws 1933, p. 341, rather than revenue of year in which defendant entered plea of guilty.
<a href="#">45-34</a>	Dec 10	COUNTY BUDGET LAW.	Liability of counties for failure to pay eleemosynary accounts when due; liability of counties under budget of eleemosynary board for insane patients of the county.
<a href="#">45-34</a>	Dec 12	ELEEMOSYNARY INSTITUTIONS. COUNTY COURTS. INSANE PERSONS.	When revenue is "provided for" within the meaning of the Constitution, defined. Obligation incurred by county in 1934 cannot be paid out of income and revenue provided for such county in the year 1935. Insane county patients may be returned to sending county upon failure to pay keep or expenses of such persons.
<a href="#">45-34</a>	Dec 12	TAXATION. COUNTY COURTS. COUNTY WARRANTS.	The words, "Provided for" as used in section 12 of article 10 of the Constitution of the State of Missouri, defined. Obligations incurred by county in one year cannot be paid out of revenue provided for in subsequent year.
<a href="#">45-34</a>	Dec 15	ELEEMOSYNARY INSTITUTIONS. ACCOUNT-CITY HOSPITALS.	St. Louis City Sanitarium entitled to be paid according to the provisions of Laws of Missouri 1931, page 221.
<a href="#">46-34</a>	Feb 9	JURORS, PAYMENT OF.	Effect of County Budget Law of 1933 (Laws of 1933, page 340) upon statutes regulating pay of jurors (R.S. Mo. 1929), Sections 8765, 8767.
<a href="#">46-34</a>	Mar 10	ITINERANT VENDOR.	Relating to the sale of merchandise by truckers at public auction.
<a href="#">46-34</a>	Aug 28	SCHOOLS.	Sending school must pay entire tuition of pupil, receiving credit up to \$50.00 if the State has the money.
<a href="#">46-34</a>	Oct 23	CRIMES.	Venue for arson committed in Arkansas cannot be placed in Missouri for purposes of prosecution under Missouri law.
<a href="#">46-34</a>	Oct 30	SCHOOLS.	(1) Persons over 20 years of age not entitled to gratuitous instruction. (2) Board of directors may provide for persons between 5 and 6 and over 20 years of age and pay tuition just so long as it is not paid out of funds derived by virtue of Section 6, Article XI, of the Constitution of Missouri.
<a href="#">47-34</a>	Feb 22	AUTOMOBILE REGISTRATION.	Owner of vehicle does not need a Chauffeur's or registered operator's license.
<a href="#">47-34</a>	Mar 27	CIRCUIT CLERK.	Compensation of person appointed to fill out unexpired term same as salary of predecessor until the end of the term.
<a href="#">47-34</a>	Apr 10	TAXATION &	Change as made in the collection of delinquent real estate taxes, as to



		REVENUE.	hiring of attorneys, does not affect or change the law as it existed in 1929 relative to the hiring of attorneys for the collection of delinquent personal taxes.
<a href="#">47-34</a>	Aug 9		Construction of Section relative to time required to be done for costs.
<a href="#">47-34</a>	Aug 30	MATTRESSES.	Use of old material in the manufacture and sale of mattresses.
<a href="#">47-34</a>	Sept 14	CONTRACT HAULER.	Persons whose principal business is that of hauling property or persons for another is a "contract hauler" and is required to obtain license from the Public Service Commission.
<a href="#">47-34</a>	Nov 7	SCHOOLS.	Compromise of school fund mortgages.
<a href="#">48-34</a>	Mar 28	TOWNS AND VILLAGES.	Method of collecting delinquent taxes-qualifications of town trustees-method of removal of unqualified members of a school board.
<a href="#">48-34</a>	Nov 20	TAXATION.	Senate Bill No. 94. Lands and lots to be offered yearly for three years if necessary, and not to be re-offered in the same year in which they have theretofore been offered.
<a href="#">50-34</a>	Sept 14	POLL TAX.	I. Relating to the methods of collecting delinquent poll tax. II. Relating to the authority of town and villages to pass ordinances disfranchising those subject to payment of poll tax, who become delinquent.
<a href="#">51-34</a>	Mar 1	COUNTY BUDGET LAW.	It is not in conflict therewith for the County Court to contract and make an appropriation for three years for extention work in the county.
<a href="#">51-34</a>	Apr 17	LICENSE. DELIVERY TRUCKS.	City cannot pass ordinance imposing license tax on delivery trucks on non-residents using streets and at the same time except delivery trucks of residents who have place of business in said city.
<a href="#">51-34</a>	May 28	SCHOOLS. NEPOTISM.	School director voting for first cousin would forfeit office; the fact that husband dies does not terminate the relationship by affinity where there are children living who were born of the marriage.
51-34	Sept 20	Mr. M. G. Lavender, Editor	WITHDRAWN
<a href="#">51-34</a>	Oct 15	NEPOTISM.	Appointment of collateral relative due to marriage along the line of descent or assent does not violate the Missouri Constitution on Nepotism.
<a href="#">52-34</a>	Mar 1	COUNTY BUDGET. COURT REPORTER.	Salary of official court reporter should be in Class 4.
<a href="#">52-34</a>	Apr 28	SCHOOLS.	Duties of school treasurer in six-director school district under Section 9515-9516.
<a href="#">52-34</a>			

<a href="#">52-34</a>	July 3	ELECTIONS.	No part of filing fee goes to the State Committee; Candidate can be a delinquent taxpayer.
<a href="#">52-34</a>	July 24	MOTOR VEHICLE.	Trailer or semi-trailers registered according to the maximum weight carrying capacity of such-live load capacity.
<a href="#">52-34</a>	Sept 14	SCHOOLS.	(1) Does a high school have to return fees exacted from pupil? (2) What action may be brought to compel sending district to pay tuition of non-resident student if such refuses to do so?
<a href="#">52-34</a>	Sept 27	SCHOOLS.	Filling vacancies in the six director school district. What constitutes a quorum?
<a href="#">54-34</a>	Jan 9	CONTRACTS.	Agreement entered into by the County Court of Morgan County and physician appointed to act as Deputy State Health Commissioner is not a valid contract under Sec. 2962, R.S. Mo. 1929.
54-34	Feb 23	Mr. M. V. Long	WITHDRAWN
<a href="#">54-34</a>	Apr 5	BANKRUPTCY.	Action in nature of a suit should not be taken by a collector to collect taxes from a bankrupt railroad; Claim for taxes should include interest, penalties and commissions.
<a href="#">54-34</a>	July 19	NEPOTISM. SCHOOL DISTRICTS.	Under Section 13 of Article XIV, election of teacher is legal where related director does not participate in teacher's election and does not, by collusion or fraud, bring about her election.
<a href="#">54-34</a>	Nov 2	NEPOTISM.	Under Section 13 of Article 14 of the Constitution members of school board may supervise relief projects for improvement of school property, but have no right to withdraw money from incidental fund for such services.
<a href="#">55-34</a>	Apr 27	ELECTIONS.	Cities or counties that have registration of voters may not take advantage of Sec. 10389, i.e., has to appoint two judges and two clerks-such cities or counties are governed by the General Election Law.
<a href="#">56-34</a>	Mar 27	CIRCUIT CLERKS.	Duty to include all costs in criminal costs bills.
<a href="#">56-34</a>	May 7	LIQUOR CONTROL ACT.	City of fourth class has authority to pass an ordinance prohibiting the possession of intoxicating liquor upon which state and federal tax has not been paid, provided same does not conflict with Sec. 8 of the Act.
<a href="#">56-34</a>	Aug 28	SECTION 12167, R.S.MO. 1929.	Transfer surplus \$1,000 remaining in the pauper fund may be transferred to any other fund which in the judgment of the county court be in need of the balance.
<a href="#">57-34</a>	June 21	COUNTY BUDGET LAW.	County Court cannot pay cost of rights-of-way in Special Road Districts out of expenditures in Class 3, but must pay same out of expenditures in Class 5.
<a href="#">58-34</a>	Jan 23	COUNTY BUDGET	Classification of salaries – office expense- traveling expenses.

		LAW.	
<a href="#">58-34</a>	Feb 20	COUNTY CLERK.	Deputy County Clerk may be put on the new salary schedule as set out in Section 11811, Laws of 1933, page 371, at any time after said law becomes effective.
58-34	Mar 1	Hon. W. S. Mathews	WITHDRAWN
<a href="#">58-34</a>	Mar 13	LIQUOR CONTROL ACT.	St. Francois Recreation Club cannot sell on premises intoxicating liquor other than malt liquor containing alcohol not in excess of 5% by weight.
<a href="#">58-34</a>	Apr 12	COLLECTORS. ATTORNEY GENERAL.	Voluntary overpayment to County. Cannot decide questions of fact in opinions.
<a href="#">58-34</a>	May 21	TAXATION.	Owner of grain stored in warehouse liable for taxes thereon.
<a href="#">58-34</a>	June 18	TAXATION AND REVENUE.	Liability of administrator for taxes against an estate.
<a href="#">58-34</a>	Nov 21	CIRCUIT CLERKS AND DEPUTY CIRCUIT CLERKS.	Amount, method and source of compensation.
<a href="#">58-34</a>	Dec 27	CIRCUIT CLERKS.	In counties having population between 70,000 and 80,000 to receive \$3000.00 annually.
<a href="#">59-34</a>	Feb 6	BUILDING AND LOAN COMPANIES.	Proceedings for merger examined.
<a href="#">59-34</a>	Mar 17	BUILDING AND LOAN ASSOCIATION.	May become Federal Savings and Loan Associations only be ceasing to do business and voluntarily transferring its assets by two-thirds of stockholders' vote.
<a href="#">59-34</a>	Mar 23	SCHOOLS. SCHOOL DISTRICTS.	Under Section 9331, Laws of Missouri 1931, page 350, which amended same section of the Revised Statutes of Missouri 1929, the school district may be dissolved by a vote of two-thirds of the resident voters and taxpayers who are present and voting for dissolution.
<a href="#">59-34</a>	Apr 11	GOLD.	Mineral rights under private property belong to the owner of the land.
<a href="#">59-34</a>	Apr 26	CONSULS. VICE-CONSULS. CONSULAR AGENTS.	Immunity from auto license tax by reason of their office.
<a href="#">59-34</a>	June 25	BUILDING & LOAN ASSOCIATIONS.	Conversion to Federal savings and loan associations by Missouri building and loan associations shall be determined by a friendly test suit.
<a href="#">59-34</a>	Oct 17	CITIES, TOWNS AND VILLAGES.	Relating to the taxing power of cities having less than ten thousand and more than one thousand inhabitants.

<a href="#">59-34</a>	Nov 22	BUILDING AND LOAN.	Person who pledged stock to association may not vote on any question which affects the claim the corporation has against such person.
60-34	Jan 15	State Board of Health	WITHDRAWN
<a href="#">60-34</a>	Jan 15	INTERMEDIATE REFORMATORY.	Eligibility of convicts, eliminations of ineligible convicts.
<a href="#">60-34</a>	Feb 9	STATE BOARD OF HEALTH.	Authority to appoint Local Registrar of Vital Statistics in Cities. Section 9043 R.S. Mo. 1929.
60-34	Feb 9	The State Board of Health	WITHDRAWN
<a href="#">60-34</a>	Feb 12	BIRTH CERTIFICATES.	Relating to the Powers of Registrar of Vital Statistics, as relates to birth certificates.
<a href="#">60-34</a>	Feb 22	SCHOOLS.	Non-resident tuition.
60-34	Apr 10	Dr. E. T. McGaugh	WITHDRAWN
<a href="#">60-34</a>	May 1	TAXATION. SCHOOL DISTRICT.	Assessor's duty to indicate district whose land is located in making out list; Sec. 9261, R.S. Mo. 1929 applies only to personal property.
<a href="#">60-34</a>	May 9	BIRTH-REGISTRATION.	Relating to power of State Registrar to make all rules and regulations to the end that person born prior to 1909, either in this state or out of the state and now resident to register birth.
60-34	May 14	Hon. S. T. McIntyre	WITHDRAWN
<a href="#">60-34</a>	May 15	DEAD BODIES.	Disposition of same when the property of a penal institution.
60-34	July 3	The State Board of Health of Missouri	WITHDRAWN
<a href="#">60-34</a>	July 27	DEATH CERTIFICATE.	By whom to be signed.
<a href="#">60-34</a>	Aug 10	CERTIFIED COPIES.	Right of State Registrar of Vital Statistics to certify photo-static copies of Birth and Death Certificates.
<a href="#">60-34</a>	Aug 15	SCHOOL DISTRICTS. APPEAL AND SUPERSEDEAS.	Where Circuit Court renders judgment of ouster against director, appeal and filing of bond does not act as supersedeas; ousted director is not member of board pending the termination of appeal.
<a href="#">60-34</a>	Sept 4	MEDICINE. PRACTICE OF MEDICINE.	Injunction will lie to restrain any person engaged in the practice of medicine without a license, and same is to be brought by the Prosecuting or Circuit Attorneys in the County or City where the alleged offense occurred.
<a href="#">60-34</a>	Sept 20	DEAD BODIES.	Right to remove from one registration district to another without permit.
<a href="#">60-34</a>	Oct 3	GAMBLING.	"Whiffle Boards"

<a href="#">60-34</a>	Oct 8	MEDICINE.	Qualifications necessary to right of applicant for license to practice medicine to be examined for registration by the State Board of Health.
<a href="#">60-34</a>	Oct 12	ASSESSOR.	Rights of assessors in counties of less than 25,000 to succeed himself in office.
<a href="#">60-34</a>	Dec 4	COUNTIES.	Liability for personal injuries caused by negligence.
<a href="#">62-34</a>	Jan 17	INSURANCE. FIRE. SCHOOL DISTRICT.	"A copy of this opinion should not be released because it is questionable whether or not it expresses the law at the present time. Study is being made to determine whether or not it should be withdrawn."
<a href="#">62-34</a>	Jan 19	SCHOOL BONDS.	Proceeds from bonds voted for purpose of repairing buildings cannot be diverted and used for the teacher and incidental funds.
<a href="#">62-34</a>	Mar 1	SHERIFF.	Where prisoner convicted of felony is unavoidably injured while Sheriff is taking him to State reformatory, the State should pay for the necessary medical care.
<a href="#">62-34</a>	Mar 19	SCHOOLS.	Liability of Board of Directors. Right of Teachers to sue on contract. Payment of Back Warrants.
<a href="#">62-34</a>	Mar 21	CITIES OF THE FOURTH CLASS.	May provide for an Excise Commissioner under the Liquor Control Act.
<a href="#">62-34</a>	Mar 22	LIQUOR CONTROL ACT.	Does not confer on cities the power to tax salesmen soliciting orders at wholesale from retailers.
<a href="#">62-34</a>	Mar 26	MOTOR VEHICLES ON HIGHWAYS.	Relating to the rules of the road on passing a vehicle from the rear at the top of a hill or on a curve where the view ahead is in any way obscured.
<a href="#">62-34</a>	May 10	TAXATION.	City Collector entitled to two per cent commission on delinquent tax collections.
<a href="#">62-34</a>	May 12	CIRCUIT CLERK DEPUTIES.	Governed by Senate Bill 74 page 371, Laws of Missouri, 1933 after July 24, 1933.
<a href="#">62-34</a>	Nov 24	TAXATION.	County Court may change valuation after tax is delinquent.
<a href="#">63-34</a>	Feb 9	TAXATION AND REVENUE.	State Tax Commission, authority to appoint agents to investigate property omitted from assessment lists and to provide for their compensation.
<a href="#">63-34</a>	Mar 8	TAXATION.	Property in interstate commerce may not be taxed while in this State, but grain withdrawn from the carrier and stored for the purpose of cleaning, grading, mixing, etc. loses its interstate connection to the extent that it may be taxed in Missouri.

<a href="#">63-34</a>	May 14	REVENUE.	Defining the term "revenue" relating to amount of money common Council shall be required to appropriate for use of Police Department in Cities of the First Class.
<a href="#">63-34</a>	Sept 8	TAXATION.	Senate Bill 94 does not apply to collection of levee and drainage district taxes.
<a href="#">63-34</a>	Sept 15	TAXATION.	Board of Equalization and Board of Appeals have the inherent right to adjourn from time to time to carry out the duties imposed upon them by Statute.
<a href="#">63-34</a>	Nov 2	TAXATION. COUNTY COLLECTORS.	County Collector not required to have seal.
<a href="#">64-34</a>	Jan 13	BANKS & BANKING.	County depository not relieved of liability by vacation of ex parte circuit court order.
<a href="#">64-34</a>	Jan 24	BANKS & BANKING.	Commissioner and Special Deputy Commissioner should not invest funds in interest-bearing securities, but deposit same in state banks, savings banks or trust companies as provided by Section 5331 R. S. Mo. 1929.
<a href="#">64-34</a>	Jan 26	BANKS & BANKING. DEPOSITARY, COUNTY.	Judgment of Circuit Court relieving bank of liability for county funds. Relieving bank of liability for county deposits by judgment of court.
<a href="#">64-34</a>	Feb 10	BANKS AND BANKING.	Commissioner of Finance has right to fix fees of attorneys of failed banks.
<a href="#">64-34</a>	Feb 16	SCHOOLS.	Relating to claimants to lands by adverse possession against public school districts. Relating to the power and authority of school boards to employ teachers or superintendents beyond the term of their office.
<a href="#">64-34</a>	Mar 3	COUNTY BUDGET.	Classification of boarding prisoners.
<a href="#">64-34</a>	Mar 26	BANKS & BANKING.	Restricted deposits, permitted to be withdrawn under Commissioner of Finance's regulations, not preferred claim in event bank closes.
<a href="#">64-34</a>	Apr 2	PUBLIC ADMINISTRATOR.	Appointment by the Governor to fill vacancy is to be filled at the first general election held after such appointment.
<a href="#">64-34</a>	Apr 10	ELECTIONS.	Absentee ballots may be voted in a special election to be held May 15; persons who will be out of the State of Missouri may vote absentee ballots providing they are marked before officers who are authorized to administer oaths in the State of Missouri.
<a href="#">64-34</a>	May 15	BANKS & BANKING.	Claims of United States have preference over other claims against failed banks.
<a href="#">64-34</a>	May 29	BANKS AND	Re withdrawal of securities by trust companies under Section 5463.

		BANKING.	
<a href="#">64-34</a>	May 29	REVENUE.	Section 9868 R. S. Mo. 1929 limited by Section 11, Article 10, Missouri Constitution.
<a href="#">64-34</a>	June 5	NEPOTISM.	The violation of Section 13 of Article XIV of the Constitution does not automatically remove director; proper proceedings must be brought for that purpose.
<a href="#">64-34</a>	June 11	SCHOOL DISTRICTS.	School district desiring to be annexed to a city or town district may do so by complying with the provisions of Section 9342, R. S. Mo. 1929.
64-34	July 3	Hon. Merrill E. Montgomery	WITHDRAWN
<a href="#">64-34</a>	Aug 23	AUTOMOBILES. LARCENY.	Theft of battery is larceny and not tampering with motor vehicle.
<a href="#">64-34</a>	Aug 23	STOCK LAW.	May be submitted to voters for purpose of terminating or continuing enforcement.
<a href="#">64-34</a>	Oct 24	BANKS & BANKING.	Records and files in possession of Commissioner of Finance for defunct banks, open for inspection of interested parties.
<a href="#">65-34</a>	Feb 15	OPINION. COUNTY COURT. PRIVATE CAR TAX FUND.	What disposition is to be made of money in County Treasury to the credit of said fund under Sections 10052-10063 R. S. Mo. 1929.
<a href="#">65-34</a>	Mar 8	COUNTY BUDGET LAW.	County court cannot reduce the salary of any officer which is fixed by statute in order to balance the budget; can reduce the salary of appointive officers.
<a href="#">65-34</a>	Mar 15	LIQUOR CONTROL ACT.	County courts not authorized to license wholesale dealers, distillers, manufacturers or brewers.
<a href="#">65-34</a>	Apr 5	SCHOOLS.	Under Section 17, Laws of Missouri 1931, page 344, board may increase the levy in excess of twenty cents and reject the equalization fee or minimum guarantee.
<a href="#">65-34</a>	Apr 6	COUNTY SCHOOL FUND.	County Court having foreclosed a mortgage on property on which they have loaned money belonging to the County School Fund and having bid the property in at the foreclosure sale, cannot allow the mortgagor to redeem property by accepting bonds of the Home Owner's Loan Corporation.
<a href="#">65-34</a>	Apr 23	TAXATION. BOARDS OF EQUALIZATION.	Must give effect to Senate Bill 34, page 419, Laws of Mo. 1933 in setting valuations for 1934 taxes.
<a href="#">65-34</a>	May 17	TAXATION.	Assessor has the authority to require taxpayers to make an itemized list

		REVENUE.	of the property, as covered by classes 7, 8 and 9 of Section 9756, R.S. Mo. 1929; and all property must be returned for assessment at its true value, and any note or instrument is solvent up to its true value in money, whether that means face value or not.
<a href="#">65-34</a>	June 7	SCHOOLS. TAXATION.	Board of Directors authorized to withdraw estimate found insufficient to pay interest and principal on bonds, and to submit in lieu thereof a new and sufficient estimate.
<a href="#">65-34</a>	Aug 24	LIQUOR CONTROL ACT.	County Court has no authority to grant a license unless Sec. 27 of the Liquor Control Act be complied with.
65-34	Sept 27	Hon. Lee Mullins	WITHDRAWN
<a href="#">66-34</a>	Jan 11	STATE FUNDS AND PROPERTY.	Right of State Treasurer to accept Home Owners Loan bonds in Exchange for Real Estate Security obtained by reason of Default of State Depositories; also to accept Federal Farm Loan Bonds.
<a href="#">66-34</a>	Jan 17	ASSESSOR.	Should assess land as acreage when plat nullified by foreclosure of prior Deed of Trust.
<a href="#">66-34</a>	Jan 25	ESCHEAT REFUNDS FROM STATE TREASURER.	Order must be directed to State Auditor and not State Treasurer.
<a href="#">66-34</a>	Feb 14	BONDS. STATE TREASURER.	Executor of deceased owner of registered bonds entitled to receive accruing interest thereon without having bonds formally registered in executor's name.
<a href="#">66-34</a>	Mar 2	STATE TREASURER. DEPOSIT PUBLIC FUNDS.	Revenue Notes of State of Illinois not acceptable as security for State deposits. Revenue Notes not acceptable; not registered bonds within meaning of Sec. 11469, and not acceptable by State Treasurer as security for State deposits.
<a href="#">66-34</a>	Mar 6	BANKS & BANKING.	National banks located in Missouri may pledge their assets to secure state deposits.
<a href="#">66-34</a>	Mar 27	STATE TREASURER. CONSCIENCE MONEY.	How disposed of by State Treasurer.
<a href="#">66-34</a>	July 17	APPROPRIATIONS. STATE TREASURER. STATE AUDITOR.	Appropriations provided for in Section 41, Laws of 1933, page 86, with reference to schools, expires under the provisions of Section 19, of Article X of the Constitution of the State of Missouri.
<a href="#">66-34</a>	Aug 17	ELECTIONS.	Necessity of Congressmen to file expense account.
<a href="#">66-34</a>	Aug 22	APPROPRIATIONS. STATE TREASURER. STATE AUDITOR.	Appropriations for vocational education, Section 41, Laws 1933, p. 86, for biennial period of 1933-1934.
<a href="#">66-34</a>	Aug 29	INHERITANCE TAX.	Life Estate of Widow and remainder should be taxed according to



		LIFE ESTATE.	provisions of Sec. 595, RSMo 1929, and tax should be at highest rate possible under provisions of Inheritance Tax Law of Mo.
<a href="#">67-34</a>	May 3	STATE BOARD OF HEALTH.	Relating to the changes made by the Legislature in 1933 concerning the State Board of Health and Health Commissioner; the duties of the State Board of Health in relation to the Health Commissioner; and changes relating to the by-laws, under the statutes governing the operation of the board.
<a href="#">67-34</a>	Oct 19	STATE BOARD OF HEALTH.	Various questions concerning duties, funds, Commissioner of Health, chiropody, cosmetology etc.
<a href="#">67-34</a>	Nov 20	STATE BOARD OF HEALTH.	Authority of the Board to employ agents and fix compensation.
<a href="#">69-34</a>	Jan 17	TAXATION.	Delinquent land taxes enforced under Senate Bill 94 after July 24, 1933.
<a href="#">69-34</a>	Feb 27	QUO WARRANTO. OFFICERS.	Cities of the Fourth Class.
<a href="#">69-34</a>	Apr 12	SALARIES AND FEES.	Court Reporter's salary determined by decennial census.
<a href="#">69-34</a>	June 28	LIQUOR CONTROL ACT.	Board of trustees of an incorporated village may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of intoxicating liquor.
<a href="#">69-34</a>	Sept 1	INSURANCE DEPARTMENT. CORPORATIONS. SECRETARY OF STATE.	Receiver of dissolved insurance corporation does not have authority to sell the charter of the corporation and no rights could be acquired by such a sale.
<a href="#">69-34</a>	Sept 7	DENTISTS. INTOXICATING LIQUORS.	Without authority to write prescriptions for intoxicating liquors.
<a href="#">69-34</a>	Sept 8	TOWNSHIP ROAD BOND FUNDS.	Monies in hands of township trustee for use in paying principal and interest on road bonds cannot be invested but must be placed by trustee in bank on order of township board of directors.
<a href="#">69-34</a>	Sept 12	OFFICERS. CIRCUIT CLERK.	Section 3945, R. S. Mo. 1929, makes misconduct or abuse of authority in office a misdemeanor; Section 11681, R. S. Mo. 1929, makes a willful act contrary to duties a misdemeanor; whether or not Clerk wrongfully issuing subpoenas is guilty under either section depends upon full development of facts.
<a href="#">69-34</a>	Sept 28	TAXATION.	Senate Bill 94; limitations as applied to sales of delinquent real estate. Section 9961 Revised Statutes Missouri 1929, did not apply to Senate Bill 94 and lands for delinquent taxes for 1928 may be sold under the provisions of Senate Bill No. 94.

<a href="#">69-34</a>	Oct 4	INSURANCE DEPARTMENT.	In order to increase capital stock of a life insurance company, names of the subscribers of same, the amount paid, or the securities given by such subscribers guaranteeing payment must be shown in the proceedings to increase the capital stock.
<a href="#">69-34</a>	Oct 19	ELECTIONS.	Printing of ballot to vote on dog tax may be done on regular election ballot and not invalidate same but a better form would be to have a separate ballot.
<a href="#">69-34</a>	Dec 28	COUNTY BUDGET ACT.	The surplus in any class may be used to make up the deficit in any other succeeding class when it does not jeopardize priorities of payment of the other classes.
<a href="#">69-34</a>	Dec 29	INSURANCE.	Approval of Stock increase Liberty National Life Insurance Company.
<a href="#">69-34</a>	Dec 31	INSURANCE.	Approval of decrease in par value of stock American Life Insurance Company.
<a href="#">70-34</a>	Jan 5	TOWNSHIP TRUSTEE AS EX OFFICIO TREASURER.	Compensation on sums received and disbursed.
70-34	Jan 19	Hon. W. W. Parker, President	WITHDRAWN
<a href="#">70-34</a>	Feb 16	OPTOMETRY BOARD.	1. Expenses of Board for witness fees, mileage, etc. can be paid. 2. Board not entitled to expenses for traveling investigator of unlicensed operators.
<a href="#">70-34</a>	Mar 21	SCHOOLS.	Qualifications of Superintendent.
<a href="#">70-34</a>	Mar 23	DELINQUENT TAX ATTORNEY.	Appointment and compensation must be approved by county court, Section 9952 R.S. Mo. 1929.
<a href="#">70-34</a>	Apr 11	CONSTABLES.	Fee for trial or confession in justice court.
<a href="#">70-34</a>	Apr 16	OFFICERS. NOTARY PUBLIC.	United States Postmasters cannot at the same time be a notary public in Missouri.
<a href="#">70-34</a>	Apr 19	MARSHALL SUPREME COURT.	Mileage fees when prisoner escapes.
<a href="#">70-34</a>	May 7	NEPOTISM.	Second cousin not related within the third Degree, as prohibited by Section 6529, R. S. Mo. 1929.
<a href="#">70-34</a>	June 29	SHERIFF.	It is the duty of the local sheriff to convey the prisoner to the penitentiary when an appeal is dismissed in the Supreme Court for failure to prosecute same on behalf of the defendant.
<a href="#">70-34</a>	Sept 4	TAXATION.	Effect of judgment on House Bill 124.
<a href="#">70-34</a>	Dec 17	HOME OWNERS'	Bonds issued under Amended Act of June 27, 1934 may be accepted as

		LOAN CORPORATION BONDS.	collateral for state funds and county deposits; bonds issued prior to effective date of amended section are not acceptable unless they have since received same guarantee.
<a href="#">71-34</a>	Oct 2	PUBLIC NOTICES.	So long as Republican newspaper complies with Sec. 13773, R.S. 1929, County Clerk must make publication of election notices in same.
<a href="#">71-34</a>	Oct 8	TAXATION.	Cities special charter provision for collection of delinquent taxes prevail over general statutes.
<a href="#">71-34</a>	Dec 26	COUNTY OFFICERS.	Term of office prescribed by statute may be terminated by amendment of statute.
<a href="#">72-34</a>	Mar 2	RAILROADS.	Railroad Company may eject an intoxicated person on train.
<a href="#">72-34</a>	Mar 7	COUNTY BUDGET ACT.	(1) Priority of classifications. (2) Treasurer required to keep records and apportion money according to classifications of Section 2. (3) Surplus money of county on hand January 1, 1934 to be classified, apportioned and paid out according to the County Budget Act.
<a href="#">72-34</a>	Mar 13	SCHOOLS. SCHOOL DISTRICTS.	Surrendering of \$50.00 warrant which cannot be paid in full for lack of funds, in exchange for smaller warrants would be in effect making partial payments upon outstanding warrants, in violation of Section 9312, R. S. Mo. 1929.
<a href="#">72-34</a>	Apr 4	GAMBLING DEVICES.	"Rocket" and "Sportsman" machines.
<a href="#">72-34</a>	June 6	TAXATION.	Collection of delinquent city taxes under Senate Bill 94.
<a href="#">72-34</a>	June 14	ELECTIONS. ABSENTEE VOTER.	County Clerk can have Absentee Ballots printed more than ten days before the primary election. A qualified voter must apply in person to the county clerk, board or election commissioners of the county in which he claims residence for an absentee ballot.
<a href="#">72-34</a>	Sept 12	COUNTY HIGHWAY ENGINEER. COUNTY COURT.	Right to appoint assistant. Right to fix compensation of assistant appointed by County Highway Engineer; right to reimburse County Highway Engineer for gasoline and oil purchased by him and used in performing his duties; right to pay County Highway Engineer monthly sum for use of his privately owned automobile in performing his duties.
<a href="#">73-34</a>	Apr 17	OFFICERS.	Cities of the Fourth Class shall elect and qualify for Mayor and Aldermen in the following manner.
<a href="#">73-34</a>	May 10	TAXATION.	Duties of County Clerk under Senate Bill 34, page 419 Laws of Missouri, 1933.
<a href="#">73-34</a>	May 11	CITIES OF THE FOURTH CLASS.	Candidate in arrears on city taxes on day of election cannot be elected to office.

<a href="#">73-34</a>	May 14	TAXATION AND REVENUE.	Method of Transferring and buying out funds collected by County Collector, as school taxes.
<a href="#">73-34</a>	May 24	TAXATION.	How to place omitted property on assessment rolls. Information on perjury for making false tax returns.
<a href="#">73-34</a>	July 14	TAXATION AND REVENUE.	Method of transferring and paying out funds collected by County Collector as school taxes.
<a href="#">73-34</a>	Aug 17	TAXATION.	Drainage District Bonds subject to taxation under the Laws of this state.
<a href="#">73-34</a>	Sept 18	SCHOOLS.	Relating to the apportionments of school money to the various school districts in different funds.
<a href="#">73-34</a>	Nov 9	FOREIGN MUTUAL FIRE INSURANCE CORPORATIONS.	Authority to accept all-cash premium.
<a href="#">73-34</a>	Nov 10	FRATERNAL BENEFIT ASSOCIATIONS.	City of fourth class has no power under Section 7046, Revised Statutes of Mo. 1929, to require a license tax on agents selling fraternal insurance.
<a href="#">74-34</a>	Jan 8	TAXATION. POLL TAXES.	Discussion of cities' right to collect poll taxes and right of exemption.
<a href="#">75-34</a>	Feb 22	LIQUOR CONTROL ACT.	Intoxicating liquor may be sold in original package not for consumption on premises anywhere in Missouri when proper licenses are obtained. Definition of "city" in Sec. 13-a applicable to whole Act. County court has only power to issue licenses-cannot regulate.
<a href="#">75-34</a>	Mar 28	PROSECUTING ATTORNEY.	County Collector must accept past due drainage bonds or coupons in payment of taxes levied for the payment of bonds or coupons of the same issue, but is not allowed to accept such in payment of any tax levied for any other purpose.
<a href="#">75-34</a>	Apr 11	WAREHOUSES.	Construction of new warehouse and sealer laws – relating to form of applications to county clerk and to sealer, and fees of sealer.
<a href="#">75-34</a>	May 8	CARDING OF PRISONERS.	County or state must pay cost of boarding prisoners to an adjoining county when there is no jail in the county where the crime was committed; county liable for cost in case of misdemeanor—state in case of felony under Sec. 8551, R.S. Mo. 1929.
<a href="#">75-34</a>	Oct 9	FEEES. COLLECTORS – COUNTY CLERKS.	Fees of collector and county clerk under Sec. 9945 and 9969.
<a href="#">75-34</a>	Nov 10	NEPOTISM.	Persons related as first cousins or more closely come within the fourth degree; second cousins do not come within the prohibition of the

			Constitution.
<a href="#">76-34</a>	Jan 19	PROSECUTING ATTORNEY.	Salary fixed by Sec. 11314 R.S. Mo. 1929 and fees allowed for convictions in felony cases must be turned over to county treasurer.
76-34	Aug 31	Hon. E. L. Redman	WITHDRAWN
<a href="#">76-34</a>	Oct 1	DRAINAGE DISTRICTS. TAXATION. CONSTITUTION.	Lands purchased by a drainage district at a tax sale or redeemed from taxes, are not exempt from the payment of general taxes under Section 6, Article X of the Constitution of Missouri.
<a href="#">77-34</a>	Feb 21	SCHOOLS.	Transportation Fund received from State should be placed in Incidental Fund. Warrants in payment of transportation should be issued and paid from the Incidental Fund.
<a href="#">77-34</a>	Aug 3	ESCHEATS.	Construction of the Statutes (R. S. Mo. 1929, Sec. 625, et seq.) relating to proceedings on behalf of the state for escheated lands.
<a href="#">77-34</a>	Sept 13	OFFICERS.	Under Section 4 of Article XIV of the Constitution of Missouri, a person cannot hold office under the United States and under the State of Missouri, and the acceptance of an office under the United States would vacate the office of Probate Judge.
<a href="#">78-34</a>	Mar 26	LIQUOR CONTROL ACT.	Answering six questions relating to various phases of the Act.
<a href="#">78-34</a>	May 3	ELECTIONS. PHARMACISTS.	I. Relating to Qualification of a candidate for office who failed to comply with Corrupt Practice Act. II. Relating to authority of druggist to sell intoxicating liquor on prescription on Sunday or Election Day under Intoxicating Liquor Act.
<a href="#">78-34</a>	Sept 27	DELINQUENT TAXES.	Publication must be in one newspaper of general circulation.
<a href="#">78-34</a>	Oct 31	TAXATION.	City tax fourth class city inferior to State and County taxes.
<a href="#">78-34</a>	Nov 10	TAXATION.	Lands purchased by William Jewell College at foreclosure, for payment of endowment funds loaned by it on the lands as security, are exempt from taxation.
<a href="#">79-34</a>	Jan 17	ROAD DISTRICTS.	Whether bond of district is barred by Statute of Limitations depends upon whether or not person holding bond is under disability, as provided in Section 868, R. S. Mo. 1929.
<a href="#">79-34</a>	Feb 7	COMMISSION FOR THE BLIND.	Members of Commission for the Blind must file Federal Income Tax returns for private income.
<a href="#">79-34</a>	Mar 1	NEPOTISM.	Sec. 13, Art. XIV, Mo. Constitution does not apply to appointment of one's self. Employment of one's self by school director to transport own children to school does not forfeit office and money received therefor is not embezzlement under provisions of Sec. 4091 R.S. 1929; prosecution under Sec. 4090, R.S. 1929.

<a href="#">79-34</a>	July 21	COLLECTOR'S BOND.	Township Board may properly accept new bond under Extra Session Laws 1933-1934, p. 167, where old bond does not cover full term as required by law.
<a href="#">79-34</a>	Aug 27	BLIND COMMISSION. GARNISHMENT. PENSIONS. SCHOOLS.	Liability of Missouri Commission for the Blind to garnish wages.
<a href="#">79-34</a>	Nov 21	NOTARY PUBLIC.	Notary Public commissioned in the State of Missouri not permitted under the law to attest his own signature.
<a href="#">80-34</a>	Feb 21	CRIMES AND PUNISHMENTS.	Under Section 7782, para. a, to tamper with an automobile is a crime, and according to Webster, to tamper means to alter or change without right. Since our courts have not interpreted the word we cannot definitely say whether a person who removes a part and carries it away should be prosecuted under said Section, instead of under the Larceny section.
<a href="#">80-34</a>	May 26	ROAD DISTRICTS.	Commissioners of road districts would be personally liable for paying out money of district upon contract entered into in violation of Section 13 of Article XIV of the Constitution of Missouri.
<a href="#">80-34</a>	June 1	ELECTIONS. PRIMARY.	Last day for candidates to file for August Primary Election, 1934.
80-34	June 27	Hon. Wm. H. Sapp	WITHDRAWN
<a href="#">80-34</a>	Aug 16	DEPARTMENT OF PENAL INSTITUTIONS.	Inmates of Intermediate Reformatory should be held in that institution until ordered transferred by the Commissioners of Penal Institutions with the consent of the Governor.
<a href="#">80-34</a>	Sept 7	HIGHWAY PATROL.	Members of the State Highway Patrol are not entitled to receive rewards for the apprehension of escaped convicts from the Missouri State Penitentiary.
<a href="#">80-34</a>	Sept 20	COUNTY COURTS. SALARIES. LIMITATIONS. HIGHWAYS.	Suit by ex-office holder governed by five year statutes of limitations. Ex-office holders are not estopped to claim back salary. Rock public roads include gravel roads. Section 11808 Revised Statutes Missouri 1929 to be used in estimating population until effective date of Laws 1933, page 369.
<a href="#">80-34</a>	Oct 12	SCHOOLS.	Right of children of transients to attend free public schools in Missouri.
<a href="#">80-34</a>	Dec 4	PENITENTIARY. CONVICTS. WARDEN.	When sentence concurrent or cumulative.
<a href="#">80-34</a>	Dec 7	PENITENTIARY.	Right of Warden to issue certificate of delivery to officers delivering

		CONVICTS. WARDENS.	persons to penitentiary.
<a href="#">81-34</a>	Jan 31	LIQUOR CONTROL ACT.	Holder of Permit to sell non-intoxicating beer having alcoholic content not in excess of 3.2% by weight is prohibited from obtaining any license under Liquor Control Act.
<a href="#">81-34</a>	Mar 27	DRUGGISTS OR PHARMACISTS. BOARD OF HEALTH.	After failure of two (2) years to renew druggists or pharmacist's license, such person stands in same status as original applicant.
<a href="#">81-34</a>	June 22	TAXATION.	Relating to exemption of charitable organizations.
<a href="#">81-34</a>	Sept 21	FOOD AND DRUGS.	Inspection of, applicability of Article 8 of Chapter 93 of R. S. Missouri 1929 to malted milk beverage.
<a href="#">81-34</a>	Dec 28	SEARCH AND SEIZURE.	When illegal intoxicating liquor is found during the progress of a bona fide search for other commodities illegally possessed, it is proper for searching officers to seize the same, and evidence so obtained may be used in prosecution.
<a href="#">82-34</a>	Apr 4	TAXATION.	Penalties and Interest on 1932 taxes same as for 1933 taxes under House Bill #124.
<a href="#">82-34</a>	May 3	OFFICERS. TRUSTEES.	In towns and villages are qualified to hold office as follows.
<a href="#">82-34</a>	July 7	ELECTION.	Relating to the right of one person to hold the office of Justice of Peace and Police Judge at the same time in a city of the third class.
<a href="#">82-34</a>	Oct 9	TAXATION.	Relating to certain property subject to taxation.
<a href="#">82-34</a>	Nov 15	COUNTY BUDGET.	5 Questions in re: County Budget
<a href="#">83-34</a>	Nov 9	TAXATION.	Personal property of World War Veteran not exempt from taxation.
84-34	Mar 31	Mr. William J. Sherwood	WITHDRAWN
84-34	May 18	Hon. John P. Shreves	WITHDRAWN
<a href="#">84-34</a>	Sept 13	COUNTY TREASURER.	Duty to receive and receipt for money tendered him, asserted to be county money.
85-34	Apr 11	Barbers' State Board of Examiners	WITHDRAWN
<a href="#">85-34</a>	Sept 17	SPECIAL ROAD DISTRICTS.	Road Commissioner in a Special Road District cannot work on the roads in his district and draw compensation therefor. Special road districts are political subdivisions of the State with reference to the Nepotism Amendment.

<a href="#">86-34</a>	Jan 22	CRIMINAL COSTS.	Liability of state for defendant's costs where case "continued generally".
<a href="#">86-34</a>	Feb 7	BLIND PENSION.	Section 12-U House Bill 127, which seeks to divert from the Blind Pension Fund money for the prevention of blindness in the hands of the Missouri Commission for the Blind, is unconstitutional.
<a href="#">86-34</a>	Mar 7	SALES TAX ACT.	Sales to churches, schools, court houses, clubs, fraternal organizations, post offices, to municipalities for municipal purposes of electricity, gas and water exempt under sub-section(b) Section 2a House Bill No. 5.
<a href="#">86-34</a>	Mar 9	SALES TAX.	Magazine Advertising.
<a href="#">86-34</a>	Mar 20	COUNTY CLERKS.	Not entitled to count printed words in calculating fees under Section 9877, page 421, Laws of Missouri, 1933.
<a href="#">86-34</a>	Mar 23	STATE AUDITOR.	State institutions and appointive and county officers required to set up and maintain records and forms as prescribed by State Auditor under Section 11479 and may be compelled by the State Auditor in mandamus to so do.
<a href="#">86-34</a>	Mar 31	PENITENTIARY.	(1) Use of convicts as servants by officers of Penitentiary; (2) Paying of subsistence to officers for convicts used as servants.
<a href="#">86-34</a>	Apr 16	SALES TAX.	Tax may not be added to articles sold.
<a href="#">86-34</a>	May 11	TAXATION.	6% rebate under Senate Bill 52, Laws of Missouri 1934 p. 153 Extra Session, allowable if taxes paid during June or July.
<a href="#">86-34</a>	May 15		Indirect sales for resale.
<a href="#">86-34</a>	May 17	STATE AUDITOR. SALES TAX.	Tax to be paid by receivers, executors, etc., when.
<a href="#">86-34</a>	May 19	APPROPRIATIONS.	Appropriation under Sec. 12 B of H.B. 127, Extra session, 1933, does not meet requirements of Constitution; likewise, appropriations under Secs. 12A1 and 12 are void and of no effect.
<a href="#">86-34</a>	May 31	STATE AUDITOR. REGISTRATION OF BONDS.	Injunction suit without writ issued does not prevent Auditor from registering bonds.
<a href="#">86-34</a>	June 16	RECORDER OF DEEDS.	1. Where offices of Circuit Clerk and Recorder are consolidated due to population they may not be separated until the next decennial census but at that time are separated as a matter of law if the population requirement is met. 2. Salary of Circuit Clerk in county of 1940 population is \$1900 and same where clerk is ex-officio recorder.
<a href="#">86-34</a>	June 29	STATE AUDITOR.	1. State Auditor cannot issue a warrant under sub-section D, Laws 1933, page 151, which section appropriates money for the operation



			<p>expense of the motor vehicle registration department, to cover a loss due to robbery.</p> <p>2. A warrant can, however, be issued under such section to pay collection charges on checks during the bank moratorium.</p>
<a href="#">86-34</a>	July 2	ROADS AND BRIDGES. TAXATION.	<p>I. Relating to payment of taxes by taxpayers in special road districts in counties under township organization.</p> <p>II. Relating to special road and bridge taxes, levy and payment.</p>
<a href="#">86-34</a>	July 12	EXPENSE VOUCHERS. STATE EMPLOYEES.	<p>Are members of the Advisory Board to the State Building Commission required to file such for reimbursement of expense money?</p> <p>Can such be employed by two different state departments simultaneously?</p>
<a href="#">86-34</a>	July 27	BLIND PENSIONS.	Effect of Finding of Eligibility by Commission made in ignorance of death of applicant.
<a href="#">86-34</a>	July 30	OCCUPATION TAX.	Individual truck haulers subject to payment of the tax when transporting persons or freight for the public but not when transporting freight or persons under a contract with employer.
<a href="#">86-34</a>	Aug 4	RECORDER OF DEEDS.	Proper fee for recorder to charge for marriage license is \$1.00 but where recorder conscientiously retains doubt as to age he may take affidavit as to age at a charge of \$.25 additional.
<a href="#">86-34</a>	Aug 9	PUBLIC SERVICE COMMISSION.	Appropriation Act, construction thereof.
<a href="#">86-34</a>	Aug 10	STATE BOARD OF HEALTH.	Compensation and license fees for certificates.
<a href="#">86-34</a>	Aug 23	LIQUOR CONTROL ACT.	Intoxicating liquor purchased for purpose of securing evidence to prosecute violators may be paid for out of appropriation under subsection D, Sec. 12M Laws of Mo. (Ex. Sess) 1933-34.
<a href="#">86-34</a>	Sept 19	COUNTY CLERK.	County Court can make contract with County Clerk to make second tax book if it believes the extra book is necessary for the collection of the taxes.
<a href="#">86-34</a>	Sept 21	HOUSE BILL NO. 5. SALES TAX.	Receipts from sales of admission to football games and other athletic events not subject to tax when same are conducted for and on behalf of colleges, universities and high schools.
<a href="#">86-34</a>	Oct 23	COUNTY COLLECTOR.	Compensation under subdivision XIV, Section 9935 R. S. Mo. 1929 for back tax collections.
<a href="#">86-34</a>	Nov 3	INCOME TAX.	Section 10144, R.S. Mo. 1929 prohibits State Auditor from divulging information contained in an income tax return to persons other than the taxpayer.

<a href="#">86-34</a>	Dec 4	COLLECTORS.	Compensation of county collectors for collecting income taxes, current and delinquent.
<a href="#">86-34</a>	Dec 13	COUNTY CLERKS.	Fees received by county clerk by virtue of Section 11679, R. S. 1929, must be accounted for.
<a href="#">86-34</a>	Dec 22	CIRCUIT JUDGES.	City of St. Louis, when terms of office begin.
<a href="#">86-34</a>	Dec 28	CIRCUIT CLERKS.	Fees in criminal cases under Section 11785 for incorporating bill of exceptions into transcript.
<a href="#">87-34</a>	Feb 19	STATUTES.	Of no force or effect prior to effective date.
<a href="#">87-34</a>	Feb 21	APPROPRIATIONS.	Section 12-A1 appropriates and transfers to the Grain Inspection Fund \$18,000.00 which may be paid out according to the appropriations charged to the Grain Inspection Fund under Section 14, Laws of Missouri 1933, page 98.
<a href="#">87-34</a>	Mar 9	ELECTIONS.	An election to determine whether or not intoxicating liquor shall be sold in a city must be a special election and must not take place within 60 days of any general election; city or school election not a general election under the Constitution and Laws of Mo.
<a href="#">87-34</a>	Apr 5	TAXATION.	No time limitation on assessment of omitted property.
<a href="#">87-34</a>	May 15	MOTOR VEHICLES.	Motor Car Salesmen required to register as registered operator under motor vehicle act.
<a href="#">87-34</a>	May 23	SCHOOLS.	Requirement of county superintendent to have state certificate in order to hold office—"State Certificate" discussed.
<a href="#">87-34</a>	July 2	ELECTIONS. PRIMARY.	Depositing a written declaration of candidacy in mails is not a filing; but declaration must have been in County Clerk's office before June 8, 1934, the last day for filing.
<a href="#">87-34</a>	Sept 14	NATIONAL BANKRUPTCY ACT.	Agricultural compensations and extensions – liability for cost of publication of notice.
<a href="#">88-34</a>	Jan 5	FEES OF MESSENGER. EXTRADITION OF FUGITIVES.	To be fixed in amount by governor. Expenses of messenger fixed by governor.
<a href="#">88-34</a>	Jan 6	TAXATION. SCHOOL DISTRICTS.	Question of right to collect taxes on newly acquired territory by consolidated school district discussed; assessor's duty to indicate district where land is located in making out list; personal notice need not be given to owner of newly acquired land; county superintendent's duty to file plat of district with county clerk.
<a href="#">88-34</a>	Jan 11	MOTOR VEHICLES.	License registration fee, amounts to be charged under recent act discussed.
<a href="#">88-34</a>			

<a href="#">88-34</a>	Jan 27	MOTOR VEHICLES.	Commissioner of Motor Vehicles does not have to amend certificate of ownership to show liens or encumbrances; neither is he compelled to file notices of releases or filing of mortgages.
<a href="#">88-34</a>	Jan 30	SHERIFF.	County is not liable for supplies purchased by sheriff to be used in courthouse unless the jail is in such courthouse and such supplies are for use in said jail and deemed necessary by said sheriff for the proper administration of said jail.
<a href="#">88-34</a>	Mar 8	PROSECUTING ATTORNEY.	Where chattel mortgage is filed in one county and unauthorized sale of the chattel is made in another county, the latter county is the proper county in which to bring the prosecution.
<a href="#">88-34</a>	Apr 18	NEWSPAPERS.	Independent newspaper cannot qualify for publications under Sec. 10249, R.S. 1929.
<a href="#">88-34</a>	June 16	TAXATION. SCHOOL DISTRICTS.	Section 1, Laws of Missouri 1931, page 349, is not unconstitutional as being in conflict with Section 6 of Article X, which exempts school property from general taxes.
<a href="#">88-34</a>	Sept 5	TAXATION.	Procedure established by Senate Bill 94 applicable in cities of the third class.
<a href="#">88-34</a>	Sept 11	TAXATION.	Under Section 9868, R. S. Mo. 1929, upon petition by County Court, Circuit Judge may issue order directing increased levy and may, under same section, revoke its prior order.
<a href="#">88-34</a>	Nov 15	SCHOOLS. COUNTY SCHOOL FUND.	Right of county court to reduce or waive interest or principal of loans from county school fund secured by farm real estate mortgages.
<a href="#">88-34</a>	Dec 7	COUNTIES.	Refunds from State, taking over bridge to which county contributed, may be put in general revenue fund of county by county court. On transfer or paying back to other counties their contribution no commission allowable under 12316, R. S. 1929.
<a href="#">88-34</a>	Dec 19	MOTOR VEHICLE LICENSE FEES.	License fee for trailers and semi-trailers should be based on live load capacity of such trailer or semi-trailer.
<a href="#">89-34</a>	Feb 21	COUNTY WARRANTS.	Warrants reduced to judgment do not lose their priority nor does the judgment extinguish priority.
<a href="#">89-34</a>	May 29	COUNTIES.	No priority with respect to interest payments.
<a href="#">89-34</a>	June 12	RECORDER OF DEEDS.	Fees to be charged for recording Deeds of Trust.
<a href="#">89-34</a>	Sept 7		I. Relating to construction of Section 9044 as amended by laws of 1933. II. Relating to authority of cities to pass ordinance exceeding the

			charter rights in conflict with state laws.
<a href="#">90-34</a>	Jan 2	SPECIAL ROAD DISTRICTS.	Where Special Road District in grading a road damages culvert driveway in front of farm home, said district is not liable for said damage.
<a href="#">90-34</a>	Mar 19	BANKS AND BANKING.	Township Boards not permitted under the law to purchase Capital "B" Notes.
<a href="#">90-34</a>	July 3	ELECTIONS. PRIMARY.	Only one Party Ballot can be handed to each Elector.
90-34	Oct 8	Mr. J. Olin Taylor	WITHDRAWN
<a href="#">90-34</a>	Oct 26	NEPOTISM.	Member of Board of Aldermen may not pay upon the appointment of his brother as City Attorney without violating Section 13, Article XIV, of Missouri Constitution. Member of Board of Aldermen who also holds the office of City Clerk does not forfeit both offices by passing upon the appointment of brother in his capacity as Member of Board of Aldermen. Both appointor and appointee forfeit office under the Nepotism law. The Nepotism Law of Const. of Mo. applies to Cities of Fourth Class.
<a href="#">90-34</a>	Dec 20	TAXATION. GASOLINE TAX.	Federal Emergency Relief Administration exempt from gasoline tax.
<a href="#">91-34</a>	Feb 15	COUNTY WARRANTS.	An opinion relating to the payment of delinquent county warrants.
<a href="#">91-34</a>	Mar 22	CITIES OF THE THIRD CLASS.	Relating to the Extension of its city limits.
<a href="#">91-34</a>	Apr 18	PETITION.	Form in action for deficiency in public school fund loan.
<a href="#">91-34</a>	Apr 27	SCHOOL DISTRICTS.	Discussion as to who are elected school directors where 6 run for three offices without announcing for which terms they aspire, and where some receive the same number of votes.
<a href="#">91-34</a>	May 31	SHERIFF. TRUSTEE.	When sheriff is appointed by the court as trustee to foreclose a deed of trust, deputy sheriff can make a legal and binding sale.
91-34	July 9	Hon. Vane C. Thurlo	WITHDRAWN
<a href="#">91-34</a>	July 17	CRIMINAL USURY.	One violates the criminal code of Missouri who charges in excess of 2% per month as interest for a loan.
<a href="#">91-34</a>	Aug 1	VOTING.	Members of Veterans Administration department of Federal Government are entitled to vote in Missouri.
<a href="#">91-34</a>	Aug 8	TAXATION.	Municipalities may tax real estate within city limits regardless of acreage.
<a href="#">91-34</a>	Oct 31	TAXATION.	Senate Bill 94. Published list of delinquent lands to be made according to any legal subdivision as the same may be according to ownership.

			Cost of publication to be prorated against all lands in publication.
<a href="#">91-34</a>	Nov 22	ELECTIONS.	Where more votes are cast than names on the poll books, the illegal votes, if any, could be thrown out, but this would not necessitate throwing out entire vote of the precinct.
<a href="#">91-34</a>	Dec 18	DEAD BODIES.	Definition of common carrier of, under R.S. Mo. 1929, Chap. 52, Art. 3.
<a href="#">92-34</a>	Jan 10	COUNTY COLLECTOR.	Subdivision XIV of Sec. 9935, R.S. Mo. 1929 unchanged by subdivision XIV of Sec. 9935, Laws of Mo. 1933, p. 454.
<a href="#">92-34</a>	Oct 10	CITIES, TOWNS & VILLAGES.	Under Section 7030 R. S. 1929. Bond issue under Section 7030, R. S. 1929, for construction of waterworks carried by two-thirds vote of those voting at election held for that purpose.
<a href="#">93-34</a>	Jan 8	NOTARIES PUBLIC.	Clerical position not within the intent of the words “an office of profit under the U.S.”.
<a href="#">93-34</a>	Dec 28	CIRCUIT CLERKS.	Circuit Clerks are to be paid on a basis of fees collected by them and not on a basis of fees earned by them.
<a href="#">95-34</a>	Feb 17	PROBATE CLERKS.	Probate Court may not have more than one clerk in one place but deputy clerks may be appointed in same place by the clerk with the approval of the probate judge.
<a href="#">95-34</a>	May 29	SCHOOLS.	A school director cannot enter into a contract with his school board for the sale of insurance or any other commodity-the same being against public policy.
<a href="#">95-34</a>	June 20	PROBATE JUDGE.	1. Sheriff must be and remain in attendance upon the Probate Court when the same is in session. 2. The Probate Court has not power to appoint a bailiff as an officer of the Court to keep order, summon witnesses, etc.
<a href="#">95-34</a>	June 21	COUNTY TREASURER & EX-OFFICIO COLLECTOR.	Act of 1933 reenacting Sec. 12316, R. S. Mo. 1929, goes into effect 90 days after adjournment or July 24, 1933, and from that time on, rate of commission is based on new law.
95-34	Nov 8	Hon. Thomas A. Walker	WITHDRAWN
<a href="#">96-34</a>	Feb 10	TRUCKS.	Relating to classification of trucks which come under regulations of P.S.C. and discusses interstate and intra state transportation.
<a href="#">96-34</a>	Mar 9	TAXATION AND REVENUE.	Interstate Commerce under Act of 1933, Section 9, House Bill No. 5 – Applicability of Act to receipts by newspaper publisher in Missouri from advertising and newspaper service furnished to advertiser outside of Missouri.
<a href="#">96-34</a>	Apr 12	SPECIAL ELECTIONS.	Sec. 10389 not applicable – only necessary to appoint two judges and two clerks at each polling place for the Bond election on May 15, 1934.

<a href="#">96-34</a>	May 1	PHYSICIANS. CHIROPODISTS.	A registered physician may hold himself out to the public as a chiropodist, and in so doing does not violate criminal law.
<a href="#">97-34</a>	May 24	SCHOOLS.	Employment of teachers and number thereof discretionary with board —contingent upon funds in possession or amount voted.
<a href="#">97-34</a>	July 13	ELECTIONS.	Vacancies occurring before primary must be filled after the primary election.
<a href="#">97-34</a>	July 16	CONSTABLE. HIGHWAY PATROLMEN. JUSTICE COURTS.	Arrests made by Highway Patrolmen not predicated on warrant issued to a constable. Constable alone is not the only officer of a Justice Court. Constable fees out of Justice Court are limited to statutory allowance and are collectible only where actual service is rendered.
97-34	July 31	Hon. William J. White	WITHDRAWN
<a href="#">97-34</a>	Dec 26	TAXATION.	House Bill 124 page 166, Laws Missouri Extra Session 1933-1934, not a temporary measure.
<a href="#">98-34</a>	Mar 10	NEPOTISM.	Right of City Council in Louisiana, Missouri, to appoint a brother of one of their members as an election judge in a city election.
<a href="#">98-34</a>	Mar 19	PUBLIC HEALTH. SCHOOLS.	Deputy State Commissioner of Health – Effect of Laws of 1933, page 271 on right to office under R. S. Mo. 1929, Section 9025. Salary of County Superintendent of Schools as changed by Laws of 1933, page 384.
<a href="#">98-34</a>	Mar 31	WITNESS FEES.	Expert Witness fees for State Witnesses are properly chargeable under certain circumstances.
<a href="#">98-34</a>	Apr 3	STATE BOARD OF EQUALIZATION.	Has implied powers to employ clerks necessary in the preparation of the Journal of the State Board of Equalization, assessments, examination of county tax returns, etc.
<a href="#">98-34</a>	May 11	TAXATION AND REVENUE.	Application of Senate Bill 94 to delinquent city tax collections depends on classification of cities.
<a href="#">98-34</a>	June 6	SCHOOL DISTRICTS.	Financial statements shall contain what. School Boards may be compelled to publish annual statements, how.
<a href="#">98-34</a>	June 21	COUNTY FUNDS.	Classes should be paid in order of their priority; not necessary to retain funds in Class 1 to detriment of other classes in advance of time payments are due; balance in special road fund and grand and petit jury funds for 1933 can be transferred to 1934 county revenue fund after outstanding warrants are paid.
98-34	Dec 1	Mrs. Sallie Wilson	WITHDRAWN
<a href="#">98-34</a>	Dec 18	CONFEDERATE SOLDIERS' HOME.	Compensation of treasurer of board of trustees.

<a href="#">99-34</a>	Apr 12	GAMBLING.	"Bank Night"
<a href="#">99-34</a>	May 17	COUNTY CLERK DEPUTIES.	Entitled to increase authorized by Section 11811 Laws of Missouri 1933, page 371.
<a href="#">99-34</a>	May 29	MOTOR VEHICLES.	Right of City to license is not affected by Motor Bus and Truck Law.
<a href="#">99-34</a>	Aug 21	CHIROPRACTORS.	Right to possess or prescribe narcotics.
<a href="#">99-34</a>	Sept 14	TAXATION.	Where drainage district acquired land upon which there are delinquent state, county, school and road taxes, it takes such land subject to the taxes, which may be enforced by such political subdivision if not paid.
<a href="#">99-34</a>	Dec 8	CIRCUIT CLERKS WHO ARE EX-OFFICIO RECORDERS OF DEEDS.	Bond required for each capacity – both offices to be assumed on first Monday in January.
<a href="#">99-34</a>	Dec 26	COUNTY CLERK FEES. SALARIES & FEES.	County Clerk not entitled under Section 11781 to 50 cents for attesting each county warrant.
<a href="#">100-34</a>	June 9	TAXATION.	Past due bonds and coupons of drainage and levy districts may be used to pay tax imposed for purpose of paying such bonds and coupons. Section 9911 R. S. Mo. 1929.
100-34	Aug 30	Mr. W. J. Yount	WITHDRAWN
<a href="#">100-34</a>	Nov 10	COUNTY BUDGET LAW.	Balance in any of five classes entitled to priority may be transferred to Class 5 on certain conditions. Boarding of prisoners should be in Class 4; Receipts for expenses paid by relatives of patients in Hospital No. 2 should be taken into consideration in estimating receipts under Sec. 1.
<a href="#">100-34</a>	Nov 12	TAXATION.	House Bill 124 Extra Session, applies to penalty on "taxes", does not apply to drainage district assessments.

DISTRICTS:-book Fund can only be used for the purchase of  
free textbooks.

February 16, 1934.



Mr. George F. Addison,  
Prosecuting Attorney,  
Salem, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"Please let me have a copy of your  
opinion with reference to whether or  
not the money in a school district  
Free Textbook Fund can be transferred  
to another fund, after the purchase  
of the necessary books for the school,  
for the purpose of paying teachers  
salary."

You refer in your letter to the Free Textbook  
Fund and we assume that you refer to the money turned over  
by the County Court to districts under Section 9507, R. S.  
Mo. 1929, which is as follows:

"Whenever the board of directors or  
board of education of any school district  
in this state certifies to the county  
court that they are furnishing textbooks  
free of charge to all the pupils in at  
least the first four grades in the public  
schools of their district, it shall be  
the duty of the county court to apportion  
annually to each such school district from  
the county foreign insurance tax moneys  
received from the state treasurer in accord-  
ance with section 5982, an amount to be  
determined by multiplying the number of  
children on the last enumeration list of  
said school district by the ratio used by  
the state auditor in making the distribu-  
tion of said foreign insurance tax moneys  
among the counties of the state, and shall  
order the county treasurer to place to the  
credit of the incidental fund of each such  
district the amount thus obtained, or shall  
draw its warrant in favor of the proper  
township treasurer or treasurers for the  
amount due the districts of the various



townships, and shall also draw its warrant in favor of the treasurer of any school district organized as a city, town or consolidated district for the amount due such district. When any school district that contains an incorporated town or city receives such aforesaid moneys on account of furnishing free textbooks, then the incorporated city or town contained in such district shall not be entitled to any further moneys under section 5983. After the money due the aforesaid districts on account of their furnishing free textbooks has been properly apportioned, the county court shall then proceed to apportion the remaining fund in accordance with the provisions of section 5983."

Section 9508, R. S. Mo. 1929, regarding the use of the money is as follows:

"The funds received by the various school districts in accordance with section 9507, shall be used only for the purchase of textbooks for free use in the public schools of said districts, and any district that does not within three years after receiving the first grant of money under this article furnish all the textbooks free to all the pupils of its elementary schools, shall be deprived of any further moneys under this article until such time as it does furnish all said textbooks free."

Under section 9508, it is specifically provided that the funds received by various school districts, in accordance with section 9507, shall be used only for the purchase of textbooks. In view of that prohibition in section 9508 we believe that it would not be proper to transfer any balance left in the fund to any other fund. The statute expressly restricts the use of this fund for the particular purpose of buying textbooks, and we do not believe that it may be diverted into funds for other purposes.

It is therefore the opinion of this Department that the Free Textbook Fund cannot be diverted and used for other purposes because of the express provisions of section 9508.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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Attorney General.

FWH:S

E-V  
VOTING: Members of Citizens Conservation Camp are entitled to vote in Missouri. When?

March 1, 1934. 329



Honorable Geo. F. Addison  
Prosecuting Attorney  
Salem, Missouri

Dear Sir:

Your request for an opinion dated February 14th, is as follows:

"Please render an opinion as to whether or not the members of the various C.C. C. Camps over the state are entitled to vote in the respective counties in which those camps are located at the coming primary and general election this summer and fall."

Section 2, Article 8, of the Missouri Constitution was adopted February 26, 1924, and provides as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting." *shall be entitled to vote, and persons,*

Section 10178 R. S. Mo. 1929, provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall

be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other agylum at public expense, except the soldiers' home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

The Constitution and Statute above set out does not refer to those persons who work in Citizens Conservation Camps, and the very fact that these camps are composed of citizens, as the very title to the Federal Act discloses, would indicate that they are to be treated as citizens of the United States, irrespective of their duties relating to the camp to which they belong.

It is the opinion of this office that one who belongs to a Citizens Conservation Camp is not disfranchised as a voting citizen, and if said elector has resided in this State for one year and in the county, city or town sixty days immediately preceding the election to which he offers to vote, he shall be considered

March 1, 1934.

an elector, and as such is entitled to vote as any other elector when presenting himself to the polls for that purpose.

## II.

Residence is a pre-requisite to voting in this State. The Attorney General's office takes notice that the personnel of a Citizens Conservation Camp is usually made up of citizens, who, before entering the camp, resided in many states in the Union. This question may present itself: Is this personnel made up only of temporary residents in this State and County, at all events, not entitled to vote in Missouri, because of the non-permanency of their camp's location?

The fact that a camp may be moved at pleasure does not mean that the personnel must follow the camp. One who is a member of a Conservation Camp is not on the same plane as an inmate in a poor house, or a convict in the penitentiary, and hence disqualified as a citizen and a voter. These citizens are not incarcerated in a Citizens Conservation Camp. They are there by choice. They leave by choice, and they retain all their civil rights while attending camp. To reason otherwise would defeat the very purpose for which these camps were created by our President. They can sever their relations with the camp life on their own volition. Their membership and domicile within a Citizens Conservation Camp, without additional facts, is of minor importance in determining the question of their residence when qualifying them as electors for voting, under the Missouri Constitution and Statutes.

Webster's dictionary defines the verb "reside" as used in the Constitution and Statutes thus:

- "1. To take up one's abode or station.
2. To dwell permanently or for a considerable time; to have a settled abode for a time; to have one's residence or domicile; specif., to be in residence, as the incumbent of a benefice."

Webster also gives as synonyms for the verb "reside":

"Live; dwell; abide; sojourn; stay and remain."

Section 655 R. S. Mo., 1929 provides in part as follows, and defines residence in this State in its seventeenth point thus:

March 1, 1934.

"\* \* \* \*; seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;\* \* \*"

The above Statutory definition is not to be interpreted to mean that only persons falling within its provisions are to be considered as legal residents of this State when qualifying as voters. True, those persons which fall within the statutory definition are residents, ipso facto, for the purpose of voting. On the other hand the word "reside" as used in the Constitution and Statutes relating to voting has no fixed meaning applicable alike in all cases, but the intention of the party is a large factor in determining residence.

Our Supreme Court said in *Green v. Beckwith*, 38 Mo., 384, 1. c. 387:

"A man's residence, like his domicile, or usual place of abode, means his home, to and from which he goes and returns, daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on."

In the case of *State ex rel. v. Smith*, 64, Appeal 313, 1. c. 319, the Court said:

"The term 'residence' has no fixed meaning applicable alike to all cases. It must be understood differently, according to a number of varied conditions. In some instances it is regarded as synonymous with 'domicile,' but they are not, in all cases, to be treated as convertible terms. It is said that domicile is residence combined with intention. It has been well defined to be residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicile, for one and the same purpose, at any one time, though he may have numerous places of residence. His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence, without the intention of remaining, will constitute domicile."



March 1, 1934.

Judge Cooley in his Constitutional Limitations, volume 8, page 1365 to 1367 says:

"A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. The words 'inhabitant', 'citizen', and 'resident', as employed in different constitutions to define the qualifications of electors, means substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home. Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place. One's residence is where he has established home; the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It has been held that a student in an institution of learning, who has residence there for the purpose of instruction, may vote at such place, provided he is emancipated from his father's family, and for the time has no home elsewhere.\* \* \* \* Temporary absence from one's home, with continuous intention to return will not deprive one of his residence, even though it extend through a series of years."

#### CONCLUSION.

It is the opinion of this office that one who belongs to a Citizens Conservation Camp is not disfranchised as a voting citizen. It is our further opinion that as far as residence is considered in the qualification of voters, those members in a Citizens Conservation Camp, residing in a camp located in this State and your county, may become qualified electors and voters in your State and County elections. The fact that one is a member of a camp is not of itself conclusive evidence as to temporary residence, disqualifying him as a voter. Residence for the purpose of voting, in all cases is largely a matter of intention on the part of the elector. The elector's intention as to residence can be determined by his overt acts and his declarations on the matter. When once an elector has fixed his habitation for the

Honorable Geo. F. Addison      -6-

March 1, 1934.

required period of time within your jurisdiction, with no present intention of moving, then he is a qualified voter in your jurisdiction, as far as residence is concerned, even though he be a member and living at a Conservation Camp.

Those electors who have always been a resident of this State but have not shown any intention of being but temporary residents of your county may vote an absentee ballot within this State and your county, the ballot to be voted and transmitted as the absentee ballot of anyother qualified voter.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

WOS:H

DEPOSITIONS: State not compelled to pay cost of depositions taken at a preliminary hearing when defendant is discharged;

Depositions taken outside state by defendant for use at trial are legal costs to be paid by State if defendant is discharged.

3-14  
March 5, 1934.



Honorable Orin J. Adams,  
Prosecuting Attorney,  
Caldwell County,  
Kingston, Missouri.

Dear Sir:

Your letter of January 12 addressed to Attorney General McKittrick relating to criminal costs, has been handed to me for answer, the contents being as follows:

"One Deems Payne was arrested upon complaint filed before a Justice of the Peace charged with the commission of a felony, to-wit, robbery with a dangerous and deadly weapon. The defendant's defense was an alibi, a preliminary examination was demanded, and the Justice of the Peace ordered the defendant discharged. Prior to the preliminary the prosecuting attorney was served with notice that the defendant intended to take depositions in the State of Nebraska. Some twenty-three witnesses were examined on the part of the defendant, all of them testifying that the defendant was seen in Nebraska on dates prior to, and on the date of the alleged commission of the crime. The depositions were not properly certified to by the officer taking the same, and in the form in which they were presented were not admissible in evidence, but were read by the Justice.

Thereafter, the Caldwell County Grand Jury considered the case, and returned an indictment charging the defendant with the commission of the crime, and again the defendant gave notice to take depositions in the manner provided by law. Approximately the same number of witnesses were examined, all testifying solely as alibi witnesses, and as having seen the defendant in Nebraska, on certain days just prior to, and just following the alleged commission of the crime. These depositions were in proper form and were read and considered in evidence at the trial of the cause in



which the defendant was acquitted.

The question for determination is, as to whether the witnesses who testified in Nebraska are entitled to witness fees and mileage or not. The witnesses are not only undertaking to claim attendance for one day consumed in taking the depositions, but are also claiming for an extra day, when they came before the officer and signed their depositions. There appears to be no statutory authority whatever for the payment by the State of witness fees of witnesses outside of the state. Sections 11776, 11798 and 11799, R.S. 1929, make no mention of such cases and apply to witnesses within the State of Missouri.

Also, in view of the provisions of Section 3850, making it the duty of the prosecuting attorney and trial judge not to tax the state or county with more than the costs of three witnesses, to establish any one fact, this statute evidently limits the officers in their allowance of fees to a limited number of witnesses in any case."

#### I.

The State is not compelled to pay the cost of depositions taken at a preliminary hearing when the defendant is discharged.

The facts stated in your letter present a difficult question and for the purpose of this opinion we will divide same into (1) costs of depositions taken for the preliminary examination of defendant; and (2) costs of depositions used in the trial of defendant. It is mandatory on the part of the State to accord a defendant when charged with a felony a preliminary hearing before some justice of the peace of the county.

Section 3621, R.S. Mo. 1929 refers to the defendant taking depositions and provides:

"When any issue of fact is joined in any criminal case, and any material witness for the defendant resides out of the state, or residing within the state, is enciente, sick or infirm, or is bound on a voyage or is about to leave this state, or is confined in prison under sentence for a felony, such defendant may apply to the court, or judge thereof, in which the cause is pending, for a

commission to examine such witness upon interrogatories thereto annexed, and such court may grant the same upon the like proof and on the like terms as provided by law in civil cases. The court, or judge thereof, granting such commission, may permit the officer prosecuting for the state to join in such commission. The deposition of any witness confined in prison under sentence for a felony shall be taken where such witness is confined."

Section 3623, R.S. Mo. 1929, also pertaining to this matter provides:

"The defendant in any criminal cause may also have witnesses examined on his behalf, conditionally, upon a commission issued by the clerk of the court in which the cause is pending, in the same cases and upon the like notice to the prosecuting attorney, with the like effect and in all respects as is provided by law in civil suits: Provided, that the notice in such case to the prosecuting attorney shall state the name or names of the witness or witnesses whose depositions are desired or will be taken."

You will note under Sec. 3621, supra, the phrase "when any issue of fact is joined in any criminal case" is used.

We infer your question to be whether or not the costs of depositions are to be paid by the State when the witnesses reside out of the state, rather than the fees of the witnesses individually. When depositions of witnesses are taken, the person before whom they are taken attaches a statement of the costs, properly computed, and then the witnesses lose their identity; it then becomes a question of whether or not the costs as computed by the Notary are proper or improper.

Referring again to Secs. 3621 and 3623, supra, and to the fact that Payne, the defendant, took the depositions of the witnesses outside of the State, we are of the opinion that the statutes do not authorize the taking of depositions for preliminary hearing on the part of the defendant outside of the state, in as much as the statutes use the expression "when any issue of fact is joined", and as long as the defendant is not in Circuit Court under information, when the charge is a felony, the issues are not joined. You further state that the depositions were not properly certified to by the officer and were therefore subject to being quashed.

CONCLUSION (I)

In view of the foregoing, it is the opinion of this department that the costs of depositions of witnesses outside of the State for a preliminary examination on the part of the defendant, when the defendant is bound over or discharged, are not costs which can be legally charged to the State for the reason that there is no statutory provision for the taking of depositions for a preliminary hearing.

## II.

The costs of depositions of witnesses outside of the State taken by a defendant for use in his defense at the trial are legal costs to be paid by the State if the defendant is discharged.

We next consider the question of depositions taken and used by defendant at his trial wherein he was acquitted. Referring to Secs. 3621 and 3623, quoted in part I of this opinion, it must be conceded that the defendant had the legal right to take the depositions. When a defendant is charged with felony, punishable solely by imprisonment in the penitentiary under Sec. 3828, R.S. Mo. 1929, it is mandatory on the State to pay the costs, said section being as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Reiterating the statement made in Part I hereof, i.e., that the question resolves itself into the situation of the State being liable or not liable for the costs of depositions used in the trial of the case instead of the mileage and fees of the witnesses individually, Secs. 11776, 11798 and 11799 have no bearing on the issues for the reason that they deal solely with the witnesses outside of the State attending the trial in person. We must, therefore, look to the regularity or irregularity of the depositions or the cost of the same. In the instant case the testimony of the witnesses appears to have been material, as it bore on the question of an alibi and therefore we would say that defendant did not abuse his right to take the same.

It is well settled law that had the witnesses attended the trial in person and then claimed fees for mileage for their residence in the foreign state, said costs would not be properly chargeable to the State. In the case of *Buckman v. Railroad*, 121 Mo. App. 299 the Court said (l.c. 304):

"Henry and John Cline attended the second trial as witnesses, in December, 1900. They lived in Oklahoma and each claimed and was allowed eight hundred and ninety miles mileage in coming from and returning to his home in Oklahoma. A subpoena was served on one of these witnesses by a constable in the State of Illinois. The other one had been subpoenaed in this State to attend a prior term of the Monroe Circuit Court as a witness in the case, but he was not re-subpoenaed to attend the October term, 1900. The service of the subpoena in Illinois, being beyond the jurisdiction of the court, was absolutely null and void. Neither of these witnesses were therefore served with a subpoena to attend the October term, 1901, of the Monroe Circuit Court to testify as witnesses in said cause and neither are entitled to mileage (*State ex rel. v. Seibert*, 130 Mo. 202, 32 S.W. 670), and the mileage of these witnesses should have been disallowed."

In the case of *State ex rel. v. Wilder*, 196 Mo. 418, the Court said (l.c. 430):

"It will not be seriously contended that the subpoenas in this cause which are alleged to have been served upon the witnesses at their places of residence in a foreign State were of any force or vitality. A subpoena issued from the courts of this State cannot have any extraterritorial operation, hence the service of the subpoenas of the witnesses whose claims for mileage are involved in this proceeding in another State were mere nullities and of no obligatory force upon the witnesses to obey the command contained in the subpoena. The rules of law applicable to this subject were fully discussed and announced in *State ex rel. v. Seibert*, 130 Mo. 202, by the Court in Banc. There were two opinions in that case, but upon the proposition that process served beyond the limits of this State were of no force and effect, there was no division of opinion. *Sherwood, J.*

in that case, in treating of process, thus announced the law: 'When the Legislature treats of process and its service and recognizances, it will be intended that such process can only be served within this State and that such recognizances only possess obligatory force within its borders. Neither process nor recognizances can have any extraterritorial operation. (State v. Pagels, 92 Mo., loc. cit. 308; State v. Butler, 67 Mo. loc. cit. 62; Board, etc. v. Chase, 24 Kan. 774). And it would be beyond the power of the Legislature to authorize process to be effectual outside of this State. (Wilson v. Railroad, 108 Mo. 588)'"

We cite these decisions in order to clarify our differentiation between costs of taking depositions and the fees of witnesses individually when they appear in court from a foreign State.

Sec. 1806, R.S. Mo. 1929 relating to the costs of taking depositions provides as follows:

"The costs and expenses of taking the depositions shall be audited and allowed by the officer taking the same; and such costs and expenses, together with the fees of recording and copying the same, shall be taxed in favor of the party or parties praying the same, and collected as other costs in the suit or suits in which such depositions, or any part thereof, may be used."

We interpret this section to apply in the instant case, as the depositions were taken and used in the manner prescribed by civil procedure.

The outstanding decision on which we finally base our conclusion is the case of State v. Krueger, 69 Mo. App. 31, l.c. 32-33:

"This is an appeal from a judgment taxing certain costs against the defendant, though the state dismissed the indictments after the cost had been incurred. In January, 1895 three indictments were found against the defendant for violation of the election laws. The cause was continued to the April term, and during that time the defendant gave notice and took the depositions of certain witnesses. On the application of the prosecuting attorney the court appointed a special commissioner to take the depositions. The parties procured and



took the testimony of a number of witnesses, the majority, if not all, of whom were the same as those named on the indictments as witnesses for the state. Following the taking of these depositions the state dismissed the case; and the court, at the suggestion of the prosecuting attorney, adjudged the costs of taking these depositions against defendant, and he appealed.

I know of no law that will sustain the court's action. The defendant had the legal right to take depositions to be used conditionally at the trial against him. Secs. 4147, 4149, R.S. 1889. If, however, the state should thereafter abandon the prosecution and dismiss the case, then the defendant was entitled, not only to a judgment of discharge, but as well a judgment for his costs lawfully incurred in preparing for his defense. This matter of costs is one of statutory regulation, and I know of no statute provision for taxing the costs against the defendant in a criminal prosecution except where he is convicted. Sec. 4395, R.S. 1889. If the defendant should manifestly abuse this provision for his benefit, and should take depositions foreign to the issues involved, and which could not in any event be used, then the court might well deny his right to recover the same. But there is nothing in this record to show any such abuse. The mere fact that defendant took the depositions of witnesses named on the state's indictment; or that such witnesses then resided and were found within the reach of subpoenas from the court, do not establish such abuse. It may be that the testimony of such witnesses was material for the defense, though relied on by the state; and that though they were at the time within reach of the court's process, yet they might have been beyond it when the cause was called for trial. In view of this contingency, the defendant would be justified in taking the depositions of such witnesses to be used conditionally as the statute before cited has provided.

There was a final judgment discharging the defendant; and hence the objection that an appeal will not lie from a mere order taxing costs, as suggested in the brief of the state's attorney, is not well taken. The judgment of the criminal court, in so far as it taxes the costs attending the taking of the depositions in question, will be reversed."

March 5, 1934.

Section 3850 R.S. Mo. 1929 provides as follows:

"The judge and prosecuting attorney shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact, nor with the costs of witnesses unnecessarily summoned and not examined, but the costs of such surplus or unnecessary witnesses shall, in the discretion of the court, be taxed against the party or attorney causing them to be summoned."

This section limits the judge and prosecuting attorney to the testimony and costs of not more than three witnesses to establish any one fact. Trial judges have been more or less inclined to disregard this section during the trial of a case; however, it is possible that a motion to retax the costs, insofar as the question of the costs of depositions are concerned, wherein the mileage and number of witnesses as shown by the Notary before whom the depositions were taken, might be attacked and the costs of the depositions reduced.

CONCLUSION (II)

In view of the statutes and the decisions above quoted, it is the opinion of this department that the State, under the facts as outlined in your letter, is liable for the costs of the depositions used in the trial of the case of State v. Payne.

Respectfully submitted,

OLLIVER W. NOEEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

OWN:AH

ELECTIONS: Candidate is not entitled to have name printed on official ballot unless he complies with Sections 10257 and 10258 at least sixty days before the primary.

July 28, 1934

7-28



Hon. Herbert M. Adams,  
County Clerk,  
Lebanon, Missouri.

Dear Sir:

This Department acknowledges receipt of your supplemental letter of July 24th, in reference to the facts of the certain candidate filing for the primary in your County. An opinion was rendered July 12th based on the facts contained in your original letter. The supplemental letter is as follows:

"In my letters to you of June 26th and July 5 I made certain statements which I now find to be erroneous.

It now appears that the candidate in question did present his declaration duly signed, with five dollars cash to the sheriff who had been requested by the deputy clerk to receive same. (Myself and deputy live several miles in the country.) This was done on evening of June 8th.

On the morning of June 9th the deputy clerk asked the candidate to take the money and get a receipt from the committee. This he did. The receipt has the date of June 9th.

Under these changes statements I am asking for a reconsideration of the matter by you."

Declarations of candidates for primaries to be valid must comply with Section 10257 Revised Statutes of Missouri 1929, which is as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon which ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:



July 28th, 1934

"I, the undersigned, a resident and qualified elector of the (\_\_\_\_\_) precinct of the town of \_\_\_\_\_, or (the \_\_\_\_\_ precinct of the \_\_\_\_\_ ward of the city of \_\_\_\_\_), county of \_\_\_\_\_ and state of Missouri, do announce myself a candidate for the office of \_\_\_\_\_ on the \_\_\_\_\_ ticket, to be voted for at the primary election to be held on the first Tuesday in August \_\_\_\_\_, and I further declare that if nominated and elected to such office I will qualify.

(Signed) \_\_\_\_\_."

It appears from your letter that the candidate in question duly signed the declaration the same as handed to the Sheriff of your County who had previously been instructed by the deputy clerk of your Office to receive the same, this having been done on the 8th day of June the last day for legal filing of declarations. In our opinion, granting that the declaration was in proper form this constituted a legal filing insofar as the declaration is concerned; the sheriff became an agent for you and could properly accept the declaration in your behalf.

We shall next consider Section 10258, Revised Statutes of Missouri 1929, which is as follows:

"DEPOSIT TO BE MADE BY CANDIDATES--  
FUND, HOW USED.--Each candidate, except for a township office, previous to filing declaration papers, as in this article prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he proposes as a candidate and seeks nomination, a certain sum of money, as follows, to-wit: To the treasurer of the state central committee--one hundred dollars, if he become a candidate for a state office, or judge of either of the courts of appeals; fifty dollars, if he be a candidate for representative in congress; twenty-five dollars, if he be a candidate for circuit judge or state senator. To the treasurer of the county central committee--five dollars, if he be a candidate for state representative or any county office; take a receipt therefor, and file such receipt with

and at the time he files his declaration papers. The said sums of money, so paid by the several candidates, shall be evidence of their good faith in filing said declaration papers, and shall be used as an expense fund by the several political parties upon whose tickets the various candidates propose as candidates and seek nomination; and such sums of money, so paid, shall be excepted from the terms and provisions of article 14 of this chapter."

The two sections which we have herein quoted follow each other consecutively, one dealing with the condition essential to the filing of the declaration papers of the candidate, the other referring to certain acts to be performed before filing and we think that the statutes are so closely related and interwoven that they must be read in conjunction with each other.

Section 10258 quoted supra, contains the phrase, "previous to filing declaration papers as in this article prescribed" and take a receipt therefor and file such receipt with and at the time he files his declaration papers. Thus clearly showing that in order for a candidate to have his name printed upon any official ballot he must comply with both Sections.

There was a recent mandamus case filed in the Supreme Court, the style of same being State ex rel. Calvin Luallien v. Ray E. Dooley. The facts appear to be exactly reversed in that the candidate obtained his receipt for the payment of the filing fee on June 8th but failed to file his declaration until June 9th. The Supreme Court did not pass upon the merits of the case but denied the writ.

In the case which you present, there are no facts which tend to show that the Sheriff was also the agent or empowered to accept the Five Dollars in question on and in behalf of the treasurer of the county central committee, and as a result the candidate did not receive his receipt for the filing fee until June 9th which is less than sixty days before the primary.

Topermit the candidate to obtain the filing fee receipt less than sixty days before the primary and conceding that his declaration was filed or could have been filed within the proper time would in essence hold that Section 10258 is of no force and effect. If the candidate could follow this procedure and could by complying with Section 10257 obtain the printing of his name on the ballot then it would not be necessary if he so chooses to pay Five Dollars filing fee as mentioned in Section 10258 because the sole object of the candidate filing and paying the fee is having the name printed on the official ballot. We think the Legislature so related the two statutes so that

Hon. Herbert M. Adams

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July 28th, 1934

one was a condition precedent to the other; that both must be complied with "at least sixty days prior to such primary".

CONCLUSION

In the light of the above arguments and statutes we are of the opinion that the candidate in question under the facts as you have so detailed has not properly complied with such statutes therefore is not entitled to have his name printed on the official ballot for the coming primary.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

OWN/mh

CORPORATIONS--COMPANIES: Cooperative organizations cannot be organized under Article XXIX, Chapter 87, R. S. Mo. 1929, for the sole purpose of operating a cooperative oil company, but may so operate under Article IX, Chapter 32, R. S. Mo. 1929.

October 15, 1934.

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Mr. Geo. S. Alee, Chairman  
Missouri State Petroleum Committee  
358 Board of Trade Building  
Kansas City, Missouri

Dear Sir:

This department is in receipt of your letter of recent date wherein you state as follows:

"We have recently been advised that a group called the 'State Cooperative Club' has recently incorporated in this state and capitalized for \$50,000, being located at Clayton, Missouri.

"It is our understanding that this cooperative club was organized for the sole purpose of defeating the purposes of the Code of Fair Competition for the Petroleum Industry, in that they sell a membership for \$1.00 which entitles the holder to patronage dividends.

"We would be very glad to have an expression from your office as to whether or not a cooperative organization can be organized under the laws of Missouri for the sole purpose of operating a cooperative oil company."

There are two separate and distinct articles in the Revised Statutes of Missouri, 1929, dealing with Cooperative Companies. One comes under the Chapter heading of Agriculture and is designated as Article 29 of Chapter 87. The other comes under the Chapter heading of Corporations and is designated as Article IX of Chapter 32.

Article XXIX, Section 12748, R. S. Mo. 1929,  
authorizes a cooperative plan and reads in part as follows:

"Any number of persons, not less than twelve (12), may associate themselves together as a co-operative association, society or exchange, having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the co-operative plan. \* \* \*."

Article XXIX, Section 12766, R. S. Mo. 1929,  
from chapter on co-operative companies, reads as follows:

"Any part or all of the common stock of any corporation organized for the purpose of conducting any agricultural or mercantile business on the co-operative plan as provided for by article 29, chapter 87, R. S. 1929, may be legally purchased and owned in all respects as if purchased and owned by a natural person, by any other corporation incorporated under the laws of Missouri on the co-operative plan, including any other corporation organized under article 29, chapter 87, R. S. 1929."

From the foregoing sections, it is clearly evident that co-operative companies may be organized for the purpose of conducting any agricultural or mercantile business on the co-operative plan.

In the case of In Re. Cameron Town Mut. Fire, Lightning and W. Inss. Co., (U. S. ) 96 Fed. 756, 1. c. 757, the Court defined the term "mercantile" in the following manner:

"\* \* \* \* The word 'mercantile' in its ordinary acceptation, pertains to the business of merchants, and has 'to do with trade or the buying and selling of commodities.' \* \* \* \*."

October 15, 1934.

In the case of Queen Insurance Co. v. State, 24 S. W. (Tex.) 397, 1. c. 401, the Court, in defining the term "commodities" said:

"The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as a subject of barter or sale. \* \* \* \*."

Again <sup>in</sup> the case of Veguesney v. Kansas City, 266 S. W. 700, 1. c. 703, 305 Mo. 488, the Court held that the requirements of Section 7287, R. S. Mo. 1929, that a business must be specifically named as taxable in the charter before the city had power to impose a license tax, were sufficiently met by the Kansas City Charter, Article III, Section 1, cl. 4, enumerating "merchants"; and, in view of definition as "one making business of buying and selling commodities," the city was authorized to tax dealers in gasoline as "merchants".

From the foregoing cases, we are of the opinion that, as gasoline is termed a commodity, the same may be said of oil. The word "mercantile" in its ordinary acceptation pertains to the business of merchants and has "to do with trade or the buying and selling of commodities" and a company engaged in the oil business may therefore be said to be engaged in a mercantile business.

<sup>be</sup> Since a company engaged in an oil business may/said to be engaged in a mercantile business, the question arises whether it was the intention of the Legislature to permit any number of persons, not less than twelve, to associate themselves as a co-operative organization for the sole purpose of operating a co-operative oil company, under provisions of Chapter 87, Article XXIX, R. S. Mo. 1929.

Article XXIX, Section 12748, R. S. Mo. 1929, reads as follows:

"Any number of persons, not less than twelve (12), may associate themselves together as a co-operative



association, society or exchange, having all the incidents, powers and privileges of corporations, for the purpose of conducting any agricultural or mercantile business on the co-operative plan, including the buying, selling, manufacturing, storage, transportation or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purpose of the purchasing of or selling to all shareholders and others groceries, provisions, and all other articles of merchandise. For the purposes of this section the words 'association', 'company', 'corporation', 'society' or 'exchange' shall be construed to mean the same.\* \* \* \*."

The title to the Act, providing for the incorporation of co-operative associations as set out in the Laws of Missouri, 1919, at page 116, reads as follows:

"AN ACT to provide for and authorize the incorporation of agricultural or mercantile co-operative associations for the purpose of conducting any agricultural or mercantile business on the co-operative plan, including the buying, selling, manufacturing, storage, transportation, or other handling or dealing in or with by associations of agriculturists, of agricultural, dairy, or similar products, and including the manufacturing transformation of such articles into products derived therefrom, and for the purchasing of or selling to all shareholders and others groceries, provisions, and all other articles of merchandise, with an emergency clause."

Thus we see that the title to the Act and the body of the Act are almost verbatim with each other, and are verbatim on essential matter. That which is underscored above appears both in the title to the Act and in Section 12758, R. S. Mo. 1929. It is our opinion that it was the intention of the Legislature and the purpose of the Statute as expressed by the body of the Act and title thereto, when construed together, to limit Article XXIX, Chapter 87, to associations of agriculturists, for as said in the case of Glaser v. Rothschild, 120 S. W. 1, 221 Mo. 190, 1. c. 212, wherein our Court said:

"There are many canons of construction, but they all rest upon the common principle that if possible the intention of the Legislature must be ascertained. These rules are only valuable when they subserve this purpose. One of these rules of construction, long established in England, was that 'the title cannot be resorted to in construing the enactment.' (Hunter v. Nockaldis, 1 McN & Gord. 651). But in this State and others, where the Constitution gives a peculiar significance and assigns particular importance to the title by requiring that a statute shall contain but one subject, 'which shall be clearly expressed in its title,' this common law canon is clearly at variance with our methods of interpretation. On the contrary we hold that the title is necessarily a part of the statute and aids in and is a necessary guide to its right construction. (Endlich on Interpretation of Statutes, secs. 58, 59 and cases cited). So it was in Conn. Mut. Life Ins. Co. v. Albert, 39 Mo. 181; 'But the better rule, as we think, is to presume that the



true intent and meaning is to be found in the title, unless it is plainly contradicted by the express terms of the body of the act.' "

From the foregoing cases and sections, we are of the opinion that it was not the intention of the Legislature to permit a co-operative organization to be organized under Article XXIX, Chapter 87 for the sole purpose of operating a co-operative oil company. As stated in Section 12748, supra, and as found in the Title of the Act in Laws of Missouri, 1919, supra, "by association of agriculturists, of agricultural, dairy or similar products, and including the manufacturing, transformation of such articles into products derived therefrom\* \* \*", reading further "\* \* \* and for the purpose of purchasing or selling to all shareholders and others groceries, provisions, and all other articles of merchandise."

From this last phrase, we are of the opinion that although a co-operative organization cannot be organized under Article 29, Chapter 87, for the sole purpose of operating a co-operative oil company, yet incorporators under this section for agricultural purposes may purchase and sell oil to all shareholders and others; for as set out supra "oil is clearly included as a commodity or article of merchandise."

Since a co-operative company may not be organized under Article 29, Chapter 87 for the sole purpose of operating a co-operative oil company, the question arises whether they may do so by complying with all the provisions of Article 9 of Chapter 32, R. S. Mo. 1929, dealing with co-operative companies.

Chapter 32, Article 9, Section 4986, R. S. Mo. 1929, reads as follows:

"Any person, copartnership, association, organization or corporation which is now engaged in or shall hereafter engage in issuing contracts or agreements, whether in the nature of a bond, debenture, certificate or otherwise, providing for the redemption, or the ful-

filling of such contracts or agreements by the accumulation of a fund or funds from the contributions made by the subscribers to, or the holders of such contracts or agreements; or providing for the maturing or fulfilling of such contracts or agreements in the order of their issue or in some other fixed or arbitrarily determined order or manner; or providing for the payment of moneys or the granting or giving of any consideration, of any money or property, personal, real or mixed, greater in value, or represented to be greater in value, than the amount paid in upon such contracts or agreements, together with the actual net earnings accrued and accumulated thereon; or providing for the loaning of the funds contributed by the subscribers to or the holders of such contracts or agreements to such subscribers or holders in any fixed or arbitrarily determined order or manner; or for the making of loans or advances from such funds to or for such subscribers or holders to be repaid in installments; except such persons, copartnerships, associations, organizations or corporations as are organized or doing business under the statutes now in existence or which hereafter may be enacted as excepted in section 4995 of this article, shall, and the same are required, for the protection of the subscribers to, or the holders of its contracts or agreements, to deposit with the state treasurer in cash, United States bonds, or bonds of any county, or municipal township, or such parts of each of the above mentioned securities so that the whole deposit shall be equal in cash value to the sum of twenty-five thousand dollars and whenever the liability of such contracts or agreements, as hereinafter determined,

shall exceed the amount of such deposit, there shall be made an additional deposit on the first days of January and July of each year, in a sum sufficient to cover the excess liabilities accrued during the last preceding six months; and provided further, that no part of such original deposit of twenty-five thousand dollars, shall be derived from or consist of any funds contributed by the subscribers to, or the holder of, any such contracts or agreements."

In the case of State v. Meyer Tailoring Co., 25 S.W. (2d) 98, l. c. 100, an action was brought to enjoin the Meyer Tailoring Company of the City of St. Louis from transacting the business of issuing and selling contracts or certificates entitling holders to suits of clothes after making thirty (30) weekly payments, but providing for their maturity before such time by a lottery.

The Court, in that case said:

"The averments of the petition based upon the facts as to the formation and operation of the respondent \* \* \*, shows it to be if it had complied with the law of its creation and its business transaction had not partaken of the character of a lottery, a co-operative company, as that class of organizations are designated and described in chapter 90, R. S. 1919." (Now Chapter 32, Article 9, R. S. Mo. 1929.) \* \* \*"

The above case holds that, aside from the lottery feature, if the organization had complied with the provisions under which it was created (now Article 9, Chapter 32, R. S. Mo. 1929), it would have been a co-operative company.

October 15, 1934.

It is not the purpose or intention of the Attorney General's Office, (nor are we asked), to determine whether the "State Co-operative Club", a corporation, is operating an oil company within the provisions and limitations of its charter. We are not informed of sufficient facts in the premises to venture an opinion as to their conduct as a co-operative corporation, operating under the provisions of Section 4986, supra. We are only answering your questions and determining whether or not a co-operative organization can be organized under the laws of Missouri for the sole purpose of operating a co-operative oil company.

#### CONCLUSION.

It is the opinion of this office that a co-operative corporation cannot possibly be organized under the provisions of Section 12748 and 12766, supra, where the sole purpose is to sell oil. The law providing for agricultural co-operatives was not intended to promote oil co-operatives in Missouri, where the sale of oil is the sole purpose of this co-operative corporation.

It is the further opinion of this office that a co-operative corporation can be organized under the laws of Missouri, for the sole purpose of selling oil, under the provisions of Section 4986, supra, which provides for a \$25,000.00 deposit of securities with the State Treasurer, protecting co-operative subscribers and holders of co-operation contracts, along with additional statutory security to the co-operative subscribers. Our Supreme Court, as shown by the Meyer Tayloring case, supra, has held that a company may organize for the sole purpose of selling certificates and contracts entitling the holders to suits of clothes, after complying with the provisions of Section 4986, supra and since suits of clothes can be marketed co-operatively under the above Section, there is nothing in said Section to prevent the marketing of oil, where the co-operative oil company is incorporated under its provisions.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS  
Assistant Attorney General.

ROY McKITTRICK  
Attorney General.

TRADE-MARK: ABANDONMENT: Evidence not sufficient to constitute  
abandonment of Trade-Mark.

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11-24  
October 23, 1934.

FILED  
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Mr. Harry C. Alberts  
First National Bank Building  
Chicago, Illinois

Re: Sunkist Pie Company -  
Trademark "Sunkist Pies"

Dear Sir:

This department is in receipt of your letter  
and enclosures of recent date.

Your enclosure received from Honorable  
Dwight H. Brown, Secretary of State, dated September  
27th, 1934, reads as follows:

"Referring to correspondence  
relative to registration of  
trade-mark Sunkist, we passed  
this correspondence on to the  
office of the Attorney-General  
for an opinion, and are informed  
today that abandonment of this  
trade-mark by James Harry Long  
and Chas. Geo. Smith must be  
established in a court of law."

Your letter addressed to this department  
reads in part as follows:

"This office has submitted to the  
Secretary of State of Missouri an  
application for trademark regis-  
tration of the words "SUNKIST PIES"  
for use in connection with baked  
pies. We are advised by the Secre-  
tary of State that the term "SUNKIST"  
was registered by James Harry Long  
and Chas. Geo. Smith who conducted

a bakery shop some years ago and have since gone out of business.

"Letters addressed to the last known address of James Harry Long and Chas. Geo. Smith have been returned by the postal authorities, unopened, as evidenced by the attached original specimens thereof. The envelope addressed to the last known address of these prior registrants is postmarked July 11, 1934, and was opened by the Secretary of State to whom this evidence was submitted for reconsideration of my client's application for trademark registration of "SUNKIST PIES" for prebaked dough pies.

"Also, a letter was sent to the last known address of Sarah M. Hawley who notarized the trademark application of James Harry Long and Chas. Geo. Smith, but this letter has also been returned by the postal authorities as evidenced by the attached original specimen. Duns and Bradstreets have been unable to ascertain the whereabouts of these individuals nor have they been able to give this office a report on any firm using their name in the state of Missouri or elsewhere, and who are commercially exploiting any bakery goods under the term "SUNKIST".

"Such evidence is construed by the Trademark Division of the United States Patent Office to be conclusive of abandonment of a trademark and will issue another registration to other applicants for the same trademark on the strength of the same evidence that has heretofore been submitted to the Secretary of State for the state of Missouri. In the last letter received from the Secretary of State, it was indicated that the matter was referred to your office for an opinion. Further, it was stated that your office rendered an opinion to the effect that the abandonment of the trademark "SUNKIST" by James Harry Long and Chas. Geo. Smith will have



to be established by a court action."

\* \* \* \* \*

"It is hoped that you will reconsider your decision in this matter and all of the papers including the trade-mark application are being submitted to you for reconsideration with the request that the Secretary of State of the State of Missouri be instructed to grant a certificate of trade-mark registration covering the term "SUNKIST PIES" for the State of Missouri."

From an early date, the common law has recognized the right of the proprietor of a trade-mark to its exclusive use. The right has been, without interruption, recognized and protected by the courts of England and the United States, in the absence of statutes declaring the existence of such rights or providing regulations for its exercise and remedies for its deprivation. (26 R. C. L. 834, and cases cited in note thereto.)

Section 14329, R. S. Mo. 1929, provides who may adopt a trade-mark, the manner in which it may be adopted, and reads in part as follows:

\*\*\*\*\* No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by (any) person other than the owner thereof."

It is established that the trade-mark "SUNKIST" is already registered in the State of Missouri by James Harry Long and Chas. Geo. Smith under the above section. The latter parties have thereby acquired the exclusive use for such purpose, and unless it has abandoned that right or has lost it by its acquiescence in the use of it by others, it still has it.

The question then arises, whether the right to protection in the use of a trade-mark continues indefinitely

or whether a title to a trade-mark, acquired by adoption and user may be lost by an abandonment of such use?

The question of abandonment of a trade name or mark is a question of intent, and as stated by the court in the case of Hickman v. Link, 116 Mo. 123, 1.c. 127, wherein it was said:

"Abandonment in law is definted to be 'the relinquishment or surrender of rights or property by one person to another. \*\*\*\* Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.' 'To constitute an abandonment there must be the concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer.' 1 American and English Encyclopedia of Law, page 1, and Note 5. "

In the case of Belden v. Zopher Mills, Inc., 34 F. (2d) 125, the court had before its consideration, whether cessation from business for a short time establishes the owner's abandonment of a registered trade-mark. The Court said:

"Cessation from business for a short time does not establish abandonment. Beechnut Packing Co., v. P. Lorillard Co., 273 U. S. 629, 632; 47 S.Ct. 481, 71 L. ed. 810."

As to the lapse of time that could justify an inference of abandonment, it has been judicially said, that no statute of limitations bars one from protection of his trade-mark. On this point are many decisions, alike in principle, although varied with circumstances. In one case, a lapse of twenty years was held to be no bar; in another case, ten years; and in another case, nine years. (See Gillott v. Esterbrook, 48 N. Y. 374; Wolfe v. Barnett, 24 La. Ann. 97; Lazenby v. White, 41 L. J. (N. S.) 354.



In Julian v. Hoosier Drill Co., 78 Ind. 413, the Court in its opinion said:

"The suspension (of the use of a trade-mark) must be presumptively at least, attributed to indisposition or inability, rather than an intention to abandon valuable rights", and "it is incumbent upon those alleging the defense of abandonment to show that the right had been relinquished to the public by clear and unmistakable evidence."

Browne on "Law of Trade-marks", Section 681, page 654, in discussing "abandonment", states in part as follows:

\*\*\*\*\* A person may temporarily lay aside his mark, and resume it, without having in the meantime lost his property in the right of user. Abandonment being in the nature of a forfeiture must be strictly proven.  
\*\*\*\* We must examine the surroundings of each case of imputed surrender, to be enabled to settle such questions of deliberate yielding up. A defense of abandonment is abhorrent, even in an action at law, and the assertion of title on the ground of abandonment by the prior owner must be established by the strongest proof."

#### CONCLUSION.

From the foregoing, we are of the opinion that the question of abandonment of trade-mark or a trade-name is a question of intent that may be inferred from disuse, lapse of time and other circumstances evidencing the intention to discontinue the trade-mark.

The only evidence presented to us as evidencing an intention to abandon are letters addressed to the last known address of prior registrants, post-marked July 11, 1934 and returned by postal authorities unopened. The

cases dealing with the time element, decided as they are under varied circumstances, make them of little help insofar as the instant case is concerned. It is true that the question of intent to abandon may be inferred from lapse of time but it must be considered with other circumstances, which in this case is the fact that the prior registrants cannot be located.

The mere fact that the parties have apparently gone out of business and cannot be found is not sufficient evidence in itself to declare an abandonment without a judicial determination to that effect. As stated in Browne's work on "Law of Trade-Marks", *supra*, "A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of user. Abandonment being in the nature of a forfeiture must be strictly proven."

We are therefore of the continued opinion that the alleged abandonment of the trade-mark "SUNKIST" by James Harry Long and Chas. Geo. Smith must be established in a court of law.

Respectfully submitted,

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OLLIVER W. NOLEN  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

MW/afj

ELECTIONS: Moving of election place from general store to basement of Methodist Parsonage would not invalidate returns unless fraud existed.

It is illegal for candidate to remain in voting booth or voting precinct and electioneer for themselves or any one else.

October 31, 1934.



Hon. Orin J. Adams,  
Prosecuting Attorney,  
Caldwell County,  
Kingston, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of October 24, 1934, requesting an opinion based on the facts as contained in a letter to you from Mr. Frank E. Hilton of Braymer, Mo. His letter is as follows:

"At the primary election on August 7, 1934, I observed the following at one voting place:

The voting is done at the township house, which is used as a country general store. The rental contract with the storekeeper stipulates that elections will be held in this township house. On the morning of August 7 the constable proceeded to set up the voting booths in the back room of the store and had this job completed when the judges and clerks arrived. The judges at once decided that it would be too hot in the rear of the store building and voted among themselves to move the voting place to the basement of the Methodist Parsonage, about 1/8 mile away; this parsonage being located about 100 feet from the Methodist Church where Sunday school is held every Sunday morning, weather permitting. A former storekeeper had vacated the parsonage about four months previous, but had some miscellaneous furniture stored on the first floor. Was it legal to hold the election in the basement of this parsonage under these conditions?

At this same election the township committee-woman, who has been in office for a number of years, had her name on the ballot for reelection. When the voting started she took a list of the voters and placed herself in the room where the voting and counting of the ballots was being done. Fre-

quently she would get up and go out and tell her husband to take their car and go and get some one whom she would designate to vote. About two weeks previous to August 7 and independent candidate was brought out for this same office, although her name was not placed on the ballot, and the other name was scratched out and this independent candidate's name was written in, and it was counted. Was it legal for this first committee woman to take her list of the voters and remain in the room where the voting and counting was being done? By doing this, she could just about tell where she stood most of the time. The township committeeman informed me that it was all right when I mentioned it to him."

# I

Section 10192, R.S. Mo. 1929 provides:

"The place of holding the elections shall be designated, and the judges and clerks of election appointed in such districts or for such election precincts, and the elections therein shall be conducted, in all respects, in the same manner as is hereinafter provided by law for the townships."

Section 10254, R.S. Mo. 1929, further relating to the polling places, is as follows:

"The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

In the case of *State v. Himmelberger-Harrison Lumber Co.*, 58 S.W. (2d), 1.c. 752, the Court said; in regard to places of holding elections or voting precincts in a school election:

"As we have said, the statute fixes the time of holding such annual meetings or elections, and it is sufficient if the notices posted of such meeting follow the law in fixing the time. The exact place of holding such elections is so generally fixed by custom, if not by law, and such

exact place is so easily ascertained by any one desirous of voting, that laws in that respect are liberally construed to the end that elections fairly held and which afford the voters a fair opportunity to exercise their right to suffrage will be upheld. The Court of Appeals in *Martin v. Bennett*, 139 Mo. App. 237, 244, 122 S.W. 779, 781, overlooked the fact that the *Thornburg Case*, supra, cited and relied on there, was dealing with fixing the time of a special election, when on the authority of that case it said that 'It is our duty to follow the decisions of the Supreme Court, and under the authority of the case above quoted from we hold that the order of the board made March 12, 1907, was insufficient in not specifying the place for the election', though it correctly held that 'on that order the secretary was not authorized to submit the proposition of furnishing the schoolhouse and purchasing a site for the new building', when the order of the board, as shown, was 'authorizing the board of directors of said school district to borrow the sum of ten thousand dollars for the erection of additional school building.'

We approve what is said in *State ex rel. Mercer County v. Gordon*, 242 Mo. 615, 624, 147 S.W. 795, 797, to-wit: 'It is rare indeed that any one desiring to cast a vote in a special election has any difficulty in finding the place where the election is to be held. Either those urging the adoption of the measure submitted or those desiring its defeat will take such an interest in the result of the election that every one who may desire to vote thereat will have no difficulty in finding the place where he should cast his ballot. \*\*\*\* The law contemplates that everything necessary shall be done to afford the voters a free and fair opportunity to vote yes or no on the proposition submitted, and unless some mandatory statute has been violated, or something has been done or omitted, which has deprived the voters of a free and fair expression of their will, such election should be upheld. (cases cited). \*\*\*\* The record is barren of even an intimation that any voter in said county failed to understand where he should vote or was deprived of his right to vote in the special election by reason of any alleged defect or ambiguity

in the notice of election as published.' This was said with regard to a special election, and would be even more applicable to an annual school election.

In State ex rel. Gentry v. Sullivan, 320 Mo. 362, 8 S.W. (2d) 616, 618, the notice of an election to be held in a consolidated school district specified the place of the election as 'at Stoutland', a village of some 300 people. The election was actually held at the Christian Church in that town by making public announcement on the street just before the voting began. As to this the court said: 'Before the voting commenced the county commissioner made a public announcement that the election would be held at the Christian Church. It was accordingly held at that place. No evidence having been adduced that any voter was deprived of his right to vote by reason of the general nature of the notice, no right was impaired or privilege denied, and we are, in all fairness, prompted to overrule this contention. In so doing we are not without a precedent therefor in our own rulings. State ex inf. Poage v. Higley, (Mo. Sup.) 250 S.W. 61'.

Defendant cites State ex rel. v. Martin, 83 Mo. App. 55, and Harrington v. Hopkins, 288 Mo. 1, 231 S.W. 263, but we find nothing therein justifying our holding the annual school election void for failure to sufficiently apprise the voters of the place where the election was held, and we rule this point against defendant."

In the case of Bowers v. Smith, 3 Mo., l.c. 61-62, the Court, in passing upon the question of voting places, said:

"It is next asserted that the votes from Sedalia should be excluded because they were received at two polling places instead of at one.

It appears that the county court had designated Sedalia city as one election district, but had further provided two voting places therein for holding this election, with one set of judges at each, as hereafter more particularly described. This was done by orders to that effect before the election. Both of the voting precincts were at the courthouse in that city.



At one, the voters whose surnames began with the letters 'A' to 'K' voted; at the other, those with the letters 'L' to 'Z'. Each poll was reached by way of a window, and the two were only seventy-five feet apart. The windows fronted on one portico of the court building. Through them, passages led to the polling booths in the rooms within, where the election judges were stationed and received the ballots.

Assuming that these arrangements involved the irregularity of receiving the vote at two places instead of at one, does it nullify the will of the people so expressed, the election having been regular in other respects?

Undoubtedly some irregularities are of so grave a nature as to invalidate the whole return of the precinct at which they occur; as, for example, the omission of registration. *Zeiler v. Chapman* (1874), 54 Mo. 502. In determining which are of that kind, the courts aim merely to give effect to the intent of the law-makers in that regard, aided by established rules of interpretation.

If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. *Ledbetter v. Hall* (1876), 62 Mo. 422. In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial.

It has been sometimes said, in this connection, that certain provisions of election laws are mandatory, and others directory. These terms may, perhaps, be convenient to distinguish one class of irregularities from the other. But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview. But it does not, therefore, follow that every slight departure there-

from should taint the whole proceedings with a fatal blemish.

Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribe the formal steps to reach that end; and, in order not to defeat the main design, are frequently led to ignore such innocent irregularities of election officers as are free of fraud, and have not interfered with a full and fair expression of the voters' choice.

Thus, in *Davis v. State ex rel* (1889), 75 Tex. 420, the law required that each ward in a town should 'constitute an election precinct'; Yet, in SAN MARCOS, a town incorporated with four wards, the county commissioners established two precincts only (without reference to ward lines), and each included parts of the adjacent country; but the court, after full discussion of the general subject, held that the election at those precincts was not avoided by the irregularity.

In *Stemper v. Higgins* (1888), 38 Minn. 222, a general election was conducted in the village of Madelia by its officers, as though it constituted a district separate from the township in which it was situated, where also a precinct was open; whereas, the law declared that 'every organized township, and every ward of an incorporated city, is an election district;' yet the court held the returns from the village valid, despite the irregularity indicated."

While in the above decision the facts are not identical with the first question presented in Mr. Hilton's letter, the underlying principle of law is the same in that in the absence of any statutory enactment making such an irregularity fatal, and we confess we find none in the statutes, the returns from such precinct will not be invalidated.

#### Conclusion

In view of the above decisions, we are of the opinion that the place of holding the election, as described in Mr. Hilton's letter, would not invalidate the returns from the precinct unless it could be shown that fraud existed, and that the voters were precluded from exercising their free will and having an



opportunity to cast their votes.

## II

The next question presented in your letter relates to what is commonly termed "electioneering". Section 10332, R.S. Mo. 1929 provides:

"No officer of election shall disclose to any person the name of any candidate for whom any elector has voted. No officer of election shall do any electioneering on election day. No person whatever shall do any electioneering on election day within any polling place, or within one hundred feet of any polling place. No person shall remove any ballot from any polling place before the closing of the polls. No person shall apply for or receive any ballot in any polling place other than that in which he is entitled to vote. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor."

The section relating to electioneering in the booth is Section 3980, R.S. Mo. 1929, which provides as follows:

"It shall be unlawful for any judge of election, clerk or person designated as a challenger under any laws of this state, or any person or persons within the polling place, to electioneer for any candidate, party or proposition. Any violation of this section shall be a misdemeanor, and shall be punished by imprisonment not less than ten days nor more than ninety days, or by a fine of not less than fifty dollars nor more than one hundred dollars."

### Conclusion

Under the terms of the above sections, it is our opinion that it is illegal for a candidate, or any other person, to remain in the voting booth or voting precinct and electioneer for themselves or any any else.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN  
Assistant Attorney General

SCHOOLS-

SCHOOL DISTRICTS:-is making a permanent or temporary home with her grandmother, is entitled to be educated in the district in which she lives, without the payment of tuition.

2-5  
March 3, 1934.

FILED  
2

Mr. Bernard Altman,  
Clerk School District No. 51,  
Rock Port, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We have a case in our District coming under Section 11135. We have a pupil who was staying with her grandmother, whose parents are living in Texas and separated and do not contribute to the support of the child. She attended Rock Port High School last year and the Board of Education insist that our District is indebted to them for her tuition. We hold she is not. Her grandmother owns a farm in the district and pays taxes. In the foot notes of the above section, State ex rel. Halbert v. Clymer, 184 N. A. 671, would apply.

Will you kindly decide this for us, at your convenience?"

You refer us to Section 11135, which is now section 9207, R. S. Mo. 1929, and reads as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to

be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided, further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

Section 1 of Article XI of the Constitution of Missouri provides as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

Pursuant to that constitutional mandate the courts have adopted a policy of construing statutes relating to schools very liberally. The Court in *State ex rel. v. Olymor*, 184 Mo. App. 671, 676, says:

"The policy of this state is to educate, and to furnish free of charge, good schools for all children of school age, and even to compel the attendance of children thereto.\*\*\*It is therefore the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the State."

You state in your inquiry that there is a pupil staying with her grandmother, whose parents are living in Texas and are separated and do not contribute to the support of the child. Under Section 9307 Above, if a child is unable to pay tuition he shall have the privilege of attending school in any district in the state where he or she may have a permanent or temporary home, where the child's parents do not contribute to her support. It is evident from your

letter that the parents of this child do not contribute to her support. The question then remains as to whether or not the child has a permanent or temporary home within the district wherein she is attending school. While upon the facts set out in your letter we may not be able to say that the child has a permanent home within the district, yet, undoubtedly the situation is such as to warrant our holding that the child does have a temporary home within the district. The child's parents do not contribute to her support and she, by reason thereof, is compelled and does make her home with her grandmother. Since the parents do not contribute to the support of the child, that support must come from someone, and in this event apparently it comes from the grandmother, who must provide shelter, food and clothing for the child. We believe it is apparent that this child is not within the district for the purpose of attending school, but is there because her parents do not support her. For that reason it is absolutely necessary that she make her home with her grandmother. Under the statutes it makes no difference whether her home with her grandmother be a permanent or temporary home. In either event, if her parents do not contribute to her support she is entitled to attend school without paying tuition.

In State ex rel. v. Clymer, 104 Mo. App. 671, 678, it is said:

"The statute is not ambiguous, and plainly provides that children who are unable to pay tuition, and whose parents are not contributing to their support, shall have the privilege of attending school in any district in which they may have a permanent or temporary home. It will be noticed that the privilege is granted, regardless of the residence or domicile of the parent.

It seems to us that the evidence clearly brings the case within the fourth subdivision of the statute. The boy, to all intents and purposes, was a resident of the school district, although his domicile may have been at Springfield. He was living in the district as a member of the relator's family, and under an agreement made with his father by which the relator had agreed to take, care for, and educate him. It was not a contract made for the sole purpose of permitting him to attend the Steelville school. The grandparent was aged, and the boy had lived with him

March 3, 1934.

a part of the time for more than five years, and undoubtedly there existed between them a degree of affection perhaps equally as strong as that between father and son. The common experience of mankind proves the truth of this statement, and therefore, it needed the testimony of no witness to establish it. But the grandfather did testify that he liked the boy and wanted him to live with him, and it was satisfactory with the father and the son also. There is no claim that the contract was not made in good faith, or that it was not being strictly performed by all parties thereto. The fact that it was not in writing was a matter that the parties alone were concerned about, and no stranger could set it aside or take advantage of the failure to observe formality in its execution."

In view of the foregoing observations, we conclude that this child is entitled to be educated without anyone paying her tuition; her parents do not contribute to her support and she is making either a permanent or temporary home with her grandmother. The statute is fully complied with. Although it does not appear there is any contract between the parents and the grandmother regarding the support of this child, as there was in the Clymer case, yet the only inference to be drawn from the facts stated in your letter is that the child has a home with her grandparent and this grandparent is supporting her without any assistance from her parents. In view of our constitutional mandate that all children between the ages of six and twenty should be furnished, free education, and in view of our decisions constraining our school statutes favorable to carrying out the mandate of the Constitution, we conclude that no one is responsible for her tuition.

It is therefore the opinion of this Department, upon the facts stated in your inquiry, that the child in question, whose parents do not support her and who has a temporary or permanent home in the district, is entitled to be educated without the payment of tuition.

Very truly yours,

APPROVED:

FRANK W. BATES,  
Assistant Attorney General.

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Attorney General.

COUNTY COLLECTOR: After Dec. 31, 1936 in counties of less than 40,000 inhabitants, the county collector is to assume duties of county treasurer and is to receive no additional compensation therefor.

Sec 12132a Laws of Mo. 1933

5-10  
May 8, 1934.



Hon. Haston Allen,  
Collector of the Revenue,  
Alton, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of April 4, 1934 wherein you make the following inquiry:

"Will you kindly advise me if after the collector takes over the treasurer's office in counties under 40,000 inhabitants, if he will be allowed deputy hire by the county court?"

The law passed by the Legislature of 1933 relating to collectors and the abolishment of the office of county treasurer in certain counties is to be found on page 338, Laws of Mo. 1933 and is as follows (Sec. 12132a):

"On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector,



and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

Oregon County, having less than 40,000 inhabitants, comes within the provisions of this section. Sections 12132b to 12138a are designed to take care of the compensation of the county treasurer and the manner in which he shall carry out his duties until the 31st day of December, 1936.

Section 12132a, supra, is plain and unequivocal in its terms when it states "such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector".

Section 9935, R.S. Mo. 1929 still governs the compensation of the collector in counties of the population of Oregon County. It was amended by the Legislature in 1933 (Laws of Mo. 1933, p. 454) and by the Extra Session of the Legislature 1933-34 (Laws of Mo. 1933-34 Extra Session, page 134), but the amendments contained therein relate only to counties of between 50,000 and 80,000 inhabitants.

Section 9896, R.S. Mo. 1929 relates to the manner in which deputy collectors may be appointed and was not in any wise amended by the Legislature in 1933.

#### CONCLUSION

It is the opinion of this department that according to Section 12132a, supra, in counties of less than 40,000 inhabitants the collector is to assume the entire duties of the county treasurer on and after the 31st day of December, 1936; that he is to receive no additional compensation therefor, nor is he entitled to the appointment or compensation of a deputy by the county court.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH



MUNICIPALITIES - Construction of Charter provisions of Maplewood, Mo.

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June 1st, 1934.

65



Honorable Charles Altenbernd  
City Attorney  
Maplewood, Missouri

Dear Sir:

This acknowledges receipt of your request  
for an opinion, which is as follows:

"The City of Maplewood, St. Louis  
County, Missouri, is a City of the  
Third Class under the Alternative  
Form of Government.

By the terms of Revised Ordinance  
No. 6 of said City, Section 2 provides  
that the Council shall, at its first  
meeting after its election, appoint a  
Marshal, who shall be the Chief of  
Police, and until a change by future  
ordinance, he shall also be Chief of  
the Fire Department; etc.

The present Marshal holds all three  
offices but is only paid one salary,  
namely, that as Marshal.

In view of Section 18 of Article 9  
of the State Constitution, which pro-  
vides, "No person shall, at the same  
time, fill two municipal offices,  
either in the same or different munici-  
palities", would it be your opinion  
that above Revised Ordinance No. 6 is  
void because it conflicts with above  
Section 18 of Article 9, and that the

#2 - Honorable Charles Altenbernd

Marshal cannot legally be Chief of Police and Chief of the Fire Department?

May I call your attention to Section 6912 R. S. Mo., 1929, which reads that the Council "may require an officer or employe to perform duties in two or more departments; and may make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the City."

We understand from your request that Ordinance No. 6, Section 2 provides, among other things, that the person elected marshal shall be ex-officio Chief of Police and Chief of the Fire Department, and that the three positions are filled by one individual.

Under the above facts, it would appear that there is only one office created, namely, that of marshal, and that the duties of the Chief of Police and Chief of the Fire Department are, by ordinance, attached to and made a part of the general duties of the person elected to the office of marshal. There is, therefore, only one office to be filled, namely, that of marshal.

Section 18, Article IX of the Constitution of Missouri, in part, provides:

" no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; \* "

You will note that the constitutional provision refers to offices, and since there is only one office involved in the problem presented by you, it is the opinion of this department that the above constitutional provision has no application to one office which automatically carries with it the duties of Police Chief and Fire Chief. It therefore follows

#3 - Honorable Charles Altenbernd

that the above ordinance, No. 6, is not in conflict with  
Section 18, Article IX of the Constitution of Missouri.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:PE

LIQUOR CONTROL ACT: <sup>wholesale</sup> Licensed/distributor may employ agent and agent need not obtain a license.

June 13, 1934.



Hon. E.W. Allison,  
Prosecuting Attorney,  
Rolla, Missouri.

Dear Sir:

This department is in receipt of your letter of May 25, 1934 in which you request an opinion as to the following state of facts:

"A wholesale distributor of 3.2 beer, holding from the State a wholesale dealer's license and having a group of counties as a district, hires a second man in one of his counties to take orders and deliver the beer thereafter. This hired man furnishes his own truck and is paid on a straight salary basis--no bonus or commissions. The beer is at all times the property of the wholesale distributor or dealer; the hired man merely taking orders from retail customers and delivering the beer for the distributor who hires him. The wholesale dealer supplies and the hired man keeps on hand about one week's supply in advance ready for delivery to retail customers.

Now the question: Is this hired man required, under the 3.2 per cent beer law to obtain a distributor's license from the Food & Drug Commissioner?"

Laws of Missouri 1933, page 256, provide for the manufacture, sale and inspection of non-intoxicating beer. Sec. 13139e provides in part as follows:

"Before any permit required by this article shall be issued, the annual fee required therefor shall be paid into the State Treasury, and the receipt for such payment filed in the office of the Food and Drug

Commissioner. Annual fees required for permits authorized by this article shall be as follows:

\* \* \* \* \*

(b) For a permit authorizing the sale in this state by any distributor or wholesaler, other than the manufacturer or brewer thereof, of non-intoxicating beer (\$50.00) fifty dollars."

Where a person conducts the same business at several different places, as a general rule, he must procure the required license or pay the required tax for each establishment. 37 Corpus Juris 210.

In the case of State v. Hughes, 24 Mo. 147, the Court said (l.c. 150):

"The indictment is for selling liquor in St. Louis County without license. The license offered permitted the sale at a particular place in the county, namely, in block No. 15, of the City of St. Louis. Now my own impression is, for this license to protect, he must show that he sold under it--that is, at the place permitted--otherwise, the license fails to give authority to sell, for nowhere else except at block No. 15 aforesaid is he authorized to sell. There is no error then committed by the court in rejecting this license first offered."

However, this restriction as to place of sale must not be confused with the proposition of persons protected by the permit or license. Absent any statutory requirement in the Missouri Act, it is fundamental that a licensed vendor of intoxicating liquors may employ an agent to carry on his business, and the agent will be under the protection of the licensee.

In the early case of Haug v. Gillett, 14 Kan. 140, the Court held:

" A liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state for goods to be selected and forwarded from the stock kept in such store, and is not required to obtain a license from the authorities of each city or county in which contracts are made therefor by such agents."

In the opinion, Judge Brewer said:

\*\*\*\*\*The proposition involved in this case is substantially that a wholesale liquor-dealer having a stock of goods and conducting business in a city from whose authorities he has received a license cannot send out agents and take orders for those goods elsewhere than in such city without first obtaining a license from the authorities of each city or county in which those orders are taken. The proposition is a broad one, and the language of the statute should be clear before such an intention is imputed to the legislature. The legislature may suppress the liquor traffic altogether, or it may impose such restrictions as it deems wise.

\* \* \* \* \*

The business of a wholesale dealer is carried on extensively, generally by agents--traveling-men, as they are called--who visit the different towns, and solicit orders. To recognize and license such a business, and at the same time to cut off one of the ordinary methods of carrying it on, while it is within the power of the legislature, should also be within the clear meaning of the enactments.

\* \* \* \* \*

But where was the sale completed? The contract therefor was made in Topeka, but did any title pass before the goods were selected and separated from the whole stock? Clearly not--and therefore the sale was not completed till then. The goods were selected and separated at Leavenworth, and there delivered to the carrier, to be by him forwarded to the purchaser. At Leavenworth, then, the sale was completed, and there Gillett had a license. *Baucher v. Warren*, 33 N.H. 183; *Boothby v. Plaisted*, 51 N.H. 436."

June 13, 1934.

CONCLUSION

In view of the foregoing, it is the opinion of this department that a licensed distributor of <sup>high</sup>intoxicating liquor may employ an agent to carry on his business, and the agent need not obtain a license so to do from the Food and Drug Commissioner; however, if a licensed distributor maintain warehouses other than that wherein he is licensed to do business as a distributor, then it is necessary that he obtain separate licenses from the Food and Drug Commissioner.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH



COUNTY COLLECTOR - COUNTY CLERK.

Costs collectible from the taxpayer, when.

Collector entitled to pay for making list of delinquent taxes although not collected until term of office expires.

June 28, 1934

Honorable Leonard L. Alley  
Clerk County Court  
Princeton  
Missouri



Dear Sir:

Letter of yourself and Mr. George dated May 19, 1934 was duly received by this Department. The letter is as follows:

"Regarding the collection of back taxes as set forth in Section 9945 of the 1933 law, we would like to have your opinion as to the following matters.

1. - Is the collector's cost for making the delinquent tax books in the amount of 10¢, (ten cents), and the clerk cost in the amount of 5¢ (five cents), as set forth in this section collectable from the taxpayer which would be an addition to the regular taxes?
- 2.- Does the collector who makes this back tax record have any claim for his fee in the events that this record is made just prior to the expiration of his term of office or can this amount be collected by the incoming collector and be retained by him?
- 3.- If the clerk's cost of 5¢, (five cents), per tract is collectable from tax payers should this amount be added to the regular 25¢, (twenty-five), per tract as set forth in section 9969 when transferring delinquent taxes to the consolidated back tax books, or is this amount dropped and the clerk

fees discontinued.

Trusting that this information will be furnished promptly in order for this county to render tax receipts payable on your opinion of this law, we are."

Section 9945 Laws 1933, page 426, is as follows:

"Hereafter as often as any delinquent tax list or tax bills shall be received by the county court or other proper tribunal or officer from collectors at their annual settlements, the same, except as to the list of delinquent lands, shall be made by the county clerk, and as to the delinquent lands the same shall be entered of record in the county collector's office by the collector, if in counties, and if in cities containing a population of five thousand or more inhabitants, by the proper officer, into a 'back tax book,' containing the same facts and in the same form as provided in sections 9948 and 9952, as to lands, city and town lots now delinquent; except that in counties where an alphabetical arrangement of the 'land list' in the assessor's book shall have been required by an order of the county court, such collector's record of the delinquent land list shall be made out in alphabetical order, in the name of the owner, if known, and if the owner be not known, then in the name of the person to whom the tract or lot was last assessed; the collector shall proceed to collect the taxes due thereon as provided in this chapter in reference to taxes now delinquent; all taxes hereafter becoming delinquent shall bear interest until paid as provided by section 9952, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, except that for making and recording the delinquent land list, the collector who makes such book and the clerk or other officer who makes the 'back tax book' shall receive only ten cents per tract,

city or town lot, and the clerk for comparing and authenticating such record of the delinquent list of land and lots as made by the collector shall receive five cents per tract, city or town lot."

Section 9969 Laws 1933, page 429, reads:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two percent on all sums collected - such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

1.

The general rule is that laws imposing taxes are strictly construed against the taxing power and in favor of the person sought to be taxed, so that unless there is express authority for so doing costs and fees can not be collected from the taxpayer. We find no such authority in Section 9945.

2.

Section 9945 Laws 1933, page 426, provides that 'the collector who makes such book' shall receive the compensation for making same, so that we think the compensation for the preparation of such record by a collector prior to the expiration of his term of office, should be paid to the collector preparing such record although payment be made after his term of office expires.

3.

The opinion expressed in paragraph One hereof will answer your questions in your paragraph Three.

In addition to what is said above we call your attention to the fact that Section 9969 Laws 1933, page 429, provides

Honorable Leonard L. Alley

-4-

June 28, 1934

that the twenty-five cents per tract for recording the list of delinquent lands is to be taxed as costs and collected from the party redeeming such tracts. No such provision as this appears in Section 9945 above referred to.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

SCHOOL DISTRICTS: )  
SCHOOL MONEYS: )  
DEPOSITORIES: )

Board of education of school district required to select a depository in the same manner as county courts, and treasurer of school district is liable for loss of funds not deposited in such depository.

7-19  
July 18, 1934.

93-9342-12187  
FILED  
2

Mr. E. A. Allen  
Raymore, Missouri

Dear Mr. Allen:

This Department acknowledges receipt of your letter dated July 7, 1934, as follows:

"I have just been elected Treasurer of Raymore Consolidated school, and as such officer required to furnish a bond in the penal sum of Ten Thousand Dollars.

"I find that it has been, and still is, the custom to deposit all school funds, without security, in the bank of Raymore on time or open accounts. So long as the bank remains solvent no problem arises, but in case of failure the question of responsibility for the school funds presents itself.

"I write to ask what the responsibility of the Treasurer for funds deposited in a failed bank, if deposit is made in conformity with a resolution of the School Board. Does the School District accept the bank as the custodian of funds deposited and relieve the bond of the Treasurer?

"Inasmuch as the situation is immediate, request is respectfully made that an opinion be furnished at your earliest convenience."

July 18, 1934.

1. Section 9335, R. S. Mo. 1929, provides as follows:

"The treasurer, before entering upon the discharge of his duties as such, shall enter into a bond to the state of Missouri, with two or more sureties, to be approved by the board, conditioned that he will render a faithful and just account of all money that may come into his hands as such treasurer, and otherwise perform the duties of his office according to law--said bond to be filed with the secretary of the board; and thereafter said treasurer shall be the custodian of all school moneys derived from taxation for school purposes in said district until paid out on the order of the board, and on breach of the conditions of said bond, the secretary of such board, or any freeholder, may cause suit to be brought thereon, which suit shall be prosecuted in the name of the state of Missouri, at the relation and to the use of the proper school district."

Section 9338, R. S. Mo. 1929, having reference to the treasurer of the board of education of any town, city or consolidated school district, in part reads:

"\* \* \* \* \*; and at the expiration of his term of office said treasurer shall deliver over to his successor in office all books and papers, with all moneys or other property in his hands and also all orders he may have redeemed since his last annual settlement with the board of education and with the county clerk, and take the duplicate receipts of his successor therefor, one of which he shall deposit with the secretary of said board of education and the other with the clerk of said county court."

Section 9362, R. S. Mo. 1929, is as follows:

"The board of education of city, town and consolidated school districts in this state shall select depositories for the funds of such school district in the same manner as is provided by law for the selection of county depositories; and they may loan any moneys held for the payment of outstanding bonds upon the same terms and upon the same conditions as provided by law for loaning county and school moneys."

Turning then to the laws governing the selection of depositories by county courts, we assume that your board of education has complied with all of the provisions of the statute relative to the selection of the depository, that is, that the board of education has proceeded under the provisions of Section 12184, Revised Statutes of Missouri, 1929, by advertising for bids for the school funds and no bids were received by the board from the banking corporations, associations or individual bankers in your county and that all of the banking institutions in your county have failed to proceed under Sections 12184, 12185, 12186 and 12187, R. S. Mo. 1929, to submit bids for such school funds and the giving of a bond, or bonds, as a depository for such funds.

In case the board has complied with the sections of the statute above mentioned, and no bids have been submitted, then, in that event, the board may go to Section 12189, R. S. Mo. 1929, for the selection of a depository; which section is as follows:

"If for any reason the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositories as provided in section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, in such sums or amounts, and for such period of time, as



the court may deem advisable, at such rate of interest, not less than one and one-half per centum, as may be agreed upon by the court and the banker or banking concern receiving the deposit; said interest to be computed upon the daily balances due the county, as provided in section 12186, and any bank or banking concern agreeing to accept deposits under the provisions of this section shall execute a bond in manner and form as prescribed in section 12187, with all the conditions therein mentioned, the penalty of such bond or bonds to be not less than the total amount of the county funds to be deposited with such bank or banking concern."

The duty under the law of selecting a depository under Section 9362, above set out, devolves on the board of education and it should first proceed under the first four sections of Article 2, Chapter 85, Revised Statutes of Missouri, 1929, being Sections 12184, 12185, 12186 and 12187, and then if there are no bids submitted by the banks the board should then proceed under Section 12189 for guidance, and under such section the board shall have power to deposit its school funds with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties et cetera, that are willing to comply with this section by paying the required interest, not less than one and one-half per cent. to be computed upon daily balances, and by such depository executing the bond in manner and form as prescribed in Section 12187.

2. Coming now to the question of the liability of the treasurer of the board on his official bond in the event of the failure of the board to select a depository and a consequent loss of the funds in the hands of the treasurer:

In the case of Glaze v. Shumard, 54 S. W. (2d) 726 1. c. 728, it is said:

"It is well settled that a public officer is an insurer of public funds which he has lawfully received, unless the legislature has provided otherwise."

As was said by the Supreme Court in the case of City of Fayette v. Silvey, 290 S. W. 1019, 1. c. 1021:

"\* \* \*The general rule, which is the rule in this state, is that one of the duties of a public officer intrusted with public money is to keep such funds safely, and that duty must be performed at the peril of such officer. Thus, in effect, he is an insurer of public funds lawfully in his possession. Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Thomssen v. County, 63 Neb. 777, 89 N. W. 389, 57 L. R. A. 303. He is therefore liable for losses which occur even without his fault. Shelton v. State, supra. This standard of liability is bottomed on public policy. University City v. Schall, 275 Mo. 667, 205 S. W. 631.

"In the last case cited, our Supreme Court, speaking through Blair, P. J., applied this general rule to a city treasurer, into whose hands the general funds of the city had passed, finding that the mayor and aldermen had directed the funds placed to the credit of the city treasurer in a certain trust company, which later failed. The treasurer died, and the suit was instituted against the administrator of his estate. The estate was held liable under the general bond, notwithstanding the fact that the funds had been so deposited in the trust company at the direction of the board of aldermen."

In the case of Bragg City Special Road District v. Johnson, 20 S. W. (2d) 22, 1. c. 24, 66 A. L. R. 1053, the Missouri Supreme Court in this leading case said:

"The ruling in the University City Case was made in recognition of the rule followed in this State, and generally followed that the liability of the treasurer of a public cor-

July 18, 1934.

poration for its funds coming into his hands is absolute. State ex rel. v. Powell, 67 Mo. 395; 29 Am. Rep. 512; State ex rel. v. Moore 74 Mo. 413; 41 Am. Rep. 322; County of Mecklenburg v. Beales, 111 Va. 691, 69 S. E. 1032, L. R. A., (N. S.) 285. The rule is one founded upon considerations of public policy."

In the case of Everton Special Road District v. Bank of Everton, 55 S. W. 335, l. c. 336, the Supreme Court stated:

"In selecting a county depository the steps may be all regular up to the execution of a bond by the depository and then if the bond given does not substantially comply with the requirements of the statute, the depository selected is not the legal depository."

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751, l. c. 754, the Supreme Court said:

"As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court; it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them."

July 18, 1934.

The Springfield Court of Appeals followed the Huntsville Trust Company case in the case of Consolidated School District v. Citizens Savings Bank, 21 S. W. (2d), l. c. 788, and the Huntsville case is cited with approval in the case of White, County Treasurer, v. Greenlee, 49 S. W. (2d) 132.

Also, in the case of Boone County v. Cantley, Commissioner, 51 S. W. (2d) 56, l. c. 58, the Supreme Court further said:

"A bank which has given a bond that does not comply with the provisions of Section 12187 R. S. 1929, regardless of the action taken by the county court with respect to it, is not a county depository either in law or in fact. And upon the receipt of county funds by such a bank, under color of being a county depository, a trust as to funds so deposited arises in favor of the county. Huntsville Trust Co., v. Noel, 321 Mo. 749, l. c. 757; 12 S. W. (2d) 751."

In the case of State ex rel. Cravens, to Use of Consolidated School District No. 2, v. Thompson, 22 S. W. (2d) l. c. 198, the court made the following statement which is appropriate to the question here involved:

"It is plaintiff's position, as reflected in the first assignment of error, that the recital in the said minute, 'Bond of D. W. Thompson as treasurer approved. Money to be kept in Farmers Trust Co.,' was not sufficient in law to designate a depository for the moneys of the district and to authorize Thompson to place the money there, because not in conformity with the provisions of sections 9582-9586, Rev. St. 1919, governing procedure in respect to county funds; and that, when the power of an inferior body to do a thing depends upon a condition precedent prescribed by statute, all the world must take notice of that limitation of its power and authority, and determine at their own peril whether or not the condition has been complied with and the authority granted; and that the act of the board of education in directing by minute

July 18, 1934.

entry only that the funds of said district be kept in the Farmers' Trust Company of Grant City, without first advertising for bids, and without requiring a bond of the depository selected, was void and of no effect, and not binding on the district; and that it was the duty of the treasurer before depositing the funds with the Farmers' Trust Company to see and know that said depository had been properly and legally selected and designated, and that a bond of said trust company had been properly approved and filed, and his failure to do so renders him and his sureties liable."

We think the foregoing cases fairly reflect the law of this State with reference to the liability of a person who is the legal custodian of public funds.

According to the law of this State as declared in the cases of City of Fayette v. Silvey; Everton Special Road District v. Bank of Everton; Boone County v. Cantley; and State ex rel. Cravens v. Thompson, quoted from supra, it would be no protection to the treasurer of a board of education that the board authorized or directed the money deposited in some particular banking institution if such banking institution was not legally selected and did not qualify as a depository. The board would not be authorized to accept a bank as the custodian of funds which was not properly selected and which did not qualify as a depository.

We are of the opinion that the Board of Education of Raymore Consolidated School District is required to select a depository for the school funds coming into your hands as above pointed out and that in the event of the failure to do so you would be liable on your official bond for the payment to your successor of

Hon. E. A. Allen

-9-

July 18, 1934.

all of the funds coming into your hands as Treasurer of such district which had not been otherwise legally paid out.

Yours very truly,

GILBERT LAMB  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

GL:EG



Home Owners' Loan Corporation:

County Court cannot make a compromise settlement of loans made out of county school fund, nor accept what can be loaned by H. O. L. C. thereafter.

8.23

August 20, 1934.



Mr. G. P. Allen,  
District Appraiser,  
Home Owners' Loan Corporation,  
Moberly, Missouri.

Dear Sir:-

We have your letter of June 26, 1934, in which an opinion is requested as follows:

"Having bothered your office on different occasions regarding a matter of County School Fund mortgages I am again asking your opinion as follows:

"Some counties have made loans of these sacred school funds and they have been running over a period of years. No doubt they were good loans at the time they were made but I find that a good many of them are in a bad state of repair and worth considerable less than the school fund note. The home owners are unable to pay their interest to the school fund, their delinquent taxes, and let alone the necessary repairs to preserve the property. Unless something is done these loans will become of very little value, and finally the property will be foreclosed and bring but little. Experience is already teaching some of the courts this. To dispossess the home owners makes them public charity persons, and the home will deteriorate and go down to where it will do no one any good.

"In reading section 9243 of the second volume of the Revised Statutes of 1929, we find that the duty of the courts in loaning this money they shall not loan for over 8% nor less than 4%. On unencumbered real estate worth at all times at least double the sum loaned, as explained above, many of them are not worth half of the sum loaned let alone being double what the loan is.

"One court has advanced the idea that they cannot accept the bonds of this corporation for the reason they do not bear 4% interest. This argument is met that they could accept them, immediately sell them and reloan the money on security at a rate suitable to the statutes.



August 20th, 1934.

"The question now is, can they make a compromise settlement on these loans and accept what can be loaned by the Corporation where it is necessary that we repair and put the property in a good state of condition, or would it be best that they sell this property? Then they know what the value is and they could let the home owner redeem it, as we can do under the rules and regulations of this Corporation. My purpose in asking this question is that the school funds may be saved what they can be, and the home owners not be dispossessed of their homes, that the Corporation will purchase material of material men, furnish labor for laboring men, put the homes in a state of condition whereby they will be fit to live in, and in all increase the value of all property in the towns and locations where they are found. Would it be better policy for the courts to sit idly by, let the property go to nothing, turn the home owners out without shelter and make them subject of public charity? This is exactly what is going to happen if something is not done. I have viewed a good many such cases and believe I know whereof I speak.

"Your opinion will be greatly appreciated and help to fit in and set some of the courts right as to what should be done in a business-like way as any prudent business man would do though they don't stick on the letter of section 9243, for they cannot be saved and do so. It is impossible after the condition these properties have gotten into. We are ready and willing to help save these homes, and can do so with the co-operation of the authorities and the County Courts. Thanking you in advance, I remain

Very truly yours,

(Signed) G. P. Allen  
District Appraiser,  
Home Owners' Loan Corporation."

On October 25, 1933, we rendered an opinion, a copy of same being enclosed herewith, which opinion in effect answers the question which you have asked in your letter.

We are heartily in accord with the sentiments expressed in your letter, and sincerely regret our inability to alter our previous opinion to the extent of affording some relief in a very

G. P. Allen--#3

August 20th, 1934.

difficult situation. It is the function of this office, however, to merely construe the law according to the letter and expressed intent thereof, hence, we are bound within rather narrow legal limits in the rendering of opinions, regardless of the end to be attained or the obvious advisability of a certain course of action. It is the function of the courts of this state to decide matters such as the one at issue.

The law as to the loaning of school funds and the various procedures connected therewith is plainly set out in the statutes, certain pertinent sections of which are quoted in the opinion attached hereto. There being no provision which could be construed to allow a compromise such as the one you suggest, we are constrained to hold that such cannot be effected under our laws as they now stand.

We sincerely trust you can appreciate the position which we are forced to assume.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB  
Enc.

APPROVED:

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Attorney-General.

PROSECUTING ATTORNEY: Lotteries.

"Suit Club" whereby  
weekly amount paid for  
certain period with a  
chance to get suit before  
end of period held  
violation of section  
4314 R. S. Mo. 1929  
against lotteries.

§ 23  
August 21, 1934.



Mr. E. W. Allison,  
Prosecuting Attorney, Phelps County,  
Rolla, Missouri.

Dear Sir:-

We have your letter of June 26, 1934, in which is  
contained a request for an opinion as follows:

"A business venture proposed in this County has  
been called to my attention, and, being uncertain as to  
the legality of the venture, I wish to ask an opinion  
of the Attorney General on the following state of facts:

"The venture is termed a men's "Suit Club", whereby  
members seek to obtain suits of clothes. The club will  
consist of about one hundred members. Each member is to  
pay \$1.00 per week for twenty-five weeks, at the end of  
which period each will receive a suit of clothes or top  
coat, made to measure, unless such member has drawn a suit  
sooner, as outlined below. On each Saturday night during the  
life of the club, some one member will receive a suit of  
clothes for the amount he has paid in to that date, and will  
then drop out, each member so receiving a suit on any Saturday  
evening will be chosen by a drawing. Should a member desire  
to drop out of the club before he gets a suit, the promoter  
agrees to refund seventy-five percent of what such member  
has paid, the other twenty-five percent to be retained by  
the promoter as his expenses of operating the club. The  
promoter alleges that a one-hundred member club would show  
a profit of \$4.50 per suit of clothes, gross, and out of this  
\$4.50 comes the expenses of collection, printing, etc. The  
promoter does not maintain a regularly established place of  
business as a clothing merchant, or any other kind of merchant,  
any more than he is now engaged in a business of taking orders  
for made to measure suits.

"Is it the opinion of the Attorney General that the  
operation of a club such as outlined would be in violation  
or contravention of the statutes, especially with reference  
to the lottery statutes?"

E. W. Allison--#2

August 21st, 1934.

Section 4314, Revised Statutes of Missouri, 1929, provides as follows:

**"Sec. 4314. ESTABLISHING LOTTERY.--PENALTY.**

If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

The above quoted section is the same section as section 3562, Revised Statutes of Missouri, 1919. We have two cases decided by the Supreme Court of Missouri which are directly in point on the present question. In each case, operations almost identical to those as stated in your letter were held to be in violation of the section of the 1919 statutes.

In the case of State vs. Emerson, 1 S. W. (2nd) 109, a plan whereby a furniture company sold contracts to customers on a basis of one dollar a week until fifty-five dollars had been paid, whereupon the purchaser was entitled to that value in furniture, the company reserving the right to discount one or more contracts each week by charging off deferred payments and delivering the contract holder fifty-five dollars worth of furniture without further payments, was held a lottery within the meaning of Article 14, Section 10 of the Constitution of Missouri, and Section 3562, Revised Statutes of Missouri, 1919.

In the case of State vs. Meyer Tailoring Company, 25 S. W. (2nd) 98, a company selling arbitrarily maturing certificates for suits of clothes was held to be violating the Cooperative Companies Act and lottery law. (Const. of Mo. Art 14, section 10; Revised Statutes of Mo. 1919, sections 3562 and 10237-10262).

E. W. Allison--#3

August 21st, 1934.

The language used by Justice Walker, at page 111, in the case of State vs. Emerson, above cited, is very much to the point:

"The crime having been properly charged, the proof of the existence of the elements necessary to establish it are held to be consideration, chance, and a prize. Were these elements shown to have been present in the instant case? Let the facts bear witness. The moving consideration in the making of the contract was the payment by the holder of weekly installments; the chance was that of an early selection of the holder's contract for a discount; and the prize was the furniture to be received. Further than this, the inequality between the different contract holders whereby one might secure \$55 worth of furniture for a few dollars while another would be required to pay that amount in full for the same quantity of furniture constituted a prize, within the meaning of the Constitution. The lack of knowledge of a holder, as to when his contract would be discounted constituted a chance within the contemplation of the law."

From the above, it is evident that a business venture operated as stated in your letter clearly violates our law against lotteries, (section 4314, R. S. Mo. 1929, quoted earlier in this opinion). The elements of consideration, chance and prize are the tests and are manifestly existent in the instant case.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

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Attorney-General.

NEPOTISM: Under Section 8026, R. S. Mo. 1929, Mayor, City Council and Judges of the County Court elect Commissioners. If a member of City Council participates in the election of relative within prohibited degree, such election would be illegal.

3-26  
March 23, 1934.



Mr. Omer H. Avery,  
Prosecuting Attorney,  
Troy, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"The matter of nepotism entering in the appointment of a Commissioner of a Special Road District has come up in this county, and the County Court has requested that I obtain your opinion as to whether or not it applies in this case.

I refer you to Section 8026, R. S. Mo. 1929, providing for the appointment of said commissioners. It provides that the Mayor of any city or town and the members of the City Council, within any special road district, together with the members of the County Court shall appoint the Commissioners.

The situation we have is that the City Council and Mayor have recommended or voted for three Commissioners, one of which is to be selected. One man suggested is a brother of one of the City Council members, and another man suggested is a nephew of one of the members of the City Council. The third man suggested has only one vote of the City Council and, therefore, if he received the votes of the members of the County Court unanimously, he would still lack a majority vote.

The question has been raised as to whether the two men who have relatives on the City Council are disqualified by reason of said relationship. Both men are qualified and capable to act. I am personally of the opinion that they are not disqualified. I feel that in reality the appointment is made by the County Court, with the advice and suggestion of the Mayor and Council.



I think it would be a strained and unjustified construction of the Constitution to make it applicable in this case. However, the County Court desire the opinion of your Department before they act, and I trust you will favor me with an opinion before the first Monday in April, the next meeting date of the County Court."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing section it is illegal to appoint to office a relative within the fourth degree. You apparently concede that position but are of the opinion that by reason of Section 8026, R. S. Mo. 1929, it would be proper for the representatives of the district to appoint relatives of members of the City Council. Section 8026, R. S. Mo. 1929, provides as follows:

"The mayor and members of the city council of any city or town within any special road district thus organized, together with the members of the county court of the county in which said district is located, at a meeting to be held in the county court room, at which meeting the presiding judge of the county court shall preside and the county clerk shall act as clerk, within two weeks after the voters within the territory of such proposed district shall adopt the provisions of this article, shall, by order of record to be kept by the county clerk, appoint a board of commissioners composed of three persons, designating one to serve for three years, one for two years and one for one year, and in February every year thereafter one commissioner shall be appointed as above specified, to serve for three years; all such commissioners shall be resident taxpayers of the district, and shall serve until their successors are appointed and qualified, vacancies to be filled as original appointments are made. Resignations shall be to the



county clerk. Removal from the district shall create a vacancy. Such commissioners, before entering upon the discharge of their duties, shall take oath of office, to be administered by the clerk of the county court: Provided, that where the city is located a greater distance than ten miles from the meeting place of the county court, the mayor and city council of the city or town within the road district for which commissioners are to be appointed, may make a written certificate of their choice of the commissioner or commissioners to be appointed, designating their first, second and third choice and seal the same and transmit it to the county clerk by mail or by special messenger and the choice and selection designated in such certificate shall be given the same consideration as though the board and mayor were present at the meeting of the court: Provided, that such certificate shall be given over the signature of the mayor or acting mayor attested by the seal of the city and signature of the city clerk."

Under the foregoing section the mayor and members of the city council, along with the Judges of the county court, comprise the committee or board which represents the district in the selection of commissioners. Under the terms of the statute the mayor and members of the city council have as much voice in the selection of the commissioners as do the judges of the county court. The Supreme Court, in construing this section in *State ex inf. Holt v. Meyer*, 12 S. W. (2d) 489, 490, says as follows:

"Relator assumes the mayor and councilmen act as officers of the city in appointing commissioners. As stated, the mayor and members of the council and members of the county court do not participate in the meeting as officers of either the city or county, but as representatives of the whole district, for the sole purpose of appointing commissioners.

The statute no more limits the mayor and members of the council to one vote than it limits the members of the county court to one vote. No doubt the lawmakers assumed the members of the meeting would be so interested in the welfare of the district that they would not permit rivalry between the county court and the city council to interfere with the honest performance

of their duty. Each member of the meeting is authorized to participate in the appointment, and, absent a word in the statute to the contrary, we must hold each member of the meeting to have a vote."

Under the foregoing decision, each member of the city council has a vote and, along with the mayor, has just as important a part in the appointment of the commissioners as does the county court. It is true that the section further provides that the mayor and city council may make a written certificate of their choice, where the city is located a greater distance than ten miles from the meeting place of the county court, but in the above decision, at page 491, it is said that: "The choice designated in the certificate must be given the same consideration as though the mayor and members of the council were present."

We therefore conclude that the fact that they may vote by certificate does not in the least take away their right to name or appoint. It is the act of naming and appointing a relative that is illegal and the relative so elected cannot demand the fulfillment of the appointment. We conclude, therefore, that a person who is related within the prohibited degree to members of the city council cannot be legally appointed or elected as commissioner of this road district. That a road district is a political subdivision of the State is a matter that cannot be controverted. A commissioner elected to serve the district is rendering service to a political subdivision, within the prohibition of the Constitution, and if such commissioner is related to a member of the city council who participated in his election and appointment, then we believe that such election is illegal.

It is therefore the opinion of this Department that under Section 8036, and the above decision, the mayor and members of the city council are just as much a part of the appointing power and have the same right to name the commissioner as do the Judges of the County Court, and that a person related within the prohibited degree to members of the city council would be illegally elected or appointed.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

September 11, 1934.



Mr. O. K. Armstrong,  
1074 North Clay,  
Springfield, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"There seems to be a great difference  
of opinion over the state as to whether  
or not the operation of so-called slot  
machines is legal in Missouri. I wish  
you would kindly give me an opinion on  
that subject.

"What I have in mind, of course, are the  
machines that 'play' money, or its equiv-  
alent; nickels, dimes, quarters, and the  
like; or slugs that can be bought or ex-  
changed for money.

"Differences of opinion on this subject,  
as to whether or not slot machines violate  
state laws against gambling, extend to  
the prosecuting attorneys of the various  
counties, some ruling one way, and some  
another. It seems to me that a clear-cut  
ruling from your office would be valuable."

Section 4287, R. S. Mo. 1929, provides as follows:

"Every person who shall set up or keep  
any table or gaming device commonly  
called A B C, faro bank, E O, roulette,  
equality, keno, slot machine, stand or  
device of whatever pattern, kind or make,  
or however worked, operated or manipulated,  
or any kind of gambling table or gambling  
adapted, devised and designed for the  
purpose of playing any game of chance for  
money or property and shall induce, entice  
or permit any person to bet or play at or  
upon any such gaming table or gambling  
device, or at or upon any game played or  
by means of such table or gambling device  
or on the side or against the keeper  
thereof, shall, on conviction, be adjudged

guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

Under the foregoing section we conclude that it is illegal to operate a slot machine in this State, whether they pay in money or slugs that can be exchanged for money or merchandise. As a matter of fact, the above section specifically prohibits the operation of a slot machine. In *State v. Pollnow*, 14 S. W. (2d) 574, the defendant was convicted of keeping a gambling device in the form of a slot machine and his conviction was affirmed by the Supreme Court. In that case the Court described the machine as follows:

"It was operated by putting a nickel in the slot and taking out mint or something of the kind. The machine itself, as re constructed, did not pay the player when he won. The winner was paid by the man in whose place the machine was operated. Peikert testified that the winner who put his nickel in the slot was not paid out of the machine, but Peikert himself paid the money out of his pocket, and he was reimbursed by the earnings of the machine, which came into an aluminum box, attached to the left side and kept locked. The evidence sufficiently shows that it was a gambling device, cleverly constructed in an attempt to evade the law."

In *Moberly v. Deskin*, 169 Mo. App. 672, the conviction for operating a gambling device in the form of a slot machine was also affirmed. In that case the machine was termed an 'Automatic Gum Vender.' The machine was operated by either placing a nickel or a metal trade check into the slot and the machine always delivered a package of gum, and at various occasions a quantity of trade checks which were redeemable with the owner of the place of business. The Court, in discussing the gaming device, says:

"In legal significance the term 'gaming device' and 'gambling device' are synonymous (*State v. Mohr*, 55 Mo. App. 329) and include all instruments, implements, devices and means which are made and used in unlawful gaming."

Mr. O. K. Armstrong,

-3-

September 11, 1934.

In view of the foregoing section and decisions, we are of the opinion that it is illegal and unlawful to operate a gaming or gambling device in the form of a slot machine in this State.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:



(Acting)

Attorney General.

FWH:MS

RELATING TO THE SUBJECT OF LOTTERIES AS DEFINED BY OUR  
STATUTES AND CONSTITUTION:

*Sec. 4314 R. L. 1929*

September 12th, 1934



Hon. Frank E. Ashby  
Prosecuting Attorney  
Mississippi County  
Charleston, Missouri

Dear Sir:

We acknowledge receipt of your letter of August  
31st, 1934, in which you state and inquire as follows:

"If A. has two thousand acres of land all  
in cultivation that lays well and is real  
cheap at \$40 per acre even if it were with-  
out any buildings of any kind. As a  
matter of fact the land had a loan on it  
of over sixty dollars per acre. There are  
many buyers that will buy five acre tracts  
at this price. There happens to be two  
thousand acres of the land and there are  
about 18 sets of buildings on the place.  
The sets of buildings would cost from  
\$3500 to eight hundred dollars each and  
of course one could not afford to sell a  
five acre tract for \$200 with a set of  
these buildings on it unless he knew he  
was going to sell the rest of the land.

Is it against the law to divide this land  
into 400 five acre tracts letting the  
buildings on the place be on any tract  
they might. Sell 400 five acre tracts  
for \$200 per five acre tract and after  
all tracts are sold let each man draw for  
choice of tracts. Or number each tract  
and let a man draw the tract he gets.

Every one of these tracts is worth the  
money and every man will get a tract. It  
is just a question as to whether or not  
the fact one might get a set of buildings  
worth many times more than the five acre  
tract itself would make this a lottery.  
However it seems to me that if every man  
get value there could be nothing wrong  
with this transaction.

September 12th, 1934

Please advise me as to whether or not a sale of this kind should be stopped and what law is violated if any."

## I.

Lottery is a distribution of prizes of some value, by chance or lot.

Article XIV Section 10 of the Constitution of Missouri provides as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this state; and all acts or parts of acts heretofore passed by the Legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4314 R.S. 1929, provides as follows:

"If any person shall make or establish or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

In State v Mumford, 73 Mo. 1. c. 650, the court speaking through Judge Norton, said:

"The term lottery has no technical meaning



in the law, distinct from its popular signification, and it is defined by various lexicographers, as follows: "A distribution of prizes and blanks by chance---a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles." Worcester Dict. "A scheme for the distribution of prizes by chance." Bouvier's Dict. "A distribution of prizes by lot or chance." Webster's Dict. "A kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate." Rees' Cyclopaedia. "A sort of gaming contract by which, for a valuable consideration, one may, by favor of the lot, obtain a prize of a value superior to the amount or value of that which he risks." American Cyclopaedia. It, therefore, appears from all these authorities, that when there is a distribution of prizes of some value, by chance or lot, this constitutes lottery. Testing the scheme, which the agreed statement of facts discloses in this case, by the above definition of the word lottery, and it is clearly embraced by it. The subscription price of the Kansas City Times, when paid by the subscriber, entitled him to a copy of the paper and also to a ticket which might draw a prize (as for instance, a piano), worth a hundred fold more than the subscription price of the paper. The drawing of such a prize under the scheme was within the range of probabilities, and, doubtless, many subscriptions for the paper were made and induced solely by the consideration that the person subscribing would be entitled to a ticket which might bring to him some one of the many valuable prizes to be disposed of in the drawing. The fact that the subscription prices of the Times was not increased, does not alter the character of the scheme, inasmuch as the price paid entitled the subscriber to a ticket in the lottery as well as to a copy of the paper."

In State ex rel Home Planners v. Hughes, 299 Mo. 1. c. 533-4, the court said:

"The first question argued is whether relator's plan or scheme is a lottery or in the nature of a lottery within the meaning of Section 10

of Article XIV of the Constitution which forbids the authorization of lotteries or gift enterprises for any purpose. The term "lottery," thus used, includes every device whereby anything of value is, for a consideration, allotted by chance. (State v. Becker, 248 Mo. 1. c. 560; State v. Mumford, 73 Mo. 647; 17 M. C. L. p. 1222, sec. 10.) Consideration, chance, prize--these are the elements. That regulator's plan includes the first cannot be denied. The questions debated relate to the second and third. The fact that each certificate holder eventually might or would receive an amount equal to the aggregate of his payments can make no difference if, in addition each secured a chance for a prize."

In State v. Becker, 248 Mo. 1. c. 560, the court said:

"It is not denied that the term "lottery" is, as interpreted by the courts of other States, broad enough to include every punishable plan, scheme or device whereby anything of value is disposed of by lot or chance, and it is not contended there yet has been devised nor that there could be devised any scheme in the nature of a lottery that the term lottery is not, as thus interpreted, broad enough to cover. It is said, however, the framers of the Constitution and the statute must have had a less comprehensive meaning in mind, otherwise they are convicted of employing useless words, a conclusion not favored. It is to be observed, however, that at the time the Constitution was framed the meaning of the term "lottery" was not so well settled as now and there was even then a contention being made in our courts that there was a distinction between a "regular" lottery and other devices similar in respect to the elements which rendered them culpable, but not conducted with the same formalities. (State v. Hindman, 4 Mo. App. 1. c. 582.) Doubtless to meet such a conception the framers of the Constitution (Sec. 10 art. 14) used the phrase "scheme in the nature of a lottery." The courts of this State had not then given to the word "lottery" the broad definition (State v. Mumford, 73 Mo. 647) subsequently

September 12th, 1934

approved and it seems caution rather than necessity dictated the employment of the additional words "scheme in the nature of a lottery."

In *State v. Emerson*, 1 S.W. (2d) 1. c. 111, this court said:

"The people in framing the state Constitution (section 10, art. 14) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. *State ex rel. Hughes*, supra, 1. c. 534 (253 S.W. 229). In *State v. Becker*, supra, 1. c. 560 (154 S.W. 769), in line with our former rulings and those of courts of last resort elsewhere, a more comprehensive definition is given to the word, and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme, or device whereby anything of value is disposed of by lot or chance."

Therefore in view of the foregoing Constitutional and statutory provisions and what our courts have said as herein indicated, this department holds that the facts stated in your letter brings the case clearly within section 4314 (supra) and would constitute a plan, scheme, or device whereby a thing of value is disposed of by lot or chance.

Respectfully submitted,

W. W. Barnes

Assistant Attorney General

APPROVED:



(Acting)  
Attorney General

ELECTIONS: Members of Federal Transient Camps are entitled to vote in the general election providing they possess the other necessary qualifications.

See 10178 R.S. Mo. 1929  
11-1

October 31, 1934.



Hon. James P. Aylward, Chairman,  
Democratic State Committee,  
Madison Hotel,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of a request for an opinion from Mr. R.E. Holliway regarding the following inquiry which you received from Mr. Charles W. Dickey, Chairman of the Greene County Democratic Central Committee:

"We have a Federal Transient Camp in Greene County with about two hundred men in it. A great many of these men live outside of the State of Missouri, but a number of them live in Missouri and some are inhabitants of Greene County.

Please advise us whether or not these transients can vote. Of course, the ones who do not reside in Missouri and have not resided here for one year would not be entitled to vote, but does the fact that they are in transient camps prohibit them from voting when they are residents of Missouri and of Greene County?"

The general qualifications of an elector in the State of Missouri are set forth in Section 10178, R.S. Mo. 1929, which provides:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one

years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city, or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

The phrase in the above section with which we are concerned is "that no person while kept at any poorhouse or other asylum at public expense \*\*\*\* shall be entitled to vote at any election under the laws of this state". As to whether or not the various transient camps maintained by the Federal Government in the State of Missouri are "asylums at public expense" or "poorhouses" would depend largely on the facts. As we understand the facts to be, the members of these transient camps are more or less homeless and are given employment, receiving compensation in the nature of clothes, sustenance and approximately \$1.00 per week. They may be paid out of public funds, but the matter resolves itself into the men working and receiving compensation therefor. We are therefore of the opinion that these men are not disqualified from voting and do not come within the purview and intention of the Legislature in disqualifying certain persons from voting.

Of course, these men individually must possess the necessary qualifications to vote, i.e., they must reside one year immediately preceding the election in the State of Missouri and must reside in the county, city or town in which they offer to vote for 60 days preceding the election. We are therefore of the opinion that only such members of the transient camps as are citizens of the State of Missouri and possess the residential qualifications could participate in the coming election.

Conceding that there are many members of these camps who are residents of Missouri, we are confronted with the question of whether or not Greene County is their place of residence. It has been repeatedly held in this state that residence is largely a matter of intention, as was said in the case of *In Re Lankford Estate*, 272 Mo., 1.c. 9-11:

"Residence is largely a matter of intention. (*Lankford v. Gebhart*, 130 Mo. 621). This intention is to be deduced from the acts and utterances of the person whose residence is in issue. Here by a most solemn written admission made in the very will by which the property was devised to defendants, decedent said that his residence on the 12th day of April, 1912, was at 'Marshall, Saline County, Missouri', and that his former residence had been 'Pueblo, County of Pueblo and State of Colorado;' which admission plainly indicated both an abandonment of a former or old residence and the acquisition of a new one. (*Johnson v. Smith*, 43 Mo. 499). There is not a scintilla of proof that decedent ever had a residence in but two states. He was born in Missouri. He went to Colorado, remained there about thirty years, and then in April, 1912, before his death in the December following, came back to Saline County, Missouri, where his relatives live, made his will, thereafter visited divers places where he had financial interests, till September, 1912, when he came back to Saline County, and there remained at the house of his niece till he suddenly died in December, 1912.

The only contention that is made whereon is bottomed any conflict in the evidence which would serve to make applicable here the rule of reliance upon the lower court's finding, is upon decedent's statement to his nephew Walker that he (decedent) 'had to vote in Missouri'. Clearly this is no contradiction,



for manifestly decedent had never had a domicile in Missouri since he left it thirty years before, until he came back and made his will in April, 1912. He could not vote in November, 1912, for the very simple reason that he had not been domiciled in Missouri for one whole year. So he could truthfully have made the statement attributed to him and yet have been at his death a resident and even a citizen of Missouri. In short, the statement made to the witness Walker by decedent proves nothing, and since the solemn admission made in writing made out a prima facie case for plaintiff, the judgment should have been for plaintiff, unless some evidence came in on the part of defendants which was contradictory to it. A reference to all of the evidence offered by defendants, which in fairness we set forth in the statement, discloses that nothing whatever was offered by defendants to disprove the prima facie case so made out by decedent's solemn written admission contained in his will.

\* \* \* \*

It has been held here, in conformity with the rule elsewhere, that there is often a distinction between the word 'residence', which is used in the applicatory statute (Sec. 309, R.S. 1909), and the word 'domicile'. (cases cited) If this distinction should, mayhap, exist in this case it would open up an interesting question, which we do not find it necessary to pass on here."

#### CONCLUSION

It is the opinion of this department that residents or citizens of Missouri who are members of Federal Transient Camps are entitled to vote in the coming election providing they possess the necessary qualifications and intend to make the county or precinct in which the camp exists their residence.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General



TOWNSHIP CLERK:-Section 12293,-12298, inclusive, or other sections of Chapter 86, R. S. Mo. 1929, do not require Clerk to itemize individual warrants in making report.

35  
February 27, 1934.



Mr. George F. Ballew,  
Township Clerk,  
Hale, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Just a little information if you please. In making the statement to the Township Board and the citizenry of the Township of receipts and expenditures is it necessary that that should be an itemized account for every individual warrant? Thank you."

Chapter 86, R. S. Mo. 1929, deals with Township organization. Sections 12293 to 12298, inclusive, define the duties of Township Clerk. We find no section in the article defining the duties of the Clerk which provides as to just how the report to the Township Board and the citizens should be made. In the absence of any direct statutory provision requiring a detailed itemized account to be filed, we do not believe it would be necessary, in making the report, to list each individual warrant separately. However, as a practical matter, for the enlightenment of the Court, as well as the public who read the statement, an itemizing of the individual warrants would be advisable. Such is the course adopted by the County in making its report, but such detailed statement is required by statute.

It is therefore the opinion of this Department that in view of the absence of any statutory provision requiring the itemizing of each individual warrant, such is not legally necessary, but that as a practical matter the report would better accomplish its purpose were a detailed report made.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

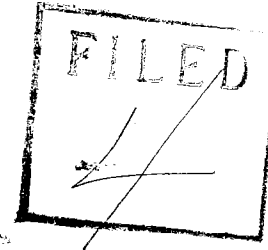
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Attorney General.

FWH:S

82-2  
TAXATION: Collection of delinquent city taxes under Senate Bill  
84 in cities.

5-21  
May 16, 1934.



Hon. B. H. Bailey  
City Clerk  
Rock Port, Missouri

Dear Mr. Bailey:

We herewith acknowledge receipt of your request  
for an opinion of this office on the following matter:

"The City of Rock Port would appreciate a  
little information in regards to proper way  
to handle delinquent real estate taxes.

It is the opinion of the Mayor that under  
the recent legislation in regard to delin-  
quent taxes, that the City Collector make  
a list of all such taxes and turn over to  
the County Collector, who adds to his list  
and after publishing lists, sells to highest  
bidder.

However, the County Collector refuses to  
accept such list from our City Collector.

What should the City do? If we do not turn  
over a list of delinquent taxes to County  
Collector and he then sells the County Tax  
receipt, and after the period of time allowed  
by law the owner of tax receipt gets a tax  
deed to the property just where will the City  
be?"

It is our opinion that your action in the collection  
of delinquent city taxes is determined by your classification  
as a city. If you are a city of the third or fourth class,

Hon. B. H. Bailey.

-2-

May 18, 1934.

and if my memory serves me correctly you are, your County Collector is correct in refusing to accept your lists of delinquent taxes, as under the law it is the duty of the City Collector to proceed to collect such taxes in the same manner and at the same time that the County Collector proceeds to enforce the payment of delinquent state and county taxes.

We have heretofore rendered an opinion to the State Tax Commission in which we express our views as to the procedure to be followed in the collection of delinquent city taxes for the first, second, third and fourth classes and for towns and villages. I am glad to forward you a copy of the portion of the opinion dealing with this subject.

If this does not assist you in determining your procedure I should be very glad to have you call upon us for further information.

Respectfully submitted,



HARRY G. WALTHER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM

CORPORATIONS - FOREIGN:

SECRETARY OF STATE:

Secretary of State can not issue a license to a foreign corporation without statement of such corporation as to its capital stock authorized in Missouri.

9-2 Rec 4598 R.S. 1927  
August 31, 1934



Honorable James A. Barks  
Securities Commissioner  
Jefferson City  
Missouri

Dear Sir:

This department acknowledges receipt of your letter dated July 21, 1934, as follows:

"We will appreciate your opinion with reference to the new code authority corporations.

These corporations are usually formed in Delaware. They have no capital stock and say they are organized for profit yet they want to qualify in Missouri and set up in this state divisional code organizations.

We have one called "Divisional Code Authority Retail Solid Fuel Industry Division 31 Incorporated." It states in its Articles of Association that it has no capital stock and is a non-profit corporation, that its purpose is to act as code authority in the retail solid fuel industry.

Our question is the method of qualifying in Missouri and what first should be charged if they can qualify or whether they would be required to use the same forms and pay the same fees that other foreign corporations are required to do in business under provisions of Section 4598.

We will appreciate your opinion in this matter."

August 31, 1934

Attached to your letter is the certificate of incorporation of the Divisional Code Authority Retail Solid Fuel Industry, Division No. 31, Inc., organized under the laws of the State of Delaware, with the articles of agreement of such corporation attached thereto.

1.

The third paragraph of such articles of association of the corporation in part is,

"The nature of the business, or objects or purposes to be transacted, promoted or carried on are:

To act as the Divisional Code Authority for Division No. 31 of the Retail Solid Fuel Industry as provided in the Code of Fair Competition for the Retail Solid Fuel Industry, approved by the President of the United States on February 14, 1934, (hereinafter referred to as 'the Code'), to further effectuate the policies of the National Industrial Recovery Act, approved by the President of the United States on June 16, 1933, and to administer the Code within Division No. 31 of the Retail Fuel Industry; and to possess and exercise all of the authorities, powers and duties, including the power of delegation, conferred upon Divisional Code Authorities for the Retail Solid Fuel Industry by the Code, or by any supplement thereof or amendment thereto, or by the National Code Authority for the Retail Solid Fuel Industry created under the Codes. \* \* \* \* "

It is further provided that the corporation has the power to acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description, in any state, district, territory or colony of the United States and in all foreign countries, subject to the laws of such state, district, territory, colony or country. It is provided that the corporation is further empowered to borrow and raise

money for any of the purposes of the corporation and to receive contributions and assess and collect fees, dues and other payments as may be provided for in the Code and by the by-laws of the corporation.

In the fourth paragraph of the articles of association it is provided:

"This corporation shall be a membership corporation and shall have no capital stock. The corporation is not organized and shall not be conducted for profit. The membership shall consist of members of the Retail Solid Fuel Industry, except that one such member may be from within or without the said Industry."

By the tenth paragraph of the articles of association the corporation reserves the right to amend, alter, change, or repeal any provision contained in the articles of association, in the manner now or hereafter prescribed by the laws of the State of Delaware for the amendment of certificates of incorporation, upon the vote of at least two-thirds of the members entitled to vote.

2.

Section 4598 Revised Statutes 1929 requires that

"Every company incorporated for the purpose of gain under the laws of any other state, territory or country \* \* \* shall file in the office of the Secretary of State a copy of its charter or articles of association\* \* \* and \* \* \* shall make and forward to the Secretary of State\* \* \* a statement sworn to of the proportion of the authorized capital stock of such corporation which is represented by its property located and business transacted in Missouri\* \* \*. Such corporation shall be required to pay into the state treasury upon the proportion of its authorized capital stock represented by its property and

Honorable James A. Barks

-4-

August 31, 1934

business in Missouri, incorporating tax and fees equal to those required of similar corporations formed within and under the laws of this state, with an additional ten dollars as a fee for issuing the license authorizing it to do business in this state\* \* \* \* \*."

While it is true it is stated in the articles of association that the corporation is not organized and shall not be conducted for profit, but it is apparent that the corporation intends to engage in a general business and it is not proposed that its purposes are either charitable or benevolent.

#### CONCLUSION.

Since the proposed articles of association do not set forth a capital stock upon which fees against same could be based, the Secretary of State is without authority to issue the proposed foreign corporation a license, by virtue of any of the provisions of the constitution and laws of the State of Missouri, and such is the opinion of this department.

We are returning you your inclosures herewith.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

Inclosures



Law 1933 p. 410

January 29, 1934



Mr. Orville M. Barnett  
University Attorney  
University of Missouri  
Columbia, Missouri

My Dear Mr. Barnett:

In response to your request for an opinion of this office respecting the construction of the State Purchasing Agent Act as applied to the University of Missouri, we render you an opinion on the following questions:

First - That the duties and powers of the Purchasing Agent extend only to appropriations made by the General Assembly. It would seem that Section 4, of the Act necessarily leads to that conclusion.

Second - That the provisions of the Act, properly construed, exempts printing contracts and printing purchases entered into or made by the boards of educational and eleemosynary institutions. That the Legislature has recognized that printing for the various institutions named should be left to the judgment and discretion of the several boards is clearly indicated by Section 13999 R. S. Mo. 1929. Further Section 2, of the Act of 1933, expressly indicates that printing and printing contracts should be distinguished from purchases or contracts for the purchase of ordinary needs and supplies.

Third - That expenditures through purchases made from Federal funds received by the Board of Curators for use of the University, and from trust funds, gifts and other items of that character are not subject to the authority of the State Purchasing Agent, because of the character of the funds and because of the further fact that they are earmarked by the donor or covered by directions

and instructions under the terms of the law or grant creating the fund."

We shall treat your inquiries in the order named.

I.

PURCHASING AGENT ACT APPLIES  
ONLY TO EXPENDITURE OF FUNDS  
APPROPRIATED BY GENERAL ASSEMBLY.

The State Purchasing Agent Act found at page 410 Laws of Missouri 1933, is a comprehensive act intended to concentrate all state buying through one agency, to place all such buying on the basis of competitive bids, and to place such purchasing on a cash basis. However, there are certain limitations upon the operation of the Act. One of these limitations arises from a mandatory requirement of the Act. Section 4 reads as follows:

"No department shall make any purchase except through the Purchasing Agent as in this Act provided. The Purchasing Agent shall not furnish any supplies to any department without first securing a certification from the auditor that an unencumbered balance remains in the appropriation and allotment to which the same is to be charged and that an unencumbered balance remains in the fund from which payment is to be made, each sufficient to pay therefor. The Purchasing Agent shall be liable personally and on his bond for the amount of any purchase made without such certification and the auditor shall be liable personally and on his bond for the amount of any false certification."

From the foregoing requirement it is apparent that before the purchasing agent can act in taking bids or making contracts to purchase supplies for any department he must act upon a certification of the State Auditor that there remains an unexpended balance in the appropriation for that department for that purpose. It is accordingly apparent that the act would not operate upon any purchases not made by virtue of an appropriation of the General Assembly, as the purchasing agent is not authorized to make any purchases without such certification. Accordingly, by this requirement

The act has excluded from its terms any purchase made by the department from funds which were not appropriated to that department by the Legislature.

II.

STATE PURCHASING AGENT ACT, WHEN  
PROPERLY CONSTRUED, DOES NOT APPLY  
TO UNIVERSITY OF MISSOURI.

Although your inquiry concerns itself only with the printing contract of the University we found ourselves confronted with a constitutional provision respecting the control and management of the University. In other words, upon deeper investigation we arrived at the conclusion that the statutory provision as found in Chapter 115 R. S. Mo. 1929, and Section 2 of the Purchasing Agents Act were not entirely controlling so far as the University of Missouri was concerned. Section 5 of Article XI of the Constitution of Missouri provides:

"The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State university shall be vested in a Board of Curators, to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate."

The above constitutional provision is a direct mandate to the General Assembly to aid and maintain the State University by the appropriation of funds for its support whenever the condition of the public school fund will permit. It likewise is a constitutional guarantee that the management and control of the University shall be in the Board of Curators. Needless to say, in the event of any conflict between these constitutional provisions and the state purchasing agent act, the act must give way to the constitutional provisions. We shall first consider whether or not the University is a department within the meaning of the Act. Section 11 of the Act defining the terms therein used provides in part as follows:

"The term 'department' as used in this act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agencies of the state."

The Supreme Court of Minnesota in the case of State ex rel. University vs. Chase, State Auditor, 230 N. W. 951, determined that the University of Minnesota was a state institution or agency of the State within the meaning of the law establishing a Commission of Administration and Finance, whose duties were closely akin to that of the State Purchasing Agent in this State. At page 952 the Court stated:

"That the university is a state institution, in the legal as well as the colloquial sense, admits of no doubt. In Regents v. Hart, 7 Minn. 61, it was said that the board of regents is a public corporation, a 'trustee or agent' of the state with a 'specified and limited powers' for use in a 'particular manner for a given end.' That language was construed in State ex rel. Smith vs. Van Heed, 125 Minn. 194, 145 N. W. 967, as recognizing the University to be a 'public institution' \* \* \* 'merely an agency of the state to exercise certain limited and specified powers.' "

Having determined that the State University is a department within the meaning of the State Purchasing Agent Act we are confronted with the interpretation which is to be given the word "government" as used in the constitutional provision hereinbefore referred to.

In examining the decisions of other states we find this identical situation arose in the State of Minnesota. A few years ago a law was passed in that state establishing a department of Administration and Finance. This act worked a radical, drastic and farreaching change upon the State Government. It was intended to draw within its provisions all of the activities of the State respecting the expenditure of state funds, except insofar as restrained by constitutional limitations. See State ex rel. Filler vs. Rines, 239 N. W. 670, 1. c. 671. In the Chase case supra, the board of regents of the University brought a suit against the State Auditor to require him to issue a warrant in payment of a group insurance for all of the employees of the University. This expenditure had not been authorized by or in accordance with the Act providing for the Department of Administration and Finance. In determining this case the Court considered the constitutional provision respecting the University. The University of Minnesota was established under the territorial laws of 1851. Section 4 of the Act provided:

"The government of this university shall be vested in a board of twelve regents."

When the territory was admitted to statehood the constitution of the state confirmed and perpetuated this provision. The Minnesota Courts in determining the construction to be placed upon the above provision held it synonymous with control and management, stating l. c. 956:

"The people were the 'corporators of this institution of learning' and 'by their Constitution, conferred the entire control and management of its affairs and property' upon the board of regents. Weinberg v. Regents, 97 Mich. 246, 254, 56 N. W. 605. All that power having been put in the regents, none of it remained to be exercised by any other body - not even the Legislature itself.\* \* \* \*"

And at page 957 stated:

"With the policy we have nothing to do - except that, recognizing the mandate of the Constitution, we must give it effect as litigation before us furnishes the occasion and imposes the duty of deciding which of two conflicting laws we must enforce, the paramount rule of the Constitution or the subordinate law of the Legislature. The Constitution of the state has declared, in effect, that the management of the University shall be, until the people themselves say otherwise, in a relatively small, slowly changing board, chosen for their special fitness for an interest in the work. The early working of the plan did not justify it. The board was considered so large as to be cumbersome and the method of its election 'a most pernicious one'. Forty Years of the University of Minnesota, Johnson, 26. But whatever or however just the criticism, the purpose of the Constitution remains clear. It was to put the management of the greatest state educational institution beyond the dangers of vacillating policy, ill-informed or careless meddling and partisan ambition that would be possible in the case of management by either Legislature or executive, chosen at frequent



intervals and for functions and because of qualities and activities vastly different from those which qualify for the management of an institution of higher education."

The Supreme Court of Minnesota held that by Constitutional provision the management and control of the State University had been vested in the board of regents. See also Fanning et al. vs. University of Minnesota, 236 N. W. 317. West vs. Board of Trustees of Miami University et al. 181 N. E. 144.

Our own Supreme Court has had occasion to discuss the meaning of the word "government" as used in this section. In the case of State ex rel. vs. Board of Curators of the University of Missouri, 267 Mo. 598, the Court considered the power of the General Assembly to enact legislation providing for additional departments of the State University. In determining that the power to govern did not include the power to create the Court stated on page 619:

"\* \* \* The real question therefore, is whether the exclusion of legislative authority arises by necessary implication from the word "government" as employed in section 5 of article 11. As stated in the beginning, the words of the Constitution must be given their natural signification in the connection in which they are used. The primary meaning of 'government' according to the Century Dictionary and Encyclopedia is 'guidance; direction; regulation; management; control; as, the government of one's conduct.' Its primary meaning, according to Webster's New International Dictionary, is: 'Act or fact of governing; exercise of authority in regulating the action of something; control; direction; rule; regulation; specif. the direction of affairs of state; the ruling and administration of a political body.' \* \* \*

We direct particular attention to the use of the word "management" as one of the synonyms of government. But before leaving the above case we wish to remark that the issue there determined was the distinction between the power to manage and control that which is in existence and the power to create. In our opinion this decision is not controlling of the issues here involved.

In Words and Phrases, 3rd Series, we find "government" to be defined:

"Thus, 'management' means administration, control, etc. and one of the synonyms of management is 'government.' City vs. Howard 119 Mo. 41. l. c. 46."

In Webster we find management defined as:

"Act or art of managing; the manner of treating; directing, carrying on or using, for a purpose; conduct; administration; guidance; control; management of state affairs.\* \* \* \* \*  
a business dealing; negotiation."

In the case of State ex rel. McDowell vs. Smith, Auditor, not yet reported, the Court considered the constitutional provision which provided that the State Highway Commission should "acquire material" for the construction of the State Highways. The Court remarked:

"The grant conferring this power contains no delegation to the legislature or authority for legislative delegation of that power or any part of it to any other state officer or agent.\* \* \*  
It need only be noted that the negotiation for purchase by advertisement for bids, the acceptance of the bid and the entering accordingly into a contract in writing are parts of the transaction and together constitute the purchase, and that the commission cannot be shorn of any part of its plenary discretion and power in the premises."

In the foregoing case the Court held that the power to acquire included the power to advertise for bids or negotiate for them, to accept such bid as was lowest and best, and to make a contract accordingly. So in the instant case it is our opinion that the word "government" means the management and control of the University and, as was held by the Minnesota Supreme Court, preserved in the Board of Curators the power of purchasing supplies, which could not be divested by the Purchasing Agent Act.



## III.

EXPENDITURES OF TRUST FUNDS, GIFTS  
AND OTHER DONATIONS UNDER THE CONTROL  
OF THE BOARD OF CURATORS.

While it is apparent from our foregoing statement that the expenditures of such funds should in no way be construed to be in the State Purchasing Agent, there is still the question as to whether or not these funds are required to be deposited in the State Treasury under the provisions of Senate Bill 124 found at page 414, Laws of 1933. Portions of this act read as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. . . . provided, that in the case of the state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

In the first place, the only funds required to be deposited are those which are received "by virtue of any law or rule or regulation made in accordance with any law." It is apparent that most donations or gifts could in no way be included within this phrase. Also, by the specific wording of the Act, we find that all such gifts, donations or grants are particularly excluded from the operation of the Act. We direct attention to the extracts from this law hereinbefore quoted.

Mr. Orville M. Barnett.

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January 29, 1934.

CONCLUSION.

It is the opinion of this office that the State Purchasing Agent Act does not modify or effect the expenditures of University funds by the Board of Curators.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

COUNTY COURTS - A County Court is without power to consolidate  
TAXES, - general revenue levy with county road and bridge  
levy; must make separate levies for each.

February 22, 1934



Hon. R. Wilson Barrow  
Prosecuting Attorney  
Macon County  
Macon, Missouri

Dear Sir:

Your request of February 2, 1934, to the Public  
Service Commission for an opinion has been referred to  
this office. Your request is as follows:

"Mr. W. A. Tibbs, our local County  
Clerk, since the new Budget Law has  
taken effect, has been desiring to  
merge our county Common Fund and Road  
& Bridge tax levies which previously  
have been 33¢ and 20¢ respectively  
into one Common Fund levy for both  
purposes of 50¢. Our Macon County  
Common Fund tax levy for last year  
was 33¢.

In your opinion, would this combin-  
ing of tax levies and increasing of  
the common fund levy itself 17¢ cause  
difficulties in the County with the  
utility companies, because of Section  
9873, R. S. Mo. 1929? Could the  
utility corporations substantiate their  
claims that such action would increase  
the total taxes in any one fund for any  
one year in excess of 10% and there-  
fore render same unlawful?

We are looking into this matter but  
would appreciate an expression of your  
attitude about what our position would  
be. Personally, I have advised the

#2 - Hon. R. Wilson Barrow

County Clerk to keep his tax levies divided and to proceed as in the past in this County."

We understand your letter to present the question of whether or not the County Court may make one tax levy to cover both the ordinary levy made for county purposes and the levy ordinarily made for county road and bridge purposes.

Under the provisions of Section 9873 R. S. Mo. 1929, which closely follows the limitations prescribed by Section 11 of Article 10 of the Missouri Constitution, a maximum rate of taxation is fixed in all counties of this state "for county purposes". Out of this levy for county purposes is to be paid the usual and ordinary expenses of the county, including the six classifications found in the new budget law, Laws 1933, p. 340.

As a part of the levy for "county purposes" authorized under Section 9873, the County Court shall levy a tax of not more than 20¢ as a road tax, which tax shall be placed to the credit of the "county road and bridge fund".- Section 7890 R. S. Mo. 1929. This money collected as taxes for county, road, and bridge purposes is to be spent by the County Court in its discretion. Section 7867 provides:

"All taxes derived from the levy authorized by section 7890, R. S. 1929, are hereby appropriated to the use of the county court in each county where levied, to be used at the discretion of said court for the construction and maintenance of roads and bridges located within the confines of the county highway system herein provided for as well as all other roads and bridges in such county."

In State ex rel. v. Wabash Railway Co., 3 S. W. 2d, 378 (1928), the court held that the levy of taxes for county road purposes was a levy coming within the meaning of the term "county purposes" as used in Section 9873.

Even though a levy for county road and bridge purposes constitutes part of the levy authorized by the Constitution and

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by statute for "county purposes", the funds derived from each source should be kept separately. In this connection, the county road and bridge fund must not be confused with the special road and bridge fund authorized by Section 7891 R. S. Mo. 1929. The special road and bridge fund tax does not come within the term "county purposes" as used in Section 7893. - State ex rel. v. Cooperage Co., 295 S. W. 78 (1927).

It is now well settled that in this state taxes can only be levied for public purposes and disbursed for the purposes collected, subject to exceptions made by the statutes. In this connection we call your attention to the provisions of Section 12,167 and Section 12,168 R. S. Mo. 1929.

Section 12,167 R. S. Mo. 1929 provides as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Section 12, 168 R. S. Mo. 1929 provides as follows:

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

It would appear that under the provisions of Section 12,171 it is the duty of the County Treasurer to keep the moneys

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the separate funds and to pay warrants drawn on that fund only when there is sufficient money in the fund to pay the warrant presented. The Legislature provided a penalty against the County Treasurer for the violation of this provision - Section 12180.

Section 9873 limits the amount of revenue that a county may receive in succeeding years, and provides:

"the county court shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any county court or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year."

It is, therefore, the opinion of this office that a County Court is without authority to increase its levy for county purposes in excess of this ten per cent limitation, and is without authority to combine the general revenue levy and the levy of taxes made for county road and bridge purposes. Each levy should be made separately and the money used for the purposes for which it was levied. To allow one levy to be made in lieu of the general revenue levy and the levy for county road and bridge purposes would permit the County Court, in some instances, to increase the rate of levy for general revenue purposes more than ten percent, in violation of the provisions of Section 9873. Any balances left in a special fund which are

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no longer needed for that purpose may be transferred by the County Court to the general revenue fund of the county. Section 12167.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE



ELECTIONS:

Under Section 10267a not necessary for the Board of Election Commissioners to print ballots for the Socialist Party in the County of St. Louis.

June 28, 1934

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Baur & York  
Attorneys at Law  
516-518 Stat National Life Building  
Four North Eighth Street  
St. Louis, Missouri



Gentlemen:

This Department acknowledges receipt of your letter of June 15, requesting an opinion based on the facts contained in your letter, as follows:

"The Secretary of the Socialist Party of the County of St. Louis has asked me to write you for an opinion concerning the election laws, in order that the said Party may not lose their place on the ballot this coming November. Briefly the facts are these:

The membership of the Socialist Party met in Convention and nominated their candidates. The filing fee was paid by the candidates to the proper Party officials and the declaration of intention with the receipt for the filing fees has been filed with the Board of Election Commissioners for the County of St. Louis.

The persons in charge of the office of the Board of Election Commissioners state that as an act of economy, and since all of the Socialist Party candidates have been nominated, it would not be necessary to have ballots of and for the Socialist Party printed and at the election polls on the Primary Election Day. While the

June 28, 1934

Socialist Party is at no time in favor of the needless expenditure of money, the question arises from the wording of the various statutes on elections, whether or not, in the event that the Socialist Party has no ballots in the Primary Election, therefore, they would receive no votes in the Primary, hence might not be entitled to be placed on the ticket in November.

Will you kindly give us your opinion respecting the above?"

Section 10267 Revised Statutes Missouri 1929 governs the manner of preparing the tickets for the Primary Election and the manner of voting. In 1933 the General Assembly of Missouri added a new section designated as Section 10267a, at page 238 of the Laws of Missouri 1933, said section being as follows:

"Whenever any person shall have filed as a candidate for nomination upon a party ticket which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the state."

You state in your letter that the candidates of the Socialist Party have filed their declarations, paid the filing fees and except for the above quoted section would be entitled to have ballots prepared representing their Party.

June 28, 1934

The question arises mathematically whether or not the Socialist Party cast a total vote of five per cent or more of the total vote cast for Governor in 1932. The approximate total vote cast for Governor in the 1932 General Election is 1,597,979, the total vote cast by the Socialist party in the same election is approximately 10,921, thus it is readily ascertainable that the Socialist Party in the State of Missouri or in your county cast less than five per cent of the total vote for Governor.

CONCLUSION.

Assuming that ten per cent of the voters voting in the County of St. Louis at the last General Election of 1932 have not petitioned requesting that ballots be printed for the Primary Election for the Socialist Party, we are of the opinion that no ballots should be printed for the Socialist Ticket in the coming Primary Election.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney General,

APPROVED:

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ROY MCKITTRICK  
Attorney General

OWN:LC

ELECTIONS - Judges of election may be appointed, even though a member of their family be a candidate for county office or central committee.

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June 29, 1934.



Miss Lula May Barry, Chairman  
Grundy County Democratic Central Committee  
Trenton, Missouri

Dear Madam:

This department acknowledges receipt of your letter of June 28, 1934 containing the following request for an opinion:

"Please give me an opinion on whether an individual of one family can act as Judge or clerk of an election, with another member of the same family a candidate for a county office, or a candidate for county committee."

We assume that your question involves the Nepotism Section of the Constitution of Missouri, the same being Section 13 of Article XIV, which is as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The manner of appointing judges of the various precincts in an election is the duty of the county court as provided in Section 10206, R. S. Mo. 1929. The pertinent part of said section we are herewith quoting:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties; and there shall be also be provided two ballot boxes for said judges of election, one of which shall be numbered No. 1 and the other numbered No. 2; and it shall be the duty of said judges to select from their number two judges who shall be designated and known as receiving judges, and two who shall be designated and known as counting judges."

Additional judges may be appointed, under certain conditions, in the same manner by the county court under the new Section 10208, Laws Missouri 1933, p. 238, and as it is similar to Section 10206, quoted supra, will not be herewith quoted.

The recommendations and appointments of judges is the duty of the central committee and the manner of making recommendations is contained in Section 10209 R. S. Mo. 1929, which is as follows:

"All judges of elections, appointed under the provisions of this article shall be selected by the county court from a list of persons furnished said court in the form and manner following: The political party that polled the largest number of votes at the last preceding general election and the political party that polled

the next largest vote at said election shall, each, through its central committee, furnish to said county court at least fifteen days before the election, a list of names of persons qualified by law to serve as judges of election, double the number required for judges of said election, from which said list said county court shall, at least ten days before the election herein provided for, select and appoint the number of judges required to hold said election, taking one-half of the judges so appointed from each of said lists: PROVIDED, that for the purpose of determining the political parties entitled to representation on the election board, the county court shall take the vote cast for governor throughout the entire state for the respective parties: PROVIDED FURTHER, that if any political party, through its committee, shall fail to present a list of names as aforesaid, within the time aforesaid, then the said county court may select and appoint the requisite number of judges provided by law for said party."

We call your attention to the fact that the Constitutional provision herein quoted contains the phrase,

" \*shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof,\* "

Miss Lula May Barry

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June 29, 1934.

which said phrase seems to apply to the facts in your case. The candidate for a county office does not, in anywise, make the appointment of his brother as a judge or clerk. The clerks are appointed by the judges of the election, as contained in Section 10211, with the new additional section of 10211, Laws Missouri, 1933, p. 239. Under Section 10209, quoted supra, the central committee recommends a list to the county court, but the appointments are made by the county court and not by the central committee. Hence, a member of the county committee might recommend the appointment of some member of his family, but the actual appointment would be made by the county court.

CONCLUSION.

We are of the opinion that a member of a family of a candidate for a county office or for a county committee may be appointed judge or clerk of a primary or general election. We are of the further opinion that the members of the county court could not appoint a member of their own family judge of the election. The conclusion of this opinion is based solely from the legal aspect of the question, but as to the moral effect or public policy, we will leave to your own discretion.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General



ROADS: Taxability of public roads and inclusion of land  
on which such roads are located in Assessor's books.

11-30

Nov. 27 1934



Hon. W. A. Bassman,  
Assessor of Cole County,  
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from  
you under date of November 14, 1934, such request being in  
the following terms:

"I would like to have your opinion as to  
whether the acreage deeded to the State  
of Missouri for highway purposes should  
be deducted from the farms and if so  
should it be carried on the tax books in  
the name of the State. In some instances  
a warranty deed is given and in others a  
right-of-way. Should both be treated in  
the same manner? I would also like to know  
if farm-to-market road deeds are in the  
same class as the State highways."

I

PUBLIC ROADS NOT TAXABLE

Where land is conveyed to the State or to a county  
or a municipality for use as a public road, whether by warranty  
deed, quit-claim deed or deed of the right of way, such property,  
so long as it is used as a public highway, is exempt from taxa-  
tion under the Constitution of Missouri, Article I, Section 6,  
which provides in part as follows:

"The property, real and personal, of the  
State, counties and other municipal corp-  
orations, and cemeteries, shall be exempt  
from taxation."

It is possible that upon the abandonment or vacation  
of the public highway, the land so used might again become pri-  
vate property. Compare State v. Culver, 65 Mo. 607 (1877) where  
the Court at page 609 says:

2. Hon. W. A. Bassman.

November 27, 1934.

"There can be no question but that defendant, as the owner of the land over which the road passed, retained the fee and all rights of property not inconsistent with the public use of it, and if the use of the highway in question had been abandoned or lost he would be entitled to his original unencumbered dominion over it."

In such an event the exemption would, of course, cease.

## II

### LAND USED AS PUBLIC HIGHWAY NOT TO BE CARRIED ON TAX BOOKS.

Land which because of its use as a public highway is exempt under the Constitution from taxation need not be carried on the Assessor's books, which under the law are only to contain taxable property. This is demonstrated by R. S. Missouri, 1929, Section 9778, which provides as follows:

"The assessor, on examination and comparison of the list of property delivered by individuals, and the list of lands furnished by the secretary of state, and said maps and plats, and after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the taxable property in his county, to be called the assessor's book."

The above conclusions would apply to all public roads. Where a private road exists the owner of the land would be liable to pay taxes on the land constituting such road even though the owner of adjoining land might have an easement of necessity or otherwise over such road.

In conclusion it is our opinion that land which has been conveyed by any kind of deed to the State, a county or a municipality, for use as a public road, is exempt from taxation so long as it is used as a public road, and that such land while so used is not to be carried on the books of the Assessor of the county in which such land is situated.

Very truly yours,

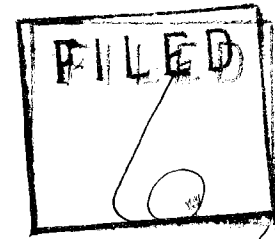
EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

NEPOTISM:-Grain Sealer, whose duties are defined in House Bill No. 79, is subject in his appointment to the provisions of Section 13 of Article XIV of the Constitution of Missouri.

1-15  
January 9, 1934.



Mr. D. F. Bennett,  
Prosecuting Attorney,  
Plattsburg, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Our County Clerk has ask that I write you, and secure your opinion relative to Nepotism applying to the appointment of a Grain Sealer under the law just passed by the present Legislature.

I have advised him that Nepotism would in my opinion apply, and if I am right I would like your confirmation, and if wrong your opinion so I may file the same with the Clerk."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Section 3 of House Bill No. 79, passed by the 57th General Assembly in Extra Session, provides as follows:

"Local supervision of this act shall be vested in the County Court of the County wherein a license has been issued; under the direction of the Commissioner of Agriculture, as provided in Section 2. Whenever a license has been issued by the County Clerk, as herein provided, the County Court shall submit to the Commissioner of Agriculture of the Missouri State Department of Agriculture, the name of some person or

January 9, 1934.

persons who shall, subject to the approval of the Commissioner of Agriculture, act as local Sealer, and every such Sealer shall have the same authority, with respect to the provisions of this act and the rules and regulations thereunder, and the enforcement thereof, as an officer of the peace."

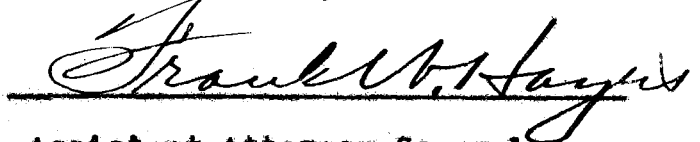
Section 4 of House Bill No. 79, passed by the 57th General Assembly in Extra Session, provides as follows:

"The Sealer shall be a resident of the county and shall furnish bond for the faithful performance of his duties, in such an amount as shall be determined by the Commissioner of Agriculture. Such bonds and the sureties thereon shall, in every case, be subject to the Commissioner's approval and be deposited with him. He shall also qualify by taking an oath similar to that required by public officers."

Then follows a number of sections defining the duties of the Grain Sealer and how he shall perform them.

In view of the foregoing constitutional provision we are of the opinion that no person can be appointed Grain Sealer who is related within the fourth degree, either by consanguinity or affinity, to the appointing power. Under Section 3 above, the County Court shall submit to the Commissioner of Agriculture the name of some person to act as local Sealer. The County Court being the appointive power, subject to the approval of the Commissioner of Agriculture, is certainly a public officer of a political subdivision of the State. The Grain Sealer renders service under the terms of this statute to a political subdivision of the State and we, therefore conclude that a Grain Sealer, under Section 3 of House Bill No. 79, comes under the prohibition of Section 13 of Article XIV of the Constitution, and that the appointment of any Grain Sealer who is related within the fourth degree to the members of the County Court, or any member so exercising his right to name him, would be in violation of the above constitutional provision.

Very truly yours,



Assistant Attorney General.

APPROVED:

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Attorney General.

LIQUOR CONTROL ACT : Corporations may be licensed, and Section 27  
not applicable to them.

*Letter to Mr. Becker 1933-34, p. 20*

February 2, 1934.



Hon. E. J. Becker  
Supervisor of Liquor Control  
State Capitol  
Jefferson City, Missouri

Dear Mr. Becker:

This is to acknowledge receipt of your request for an opinion as to whether or not a corporation may legally be issued a license under the Liquor Control Act of Missouri, passed by the 57th General Assembly, in Extra Session.

I.

When analyzing the various provisions of the Liquor Control Act it is well to keep in mind the language of the Supreme Court of Missouri, en Banc, in the case of State v. Parker Distilling Company, 236 Mo. 219, l. c. 274:

"When we bear in mind the foregoing idea, that the liquor traffic in this state has no legal rights, save and except those expressly granted by license and the statute under which it is issued, then we can more clearly see that the state may impose such conditions, burdens and regulations as it may deem wise and proper, and no one who engages therein has a right to complain thereof."

Likewise, it must be born in mind that the Liquor Bill that was truly agreed to and finally passed consisted of a Committee Substitute for Senate Bills Nos. 6, 21, 22, 23, 24 and 25, thus intimating that many bills were introduced which contained various conflicting provisions later incorporated into the act as passed.

The enacting clause provides this:

"providing for the issuance of licenses for the manufacture, brewing and sale, both at wholesale and retail of intoxicating liquor;"

Note the language of the Supreme Court of Missouri, en banc, in *State v. Public Service Commission*, 34 S. W. (2d) 486, 1. c. 488, when it was construing inharmonious provisions of the statute then before it for determination:

"From the historical sketch presented by the appellants, there were heated debates as to whether the act should be made to include urban busses such as the appellants operate. It is entirely possible that the members of the General Assembly who voted for the bill did not all understand its provisions alike. That some parts of it represented the views of some of the lawmakers and other parts met the demands of other members of the General Assembly. We are therefore obliged to interpret the law as it reads and reconcile its inharmonious provisions if possible. We may keep in mind the rule quoted from Cyc. by appellants, to the effect that, in interpreting relative or qualifying terms, they must be construed as relating to the last antecedent instead of extending them to include others more remote 'unless such extension is clearly required by consideration of the entire act.' 26 Cyc. p. 1125."

Also, the language of the Supreme Court of Missouri in *Bowers v. Kansas City Public Service Company*, 41 S. W. (2d) 810, 1. c. 815:

"If these provisions stood alone, there might be merit in plaintiff's contention. The entire statute must be considered in determining the purpose of the legislature in enacting it."

Also, in *De Jarnett v. Tickameyer*, 40 S. W. (2d) 686, 1. c. 687 (Mo. Sup.):

"All provisions of the statute should be considered in determining the meaning of any particular portion thereof, and effect given to every part of the statute where it is possible to do so."

And in *Logan v. Matthews*, 52 S. W. (2d) 989, 1. c. 992, the Supreme Court of Missouri, en Banc, said:

"The two sections of the statute should be read and construed together. In construing a statute, the court must, if possible, give effect of the whole and every part thereof, provided the interpretation reached is reasonable and not in conflict with the legislative intent."

And in *Dodd v. Independence Stove and Furnace Co.*, 51 S. W. (2d) 114, 1. c. 118 (Mo. Sup.) the court said:

"Appellant's construction would render one of said descriptive adjectives practically superfluous, and the legislature will not be presumed to have intended using superfluous or meaningless words in the statute."

Moreover, in construing a statute the evil sought to be remedied and the benefit intended to be conferred thereby should be considered \* \* \* such statutes should be construed, so far as their language permits, with a view of effectuating their beneficent purpose."

Therefore, in interpreting the provisions of the Liquor Control Act, we do so, keeping in mind the intent of the Legislature, reading the act as a whole, and harmonizing conflicting sections therein, if possible, so as to give effect to each of the provisions of the act.

## II.

An examination of the statutes of Missouri will show that the words "person or persons" include corporations, co-partnerships, and other entities; and, likewise, in the Liquor Control Act the Legislature specifically defined the word "person" to include partnership, syndicate, association, corporation etc. We quote Section 43-a:

"The term 'person' as used in this Act shall mean and include any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservator, or other officer appointed by any State or Federal Court."



Thus when the word "person" appears in the provisions of the Act, said word is susceptible of meaning "person", as defined, and it does not require judicial definition or construction to include associations, joint stock companies, syndicates, partnerships, corporations etc.

The word "person" appears throughout the Liquor Control Act, namely, Sections 5, 8, 9, 13-a, 15, 15-a, 18, 19, 21, 21-a-1, 22, 22-a, 27 and 44-a. In some instances the term "any person", "every person", "no person" and "every person" are used, and in other instances this phrase is used, "Any person, firm, partnership or corporation"; thus showing that when the Legislature used the word "person", in said Act, that it did not intend to limit same in every instance to the generally accepted definition thereof, namely, that of an individual.

To illustrate our contention, we quote a few of the sections:

Section 8, in part provides:

"No person shall possess intoxicating liquor within the State of Missouri unless the same has been acquired from some person holding a duly authorized license etc."

Section 18 provides:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license."

Section 19, in part provides:

"\* \* \* Before any application for license shall be approved the Supervisor of Liquor Control shall require of the applicant a bond, to be given to the state, in the sum of Two Thousand Dollars, \* \* \* to be approved by the Supervisor \* \* \*, conditioned that the person obtaining such license shall keep etc."

Section 21, in part provides:

"No person, partnership, association of persons or corporation shall manufacture or distill \* \* \* shall sell or give away, or offer for

sale, at wholesale or retail, \* \* \* blend intoxicating liquor, \* \* \* shall import intoxicating liquor etc. "

The Supreme Courts of other jurisdictions, in disposing of the question involving the right of a corporation to deal in intoxicating liquor, held that the word "person" included corporation. We herewith cite and quote therefrom:

In Audubon Country Club v. Commonwealth, 183 S. W. 911 (Ky.), the following was said:

"License to keep a tavern outside of an incorporated city or town shall be granted only to persons who are prepared with houses, bedding, stoves and provender sufficient to accomodate the public and shall not be granted to anyone unless the keeping of a tavern at the place proposed is necessary for the accomodation of the public nor until the applicant shall take an oath in open court that he in good faith intends to keep a tavern for the accomodation of the public."

It will be observed that the above section authorizes the granting of a tavern license to persons who are prepared etc.

Section 457, Kentucky Statute, defines the word 'person' as follows: 'the word "person" may extend and be extended and be applied to bodies politic and corporate, societies, communities and the public generally, as well as individuals, partnerships, persons and joint stock companies. The words "corporation" "company" may be construed as including any corporation, company, person, persons, partnership, joint stock companies or associations.'

It would seem reasonably clear from the statute quoted that it was not the legislative purpose to give to the word 'person' in the statute authorizing the issuing of tavern licenses any more restricted meaning than in other familiar statutes, there being nothing to indicate that such exceptions should be made in the case of persons applying for tavern licenses.

"We therefore conclude that a corporation may be granted a tavern license and that the statutory oath may be taken on its behalf by its authorized officers. This view is fortified by the following authorities from other states on this question:

Connecticut Brewing Company v. Murphy, 81 Conn. 145, 70 Atl. 450; Enterprise Brewing Co. v. Grimes, 173 Mass. 262, 53 N. E. 855; People v. Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230; In Re Brewing Co. License, 226 Pa. 56, 75 Atl. 29; In re Prospect Brewing Co., 127 Pa. 523, 17 Atl. 1090; In Re Lynch Co., 1 Boyce, Vol. 74, 75 Atl. 41."

The Idaho Supreme Court in Ada County v. Boise Commercial Club, 118 Pac. 1086, said:

"The appeal involves the construction and application of Section 1506. This section reads as follows:  
'It shall be unlawful for any person, by himself, by agent or otherwise, to sell spirituous, malt or fermented liquors or wines, to be drank in or about the premises where sold, without having first procured a license and given a bond.'

Section 16, Revised Codes, among other things provides: 'The word "person" includes a corporation as well as a natural person.'

It is urged by counsel for appellant that inasmuch as the Legislature fails to include the term 'incorporated club' in the provisions of Section 1506, therefore, the Legislature did not intend to include such corporation within the provisions of said section. It is unnecessary to classify the character or kinds of corporations which would be required to secure a license to sell intoxicating liquors to be drank on the premises, unless the Legislature had in mind the exclusion of a particular kind or character of corporation from the operation of the statute, because it had previously been enacted and had long been a law when Section 1506 was enacted that the word 'person' included all corporations and whether the conclusion is inevitable and if the Legislature intended to exclude any particular kind of corpora-

tion they would have so declared in the section. Therefore, when the Legislature said 'any person' they intended that the words should mean the same as defined by the code and should include corporations, and if so, as clubs are corporations, the word 'person' included such club."

Note the language of the Illinois Court in *People ex inf. v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230, 1. c. 231:

"Appellant further insists that as the pleadings show that the license was issued to a corporation it was issued without authority of law; the argument being that under our dramshop act the license can not issue to a corporation. Section 1, of Chap. 131, Hurds R. S. 1905, page 1946 provides that the words 'person or persons', as well as all words referring to or importing 'persons', may extend and be applied to bodies politic and corporate as well as individual."

The court held in this case that a dramshop license may be issued to a corporation as well as an individual.

Also, the court in Massachusetts declared this, in *Enterprise Brewing Co. v. Grimes*, 53 N. E. 855:

"It is true that corporations can not be imprisoned and that one of the penalties provided by law is imprisonment, and that in some cases imprisonment is imperative. This, however, is one circumstance to be weighed with many in arriving at the true meaning of the statute. Corporations can be indicted, convicted and punished under the law by fine and by forfeiture of license. They can act only through natural persons, and the natural persons who do the illegal acts of the corporation may be punished themselves also and by the full penalties of the statute. If, as we construe the law, corporations are included in its provisions and its authorizations the impossibility of the imprisonments was no doubt considered by the legislature and in view of the liability of the natural persons who could be punished for the illegal acts of the corporation the legislature was content to provide the punishments which it did."

See also: Conococheague Club v. State, 81 Atl. 602 (Md);  
In Re D. W. Lynch Co., 75 Atl. 41 (Del.);  
In Re Pollard, 17 Atl. 1087  
In Re Prospect Brewing Co., 17 Atl. 1090.

The above cases sustain the proposition that corporations may be granted licenses the same as persons under statutes similar to the Missouri Liquor Control Act.

### III.

Section 27, of the Liquor Control Act of Missouri, provides:

"No person shall be granted a license hereunder, unless such person is of good moral character and a native born or naturalized citizen of the United States of America, and a qualified legal voter and taxpaying citizen of the county, town, city or village wherein such person seeks a license hereunder; and no person shall be granted a license or permit hereunder, whose license as such dealer has been revoked, or who has been convicted, since the ratification of the Twenty-first Amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs or has employed in his business as such dealer, any person whose license has been revoked or who has been convicted of violating the provisions of any such law since the date aforesaid."

A similar section, appearing in the former dramshop law of Missouri, has been construed by our Supreme Court and by the St. Louis Court of Appeals. In the case of State ex rel. v. Scott, 96 Mo. App. 620, the court had before it an application for a license on the part of a partnership. Bland, P. J., said (l. c. 623-24):

"Section 2993, Revised Statutes 1899, restricts the granting of a dramshop license to a 'law-abiding, assessed, taxpaying, male citizen above twenty-one years of age.' There is no authority to grant a license to a partnership as such, in the partnership name, as was done in this instance. Where the application is made by a co-partnership the application



should be made in the name of the individual members of the partnership. Each member should sign the application and he should fill the statutory requirements, that is, he should be a law-abiding, assessed, taxpaying, male citizen above twenty-one years of age, and the license should be issued to the individuals doing business under the partnership name."

And in the case of *State v. Missouri Athletic Club* (Sup. Ct. Mo.), 170 S. W. 904, the Supreme Court had before it for consideration the application of an incorporated social club. Judge Walker said (l. c. 910):

"Despite all of this, and leaving out of consideration any discussion as to its moral or hygienic effect, as out of place in a legal opinion, we find that the framers and interpreters of our law, from the dawn of our jurisprudence, both here and elsewhere, have regarded liquor as an Ishmaelite among the products of man's ingenuity, and have placed its sale under the ban of carefully worded restrictions. It no sooner creeps out of the still, the winepress, or the brewing vat than the exciseman demands tribute for its being, and before it can be vended taxes ad valorem and for the privilege of sale must be paid; but this is not all, upon leaving the warehouse of the wholesaler, the retailer, before dispensing it, must take out a license as a dramshop keeper. Section 7188, supra. This is an individual privilege, which can only be granted to 'a law-abiding, assessed taxpaying male citizen above twenty-one years of age.' Section 7191, R. S. 1909; *State ex rel. v. County Court*, 66 Mo. App. loc. cit. 100; *State ex rel. v. Page*, 107 Mo. App. loc. cit. 216, 80 S. W. 912. And it cannot be granted to a partnership (*State ex rel. v. Scott*, 96 Mo. App. 620, 70 S. W. 736), nor to a corporation, because the latter does not possess the requisites expressly required of an applicant, viz, age, character, and sex--reaching its majority when its incorporation is affected, its age cannot be measured by years; being intangible, it can have no character; and for a like reason, more materially expressed, having no body to be kicked, it is sexless. It therefore lacks three out of the four statutory requisites essential to a qualified applicant for a dramshop license.

"By necessary and inevitable exclusion, therefore, it being impossible, under the law, for social clubs to procure licenses, and the sale of liquor being a limited privilege, no implied or other power exists authorizing corporations of this character to make sales. Further, an implied power in a corporation to do an unlawful act cannot exist; and if liquor be sold without license over a mahogany table, in glass of finest crystal, under a silken canopy in a palace, it is none the less a crime, under a fair and impartial interpretation of the law, than an unauthorized sale over a deal board in a hovel that would put 'Shanahan's ould Shebeen' to shame."

However, we respectfully submit that the above constructions of the ancient dramshop law are not binding on us here in the construction of the Missouri Liquor Control Act for the reason that the two acts are strangers in substance and spirit and completely lacking in uniform contemplation.

The dramshop law of Missouri provided for the regulation of dramshop keepers and defined a dramshop keeper as "a person permitted by law, being licensed according to the provisions of this chapter, to sell intoxicating liquors in any quantity, either at retail or in the original package, not exceeding ten gallons." Under this law the dramshop keeper was required to make application for a license and "if the (county) court shall be of the opinion that the applicant is a law-abiding, assessed taxpaying male citizen above twenty-one years of age, the court may grant a license for six months."

By another section of this law it is provided "that no person, firm or corporation, or agent, employee or representative of any person, firm or corporation engaged in the manufacture of malt or spirituous liquors, or the sale as a wholesaler or jobber of malt or spirituous liquors shall be licensed to keep a dramshop". Except for this section, there is no mention of corporations in the act relating to dramshops. Under a separate article entirely licenses are provided for manufacturers, rectifiers, wholesale and retail dealers other than dramshop keepers. However, the construction of the Supreme Court in the Missouri Athletic Club Case had to do only with the dramshop law proper.



The construction of the Supreme Court with reference to the dramshop law should not be construed as binding on us here; for while the section of the law is similar to the one here under consideration, nevertheless, the whole act with which it was construed was an entirely different act. We must of necessity here construe Section 27 with reference to the Liquor Control Act of Missouri and not with the ancient dramshop law.

"It is an elementary rule that the construction of a statute is to be made from all its parts together and not of one part only by itself. Endlich on Interp. of Stat. Sec. 35."

Litson v. Smith, 68 Mo. App., 1. c. 402.

The Liquor Control Act of Missouri makes notice of corporations throughout its pages. In Sections 10, 18, 21, 22, 22-a, 31, 32 and 33 corporations are noticed and provisions made for their regulation. In addition, Sec. 43-a provides:

"The term 'person' as used in this act shall mean and include any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservator or other officer appointed by any State or Federal Court."

This is a clear expression on the part of the Legislature that a corporation should be within the meaning of the act. No such provision, however, is to be found in the dramshop law construed by the Supreme Court.

It is recognized that a corporation does not possess good moral character; nor is it a native born or naturalized citizen; neither is it a qualified legal voter. Therefore, Section 27 must be construed as not being applicable to corporations in so far as the section requires information as to the above, and that the information required was only intended to be required of a single individual.

If a corporation be held not within the contemplation of the act, certain sections of the law would be meaningless. For example, in Section 22 it is provided:

"For every license issued to any railroad company, railway sleeping car company or dining car company operated in this state, for sale of all kinds of intoxicating liquor, as herein defined, at retail for consumption

on its dining cars, buffet cars and observation cars, the sum of one hundred (\$100.00) dollars per year. Provided that said license shall not permit sales at retail to be made while said cars are stopped at any station; and provided further, that a duplicate of such license shall be posted in every car where such beverage is sold or served, for which the licensee shall pay a fee of one (\$1.00) dollar for each duplicate license."

We may safely assume that the courts will take judicial knowledge that railroad companies, railway sleeping car companies and dining car companies are, in most instances, incorporated. Certain it is that they are not operated by a single individual. If then, the law does not contemplate the issuance of licenses to corporations, this provision of the law is useless.

As a further indication of the intent of the General Assembly to include corporations, it is provided in Section 18:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license."

This is an unambiguous expression on the part of the General Assembly, and we conclude, therefore, that it was the intention of the General Assembly to provide for the issuance of licenses to corporations subject to the provisions of the act. "This in accord with that well established rule, consistent with reason, that a statute should be so construed as to render it operative." State v. Long (Mo.) 204 S. W., 1. c. 916.

"The purpose for which a law was enacted is a matter of prime importance in arriving at a correct interpretation of its parts. A statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one which will carry out and the other will defeat such manifest object, it should receive the former construction. People v. Hinrichsen, 161 Ill. 223, 43 N. E. 973."

Lewis - Sutherland - Stat. Const., Vol. II, p. 711.

## IV.

A corporation may do only that which is provided in its charter or included in its corporate powers.

In *Julian v. Kansas City Star Co.*, the Supreme Court of Missouri, en Banc, 209 Mo. 35, said this relating to corporations (L.c. 67):

"The corporation is an artificial being, possessing only the rights that the State has granted and bearing the burdens that its charter imposes.

The State in issuing the charter may impose its own terms, and, when accepted, the corporation is bound by the terms; if terms are imposed in the charter that result in placing the corporation in a position less favorable than individuals would occupy in relation to the same subject, the corporation cannot complain because it is one of the conditions on which its right to be a corporation was granted."

In *Bassen et al. v. Monckton et al.*, 272 S. W. 404, l. c. 407, the Supreme Court of Missouri said:

"A corporation is an artificial person, and has no natural rights."

Also, in *Wyatt v. Stillman Institute*, 260 S. W. 73, l. c. 76, the Supreme Court of Missouri said:

"A corporation as to its character is to be judged by the objects of its creation as expressed in its charter."

In *State ex inf. v. Missouri Athletic and St. Louis Clubs*, supra, the Supreme Court of Missouri used this language (l. c. 598 et seq.):

"It will be recalled that Chief Justice Marshall said in the *Dartmouth College* case (4 Wheat. (U. S.) 518, 636) among other things that have become maxims, that 'a corporation being the mere creature of the law possesses only those properties which the charter of its

creation confers upon it, either expressly or as incidental to its very existence;' and the Supreme Court of Minnesota has held that the same rule is applicable to articles of incorporation which are analogous to a charter (Gould v. Fuller, 79 Minn. 414); so that by express judicial declaration the doctrine as to the limitation of the powers of a corporation within the instrument of its creation has been made to apply to every class of incorporated association, whether it be organized for business, moral, intellectual or benevolent purposes or to promote social intercourse. Incidental powers, as the term is employed by Chief Justice Marshall, mean such as are directly and immediately appropriate to the execution of the powers expressly granted, and exist only to enable the corporation to carry out the purpose of its creation. (Hood v. Railroad, 22 Conn. 1; People v. Chicago Gas Trust Co., 130 Ill. 268; State ex rel. v. Newman, 51 La. Ann. 833.) Such powers are not invoked by respondent, however, and their discussion is superfluous. But the implied powers are of moment. They are defined to be those possessed by a corporation not indispensably necessary to carry into effect others expressly granted, and comprise all that are appropriate, convenient and suitable for that purpose, including, as an incidental right, a reasonable choice of the means to be employed in putting into practical effect this class of powers. Broad as this definition seems, and it is the resume of an exhaustive review of many cases by eminent text-writers, we find it nowhere more lucidly and comprehensively considered than by Burges, J., speaking for this court in State ex inf. Crow v. Lincoln Trust Co., 144 Mo. 1. c. 583 et seq., where, after reviewing our own cases on this subject, as well as those of other jurisdictions, the substance of the court's conclusion is that it is a settled rule of construction that legislative grants of power to corporations, public or private, only include such rights and powers as are clearly comprehended within the words of the act of their creation or may be derived therefrom by necessary implication, regard being had to the objects of the grant;

and if ambiguities or doubts arise, the terms used in the statute must be resolved in favor of the public; that if the powers conferred are expressly enumerated, this, under the maxim of *expressio unius, etc.*, implies the exclusion of others not enumerated. Graves, J., speaking for this court in *Hanlon Mill. Co. v. Miss. Valley Trust Company*, 251 Mo. 1. c. 575, said, in substance; That a corporation possessed only such powers expressed in or that may be fairly implied from the statute of its creation; that powers enumerated imply the exclusion of all others; and that any doubt or ambiguity respecting the possession of any particular power arising out of the terms of the statute is to be resolved against its possession, or, as Burgess, J., aptly said in the *Lincoln Trust Co. case*, *supra*, 'It must be resolved in favor of the public.'

## V.

## CONCLUSION.

From the above and foregoing, we conclude, and it is our opinion, that Section 27 of the Liquor Control Act is only applicable to an individual (the word "person" includes partnership as well as individual) seeking a license to manufacture, distill, blend, sell, deal, handle etc., intoxicating liquor, as defined in the Act. And if a license is granted to an individual he is subject to the other provisions and requirements of the Liquor Control Act.

Having thusly determined the above, it follows that Section 27 is not a barrier, limitation or condition precedent in the obtaining of a license by a corporation. However, in order for a corporation to manufacture, distill, blend, sell, deal, handle etc., intoxicating liquors, as defined, the right to do so must be permitted in the corporations charter and be a part of its corporate powers.

It is our further opinion that the Supervisor of Liquor Control shall promulgate rules, regulations, qualifications, conditions, terms and requirements upon which the corporation shall be licensed. And when a corporation possesses the qualifications under the Act, and those required by the Supervisor, a license may be granted to it. The corporation is subject, however, to the other provisions (requirements) of the Liquor Control Act, including Section 27 insofar as it is applicable.

Respectfully submitted,

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JOHN W. HOFFMAN, Jr.

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COVELL R. HEWITT

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JAMES L. HORNOSTEL

Assistant Attorneys-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

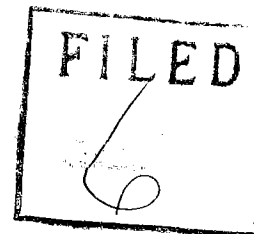
JLH:EG



ELECTIONS: Absentee voters may vote in the city primary and at the city general election by absentee ballot providing laws of Mo. 1933 p. 219-224 are complied with.

*Sec 10181 R.S. Mo. 1929*  
*2-24*

February  
Twenty - third  
1934



Board of Election Commissioners,  
Kansas City, Missouri.

Attention: Mr. Fred Bellemere, Chairman

Gentlemen:

This department is in receipt of your letter of February 21 requesting an opinion as to the following state of facts:

"Referring you to page 219 of the Laws of Missouri 1933 referring to absentee ballots, I would like an opinion as to whether or not people absent from Jackson County on the date of the primary election, March 6th and on the general election, March 27th, can vote by absentee ballot, as provided in said laws."

Section 9, Art. VIII of the Constitution of Missouri provides:

"Qualified electors absent from the state on military or naval service shall, and qualified electors absent from their counties but within the state may, be enabled by law to vote at general or special elections."

This provision of the Constitution of the State of Missouri provides that the Legislature may enact laws for absentee voters. Sec. 10181, R.S. Mo. 1929 provided:

"It shall be lawful for any employee of any railroad company, traveling salesman, student in any college of the state, state officer, or other person, being a qualified elector of the State of Missouri, who may, on the occurrence of any general or primary election be unavoidably absent from the county in which he resides and is a qualified elector therein, because



-2-

his duties, occupation or business requires him to be elsewhere within the state on the day of such general or primary election, to vote for county, district and state officers, members of the Legislature, members of Congress and electors for the President and Vice-president of the United States at any voting precinct within the State of Missouri where he may present himself for that purpose, on the day of said general or primary election, under the conditions and regulations hereinafter prescribed."

It will be noticed that this section made no provision for city elections; however, in 1933 Section 10181 was repealed and a new section enacted in lieu thereof, expressly providing for absentee voting in city elections. Section 10181, Laws of Missouri 1933, p. 219 provides:

"Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter provided."

In view of the foregoing, it is the opinion of this department that absentee voters may vote in the city primary election and at the city general election by absentee ballot, providing the laws relating to absentee voters as found in Laws of Missouri 1933, pages 219-220-221-222-223 and 224 are complied with.

Respectfully submitted,

APPROVED:

ROY McKITTRICK,  
Attorney General

JOHN W. HOFFMAN, Jr.,  
HARRY G. WALTNER, Jr.,  
Assistant Attorneys General

JWH:AH

BOARD OF ELECTION COMMISSIONERS: Authority to remove judges  
and clerks of election.

2-27  
February 26, 1934.



Board of Election Commissioners,  
Kansas City, Missouri.

Gentlemen:

Attention: Mr. Fred Bellemere, Chairman

Acknowledgment is herewith made of your letter of February 21, 1934, requesting the opinion of this office on the following matter:

"We have been confronted with a question that I would like to have your opinion on. As you know, there is an election, both primary and general, in progress under our City charter for city officials. The primary is March 6th and the general election is March 27th.

There has been a movement started here, known as the National Youth Movement and also as the Citizens Party. It has been called to our attention, by both of the dominant political parties that there are some instances where Judges and Clerks that hold commissions have deserted their respective parties and are now declaring themselves to be non-partisan. In your opinion, under the law, would the Board of Election Commissioners be justified in removing these Judges and Clerks who have, as above stated, deserted their parties in this election?

I trust that you will let me have this opinion immediately as the time is very short and the question involved seems to be of importance to a large number of people here."

Article XVI of the Charter of Kansas City, Missouri refers to nominations and elections. A portion of Section 417 reads as follows:

-2-

"All elections provided for by this charter, whether primary elections, elections for the choice of officers, or elections for the submission of questions to the voters, shall be conducted by the election authorities prescribed by law; and the provisions of the election laws of the state shall apply to all such elections, except as provision is otherwise made by this charter."

From this quoted section it is apparent that the city Charter provides that the election authorities prescribed by general statutory provisions shall conduct the city election. No attempt is made in any section or chapter of the city Charter to establish the qualifications of election officials. This has been left entirely to the Legislature. Some few matters have been specifically provided for in the Charter, such as the form of the ballot to be used in the municipal elections, but the charter provision in this respect is limited to the requirement that "ballots used in nominating and electing the Mayor, members of the Council and judges of the Municipal Court shall be without party mark or designation. \*\*\*\*\*" (Sec. 421)

This provision respecting the form of the ballot and providing that no party designation shall be placed thereon cannot in any way be construed as varying or affecting the qualifications required of persons appointed to act as judges or clerks of election, the Charter making no provision whatsoever for the appointment or qualification of judges, clerks or other officials of election. Absent any such provision, we are referred by the Charter itself (Sec. 417) to the general provisions of the election laws of the state applying to elections in cities of the class of Kansas City to find the governing provision on this question.

The general statutes respecting registration and elections in cities having over 100,000 inhabitants are found in Article XVII of Chapter 61, R.S. Mo. 1929. Section 10567 of this Article provides for the appointment of a Board of Election Commissioners for such cities, to be composed of four members of which the

"chairman and secretary shall be of opposite politics, "

and

"two of said election commissioners  
\*\*\*\*shall be members of the leading political party, politically opposed to that which the Governor belongs."

And that in case of a vacancy

"the appointee shall be a member of the same political party to which the person whom he may succeed belongs,"

and that in no case shall

"more than two members of said board  
belong to said political party."

Sections 10571 and 10572, R.S. No. 1929 provide for the selection of judges and clerks of election and require, among other things, that they be citizens of the United States and entitled to vote in the same at the next general election; that they

"must either reside or be employed or  
have a place of business in the ward  
in which they are selected to act, "

and that they shall not have been

"convicted of an offense punishable  
by imprisonment in the penitentiary, "

or

"confined in any county jail, work house,  
penitentiary, or house of correction  
within five years prior to such election,"

and that

"two judges and one clerk shall be  
selected from each of the two political  
parties of the State holding the highest  
number of votes at the last general  
election to serve in each precinct, who  
shall be recognized members of the party  
from which selected."

Section 10586 respecting registration, provides the procedure to be followed in registering voters, and in the second paragraph provides:

"Two of said judges of election of  
opposite politics shall have charge of  
the registry books, and shall make the  
entries therein required by this  
article \*\*\*\*\*"

Section 10589 provides the duties of the clerks of election acting as precinct canvassers, as follows:

"The two clerks of election of opposite  
politics, designated by the board of  
election commissioners, shall be con-  
stituted canvassers, \*\*\*\*\*"

and further provides that if a clerk fails to appear to canvas the precinct designated,

"the chairman or secretary of the board  
of election commissioners of the same  
political faith as the canvasser failing

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to appear, or, after appearing, failing to complete said canvas, shall immediately appoint a canvasser of the same politics as the one absent or failing to act."

Section 10602 provides for the filling of any vacancy upon the Board of Registry, and provides that the Board of Election Commissioners shall appoint

"a judge of the same political party as the judge causing the vacancy, and to be selected by the commissioners of that party, \*\*\*\*\*"

Section 10603 provides for the delivery of poll books, ballot boxes, etc. on the day prior to the election, and provides in respect to the two registers:

"one being received by the representative of one leading political party, and the other by the representative of the other leading political party. The ballot box of such precinct shall be delivered to one of said judges \*\*\*\*\* and the key or keys shall be given to a judge of the opposite party."

Section 10606 provides for the filling of a temporary vacancy in the position of judge or clerk, and provides that in such case

"the judge or judges present and if none present, then the clerk present, representing the same political party as the person causing the vacancy, shall immediately fill, for the time, by the selection of a member of their party the place of such absent judge or clerk or vacancy \*\*\*\*\*"

and provides further that

"the board of election commissioners upon receiving the notice of vacancy, shall appoint to fill the same a judge or clerk or deputy election commissioner of the same political party as the judge or clerk causing the vacancy, such appointee to be selected by the commissioners of that party. \*\*\*\*\*"

Section 10609 provides for the endorsement of the ballots before delivery to the elector and provides:

"Before delivering any ballots to the electors the two judges of opposite politics \*\*\*\*\* shall write their names or initials upon the back of the ballots. \*\*\*\*\*"



Section 10619 provides for the proclamation of the count of the ballots and their return to the Commissioners, and provides that the voted ballots shall be placed in the ballot box and that

"one of the judges, who shall represent the opposite political party from the one taking the ballot box, shall receive and hold the key thereto, "

and that

"said two judges of opposite politics, shall immediately after the completing signing of the statements \*\*\*\* to together \*\*\*\* and deliver said ballots to said election commissioners."

From these various provisions which are found from the beginning to the end of Article XVII, it is very apparent that the purpose of the entire enactment was that the elections in these cities be conducted under the supervision of authorities appointed by the Board of Election Commissioners, and that these authorities be and remain at all times representatives of the two leading or major political parties of the State. It is certainly as essential that these authorities remain as representatives of their respective parties as it is that they be representatives at the time of their appointment. It is the established rule of this State that such a condition creates a non-partisan board of election.

In the case of State ex rel. Harvey v. Wright, a decision of the Supreme Court En Banc, reported in 251 Mo. 325, the Court had under consideration a section of the statutes practically identical with Section 10567, R.S. Mo. 1929, and had before it the question as to whether or not a member of the Progressive Party was qualified to act as a Commissioner of Election in the City of St. Louis under the requirement that two members of the board should be members of the leading party politically opposed to that to which the Governor belongs. This section contained many similar provisions to the ones hereinbefore referred to as to the character of the board provided for in this section. The Court stated (l.c. 333):

"The Act of March 27, 1911, now under discussion, by the first sentence thereof, recites as the object of the enactment, that 'there is hereby created a non-partisan board of election commissioners for each city governed by the provisions of this article'. Other provisions of this amendment of 1911 accentuate and make plain this legislative intention so to create such a non-partisan board. Clearly such a board could not be created and certainly perpetuated, unless the political eligibility of the members thereof were written into the law, and the Legislature so wrote this intent into this law in clear and unmistakable words."

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And at page 336 the object of the Act is stated in the following words:

"The point chiefly sought was a non-partisan board of election commissioners."

And again, in considering the legislative intent in the enactment of this section, we find the following remarks (l.c. 338):

"We are not able to see any reason why the provision contained in the first clause of the section under consideration should be invalid for any inherent or self-contained defects. This provision, in order to certainly secure a non-partisan board, in conferring on the Governor the privilege of appointment, coupled with the grant of the power of appointment certain conditions of qualification in the appointee, to-wit that two of them shall be from one party and two from another. Does this militate in any wise against that provision of our Constitution (Art. 3, Constitution of 1875) which requires the segregation of our tripartite governmental functions? We think not. We have seen that as to officers such as election commissioners, the Constitution has lodged in the Legislature the power of authorizing others to make appointments, or (that which is tantamount) the right of delegating by statute to some one else the ministerial power of appointment. It says in effect to the Governor: 'We have provided for certain officers whom we desire to have appointed; will you appoint them for us; ' doing so, in such wise as will effectuate our express intent of securing a non-partisan board?'"

By these statements of our Supreme Court, it is apparent that this is not a bi-partisan board representing only the two parties to which its representatives have affiliated themselves, but that it is a non-partisan board to guarantee a fair election to all candidates, regardless of party affiliations.

The position of our Supreme Court on this issue is in harmony with decisions in other jurisdictions. In the well reasoned opinion of Judge Keeler in the case of *Miner v. Marsh*, 129 Atl. 547, the Supreme Court of Connecticut in passing upon this same issue said (l.c. 550):

"Registrars of voters have numerous statutory duties in connection with the preliminaries of elections and their subsequent orderly conduct. The legal provision that in each town there shall be



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two is unquestionably based upon the experience that there will always be two parties of predominant size. Yet in the various towns of the state there have often been more than two political parties and in the larger towns for years ordinarily this has been the case, yet the law has not provided for as many registrars as there might be parties, being evidently founded upon the idea that two persons of opposed political preference acting accordingly to law, would suffice to protect the interests of all political groups."

Without question, judges and clerks of election are in exactly the same position as are the election commissioners. Similar provisions are required, to-wit, that there must be an equal division of the appointees between the two leading political parties. It is therefore our opinion, judging from the decision of the Supreme Court hereinbefore referred to, that the statutes require the appointment of two judges and one clerk from the Democratic Party and from the Republican Party to serve at the city elections.

That such a condition is a qualification or requisite to the filling of this position, has likewise been settled by the Wright Case, supra, wherein the Court considered the consideration to be given the requirement of the political faith of the appointee. At page 339 it is stated:

"The condition attached of belonging to a certain indefinitely designated political party is a mere condition of qualification, no different in its last analysis from both the statutory and constitutional requirements of age and learning, and residence, as applied to a judge of a circuit court, and other courts of record (Constitution, Sec. 26, Art. 6; Sec. 3843, R.S. 1909); \*\*\*\*\* Such conditions as to differing political faith as a requisite qualification for a membership on one of our many boards is almost the statutory rule rather than the exception. For example, this qualification inheres to the board of curators of the State University (Sec. 11098, R.S. 1909); to the regents of our several normal schools (Sec. 11067, R.S. 1909); to the State Board of Agriculture (Sec. 597, R.S. 1909); to the State Board of Horticulture (Sec. 606, R.S. 1909); to the State Capitol Commission (Laws 1911, p. 108); as we have seen to the Supreme Court Commissioners, and to others, too numerous to mention here. The reason for these several requisites of different party affiliations is the same as that under discussion here, viz: to procure non-partisan boards, in each case."

-8-  
II.

Having determined that one of the qualifications of a judge or clerk of election is that he must be a known representative of one of the two leading parties, we are confronted with the question of what are the two leading political parties within the meaning of Sec. 10572. We first refer to the Wright Case, supra, wherein this identical question was presented. Respondent Wright had been appointed by the Board of Election Commissioners of the City of St. Louis as an admitted member of the Progressive Party. In the national elections the Progressive and the Democratic Parties were the two leading parties; however, in this state the election returns indicated that the Democratic and Republican Parties were the two leading organizations. The Court held that it was the two leading parties in this state who were entitled to representation, stating on page 342 as follows:

"From this we know that the Democratic Party polled in this state at the last general election the greatest number of votes, followed by the Republican Party and the Progressive Party respectively in the order named. The leading party in this state politically opposed to that to which the Governor who appointed respondent belongs, is then the Republican Party, and not the Progressive Party to which respondent belongs."

So that there may be no misunderstanding in respect to those who profess allegiance to a state political party, whether it be Democratic or Republican, and yet in a city election now profess to be supporting a ticket which is opposed to the ticket endorsed by the Democratic and Republican Parties, we unhesitatingly hold that they are members and supporters of the third party. Our position in this is sustained by the Supreme Court of Connecticut and of this State. It so happened that the situation presented in your request is very similar to the situation reported in the case of Fields v. Osborne, 21 Atl. 1070:

"In respect to the first claim, the circumstances attending the origin and history of the 'Citizens' ticket are detailed in the finding. We extract such as are to the purpose. Pursuant to public notice a Republican caucus was held October 4 for the purpose of nominating candidates for the town offices to be filled at the town meeting aforesaid. Immediately after the caucus was organized, a plan for making up a Citizens ticket from candidates of all political parties, was advocated. After discussion it was voted that the Republican caucus adjourn, and that a Citizens caucus be organized. Thereupon, some ten or fifteen Democrats who were present, but had not participated in the proceedings, came forward and acted with the about fifty Republicans who were present, in nominating the Citizens ticket.

-9-

The candidates nominated were Republicans, except those for town clerk, treasurer, and one grand juror, who were Democrats."

In passing upon the issue as to whether or not a political party had been formed, the Court stated (l.c. 1071):

"We are abundantly satisfied from the facts stated in the findings that for the time being, and for the purposes of the election under consideration, and within the meaning of the law requiring the ballots to contain the name of the party issuing them, there was a Citizens Party in Branford. The element of time is not essential to the formation of a legal party. It may spring into existence from the exigencies of a particular election and with no intention of continuing after the exigency has passed. To hold the contrary would be to strike a blow at that independence in political action upon which the good government of a locality may depend."

The Supreme Court of Connecticut in the Miner Case, supra, affirmed this ruling and stated (l.c. 549-550):

"The third claim of the respondents involves the rightful existence of the Independent Republicans as a political party. In the first place, the Independent Republican ticket occupied legally a place upon the official ballot. Those promoting its existence had complied with the law, and had received recognition at the hands of the secretary of state in conformity to the provisions of the statute. But counsel for the respondent insist that the names placed upon the ballot were placed there by persons whose names appeared upon the Republican caucus list and whose petition to the secretary had specifically stated that the signers were Republicans. It is not required that a new party applying for official recognition on the official ballot should issue forth from a cave of adullam, and be composed of malecontents of every political stripe. Further, by one of the provisions of general statutes, those appearing upon the Independent Republican ticket automatically separated themselves from the original Republican organization, each one of them by knowingly becoming 'a candidate for office upon the ticket of another party or organization', different

from that to which each had formerly belonged. The new organization thus formed, even though it had its origin for the purposes of a particular election, without any intention of indefinite continuance, was entitled to privileges of a political party."

In an early North Carolina Case, Mullen v. Morrow, 31 S.E. 1003, passed upon by the Supreme Court of that state at the time of the rise of the Populist Party, a number of election registrars had been challenged for the reason that they did not qualify under the law of that state which provided that the election board "shall appoint one citizen and qualified voter for each of the political parties of and for each election precinct. \*\*\*\*" It appeared that one of the appointees attempted to qualify as a Republican registrar and contended that he was entitled to act as such for the reason that he was a Republican in national politics, although, he was a Democrat in local politics. The Court removing this registrar, stated as follows (l.c. 1004):

"J.P. Wilson says he is a Republican in national politics, but in state and county politics he votes the Democratic ticket. This, in my opinion, disqualifies him as a Republican registrar. It is like a juror, when two parties are on trial in the same case; though he may be favorably disposed as to one of them, if he has formed and expressed an opinion adverse to the other, he would be disqualified."

Our own Supreme Court in passing upon the question as to whether a Progressive Republican could qualify as a Republican under the election statutes, stated in the Wright Case, supra, (l.c. 341-342):

"We have in the record, however, the clear cut charge that respondent is a member of the Progressive Party, as well as his frank admission of the truth of this charge. Can we say in the light of this that respondent is a Republican? Would it not be tantamount to saying that black is white? While appointments to office have been known to change the political complexion of men, respondent stands here solemnly averring that he has not been so affected. Relator inquires with some considerable degree of pertinence whether, if the Legislature had required the appointment of a male to this office and the Governor had appointed and the



Senate had confirmed a female, would 'she' have become a male ipso facto, to the extent of precluding judicial determination of the fact? We think not, though conceding that if the record were silent on this point of party or of sex, a Progressive might be changed to a Republican and a female to a male within the law's purview from the application of the presumption of 'right and solemn performance of a duty enjoined'

We therefore conclude that the Citizens ticket and the organization supporting it is to be considered as any other political organization or party within the purview of the applicable election laws

### III.

We shall now pass to the provision for the removal of such judges as have lost their qualifications and their right to act. At the beginning it should be stated that without question judges and clerks of elections are public officers and the position which they hold is an office. This issue is determined in the case of State ex rel. Mosconi v. Maroney, 191 Mo. 531. In determining this issue the Court stated (l.c. 546):

"It is a part of the functions of state government to provide elections for public officers and to furnish suitable officers for putting in operation such provisions. We have in this cause the relators who have been duly appointed judges and clerks of election in their respective precincts, occupying positions created and conferred by law. Their right and authority to perform the duties incumbent upon them emanates from the legislative grant of the state government. The duration of their terms definitely fixed; their duties plainly marked out, which are of great public importance and clearly for the benefit of the public. The emoluments of the office held by them, as well as certain privileges and immunities, such as exemption from jury service, are fully provided for; hence, it is apparent that in the positions occupied by relators, there are embraced 'the ideas of tenure, duration, emolument, and duties', which are essential requisites in order to constitute the position of judges and clerks of election 'an office' within the well

understood meaning of that term."

Accordingly, such officers can only be removed in accordance with the recognized rules pertaining to the removal of public officials. Section 10567 provides among other things that

"Two of the commissioners of opposite political parties shall have the power on any day of registration, revision of registration or election, to remove any judge or clerk who in their opinion is failing to perform his duty."

This gives the board a summary power to remove a judge or clerk for malperformance or non-performance of duty on registration or election day, but cannot be construed as authorizing a removal at any other time or under any other conditions.

Sections 10573, 10574, 10602, 10608 and 10589 grant certain powers of removal to the Board of Election Commissioners, none of which are applicable here. Possessing only the authority to make the removals provided for in the foregoing sections, the Board is without power to remove judges and clerks for other reasons.

"If notwithstanding the term, provision is made for a removal upon certain conditions, or for certain reasons, there can be no valid removal pending the terms unless such conditions or reasons appear, either presumptively or otherwise."

State ex rel. v. Maroney, supra.

The decision of this case is consistent with the established law in this State and in harmony with the decisions of the Supreme Court of the United States, as first established by the ruling of that eminent jurist, Chief Justice Marshall, in the celebrated case of Marbury v. Madison

The situation in the case here under consideration is analogous to the condition arising in the event an officer has been appointed or elected, one of the requisites being that he be a resident of the district from which he is elected. After election he removes to another county or district and therefore forfeits his office. It would seem that the requirement of residence or place of business in the precinct from which the judge is appointed is a similar qualification to the requirement that he represent the party from which he is chosen.

In the case of Yankey vs. State, 27 Ind. 236, the Court discussed the effect upon the right of Yankey to hold the office to which he was elected, by his ceasing to be a resident of the county. At page 240 we find the following statement:

"Section six of the sixth article of the constitution of Indiana provides that 'all county, township and town officers shall reside within their respective counties, townships and towns, and shall keep their respective offices at such places therein, and perform such duties, as may be directed by law.' If, then, Yankey, in December, 1863, ceased to reside in Clinton county, as alleged, he thereby abandoned and forfeited the office, and it became vacant; and any subsequent claim, or attempt of any one, as Yankey's deputy, to hold the office or discharge the duties thereof, would be without right and a usurpation. See Hedley vs. The Commissioners of Franklin County, 4 Blackf. 116; The State vs. Jones, 19 Ind. 358; The State vs. Allen, 21 Ind. 516." \* \* \* \*

It is the rule that these qualifications are not only required at the time of appointment but that they must continue during the tenure of the office. In the early case of People vs. Mayworm, 5 Mich. 146, the ruling is there stated, 1. c. 147:

"This appointment appears to have been regular. But it is not enough that an officer appointed for a temporary purpose, should show a legal appointment. The usurpation charged is a continuing usurpation, alleged to exist in the month of June, 1857, several months after the commencement of a new statutory term. The rule is well settled, that where the State calls upon an individual to show his title to an office, he must show the continued existence of every qualification necessary to the enjoyment of the office."

This rule is again affirmed in the case of Attorney General vs. Baker, 219 Mich. 829, 1. c. 635:

"A person who has been legally elected and qualified for an office does not necessarily continue therein during the prescribed term. Resignation, ceasing to be a resident, acceptance of an incompatible office, or removal therefrom may terminate his incumbency. Defendant was required to show by his plea the continued existence of every qualification to hold the office he claimed the right to." \* \* \* \*



Having concluded that a forfeiture of office exists and that the board of election commissioners are without statutory authority to remove those claiming the position, we refer to Section 1618 R. S. Mo. 1929. This section provides that an action in quo warranto may be brought against any person who shall usurp, intrude into or unlawfully hold or execute any office or franchise.

One of the more recent cases wherein this section was considered is that of Civic League vs. City of St. Louis, 223 S. W. 891. In that case Henry L. Weeks had been holding the position of Superintendent of Excavations in the City of St. Louis. The city charter provided for an examination to be held and an eligible list to be prepared containing the names of those having the requisite qualifications. One W. J. McKenzie had been certified as eligible but the street commissioner refused to appoint him and retained the defendant Weeks. The Court held that injunction was not the proper remedy to correct the situation and particularly pointed out what is now Section 1618 R. S. Mo. 1929, as the proper procedure:

"The jurisdiction of a superintendent of excavations in the city of St. Louis is coextensive with the boundaries of said city. He has superintending control over all excavations therein. He is paid out of the treasury of said city, and from its funds. His duties relate to the public welfare of said municipality, and we can conceive of no good reason for holding that the provisions of the statute, heretofore quoted, should not apply to this office, as well as to any other office of said city. The statute, supra, affords a speedy and complete remedy, without resorting to a court of equity. Under its provisions, the right of the incumbent to hold the office can be inquired into, and his removal obtained, if he is wrongfully holding same. The fact that the incumbent is holding said position at the pleasure of the street commissioner presents no obstacle in the way of contesting his right to hold the position under above statute. \* \* \* \* \* The above statute is not only sufficient to cover the present case, but it has been the established doctrine of this court from its earliest history that an information in the nature of a quo warranto was a proper remedy to determine the title to an office. \* \* \*"

February 26, 1934.

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In view of the foregoing, it is the opinion of this department that the Board of Election Commissioners has no power or authority to remove judges and clerks of election after they have once been finally appointed except for failure to appear and perform their duties on registration and election days, there being no statutory provision granting this power.

However, if it be a fact that certain judges and clerks of election are no longer qualified to act as they no longer are "known representatives" of the two leading political parties of this state, (affiliation with the two leading political parties of the state being mandatory) then these judges and clerks are unlawfully holding their respective offices and are subject to an appropriate legal action in quo warranto to oust them from their respective offices.

Respectfully submitted,

ROY McKITTRICK,  
Attorney General.

RM:M-H

LIQUOR CONTROL ACT: No license necessary for a druggist to sell intoxicating liquor on prescription; it is unlawful for a pharmacist to refill any such prescriptions.

4-20  
April 12, 1934.



Hon. E.J. Becker,  
Supervisor of Liquor Control,  
Jefferson City, Missouri.

Dear Mr. Becker:

This department is in receipt of your request for an opinion construing Section 4 of the Liquor Control Act of the State of Missouri.

I.

The first question raised in your letter is whether or not Sec. 4 requires all druggists selling intoxicating liquor for medicinal purposes to pay a state license fee of \$50.00 and whether or not this permit gives to the druggist the right to sell intoxicating liquor in the original package.

Section 4 of the Liquor Control Act of Missouri specifically provides as follows:

\*\*\*\*\*And, provided further,  
that nothing in this act shall be  
construed as limiting the right  
of a physician to prescribe intoxicating liquor in accordance with his professional judgment for any patient at any time, or prevent a druggist from selling intoxicating liquor to a person on prescription from a regularly licensed physician as above provided."

This section of the law specifically prohibits any interference on the part of the State with the right of a druggist to sell intoxicating liquor to a person on prescription from a regularly licensed physician. It is therefore the opinion of this department that no license is needed for a druggist to sell intoxicating liquor on prescription; however,

if a druggist desires to sell intoxicating liquor in the original package other than on prescription, a license must be obtained from the Supervisor of Liquor Control.

## II.

The second question raised in your letter has to do with prescriptions for intoxicating liquor.

Sections 4485 and 4486, Laws of Mo. 1933, p. 277, constitute the law in the State of Missouri with reference to prescriptions, and provide as follows:

"Sec. 4485. It shall be lawful for any reputable physician licensed to practice medicine and surgery in this state to prescribe any distilled, spirituous, vinous, fermented or other alcoholic liquor in such quantities and with such frequency and dosage as in his judgment the needs of his patient may require."

"Sec. 4486. It shall be lawful for any registered pharmacist engaged in the retail drug business or employed as a pharmacist in any retail drug store in this state to fill any prescription of any reputable physician licensed to practice medicine and surgery in this state, prescribing for the person named in such prescription any distilled, spirituous, vinous, fermented or other alcoholic liquor."

It will be noticed by reference to these two sections that any distilled, spirituous, vinous, fermented or other alcoholic liquor may be prescribed by the physician, and it is lawful for any registered pharmacist engaged in the retail drug business in any retail drug store to fill any such prescriptions. Sec. 4485, supra, specifically provides that the physician may prescribe intoxicating liquor in such quantities as in his judgment the needs of his patient may require. There is, therefore, no limitation in the laws of Missouri with reference to the quantity of intoxicating liquor that may be prescribed.

In your letter you suggest the following hypothetical case:

"If a person is issued a prescription by a doctor for medicinal purposes, he takes the prescription to the drug store and has it filled, and later gives the number of the prescription to a friend. He goes in the same drug store and gives the number of this prescription and asks the druggist

April 12, 1934.

to refill it. This might be on a Sunday, and the person desiring the whiskey will ask for the number, and also state that it is for medicinal purposes, in accordance with the original prescription. Is it lawful for the druggist to fill this prescription?"

It will be noticed by reference to Sec. 4486, supra, that it is made lawful for registered pharmacists to fill only prescriptions prescribing for the person named in such prescription. It is therefore the opinion of this department that it would be unlawful for a pharmacist to refill any such prescriptions as suggested in your hypothetical case.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

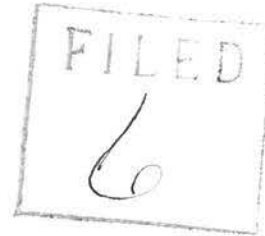
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ROY McKITTRICK,  
Attorney General

JWH:AH

LIQUOR CONTROL ACT: Sec. 11, Art. 2, Constitution of Mo. has no application to a crime being committed in officer's presence; when peace officer has reason to believe that an automobile is being used to transport intoxicating liquors in violation of laws of Mo., his search and seizure of liquors without a search or other warrant is not a violation of Sec. 11, Art. 2, Constitution of Mo.

4-28  
April 24, 1934.



Mr. E. J. Becker,  
Supervisor of Liquor Control,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter requesting an opinion as to the following state of facts:

"There is a great amount of liquor being hauled across from the State of Illinois into the State of Missouri by trucks and private cars at various points along the river; St. Louis, Hannibal, Bowling Green, etc.

"The Prosecuting Attorney at Pike County called the other day and asked if he and the county authorities needed a search warrant in order to search private cars. In our telephone conversation with Mr. Hewitt we were advised unofficially that the county authorities, with the aid of the Highway Patrol, could stop all trucks and obtain information as to where the liquor was consigned in this state, but in regard to private cars Mr. Hewitt was of the opinion that the authorities, even with the aid of the Highway Patrol, could not search and seize, as he said this law had been repealed.

"Will you please give us an official opinion on this matter immediately, as the State is losing a vast amount of revenue, which it justly deserves."



I.

Section 11 of Article II of the Constitution of Missouri has no application to a crime being committed in the officer's presence.

Section 11 of Article II of the Constitution of Missouri provides:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or things, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

Section 4511 of Chapter 31, R.S. Mo. 1929 pertaining to the prohibition of intoxicating liquors in the State of Missouri provides for the issuance of search warrants to enforcement officers; however, Chapter 31 was repealed by the Liquor Control Act of Missouri, Section 44, Laws of Mo. (extra session) 1933 and 1934, page 92, and no provision was made for the issuance of search warrants under the new Act.

The question now remaining is whether or not officers may search premises without a search warrant in order to apprehend people guilty of violating the Liquor Control Act of Missouri.

In the case of State v. Rhodes, 316 Mo. 571, the Court said (l.c. 574, 575):

"While we think the search warrant was void because it failed to describe the place to be searched as nearly as may be, as prescribed by Section 11, Art. 2, of our Constitution, yet the evidence sought to be suppressed was admissible on the theory that the sheriff named in the warrant as executor thereof, before he entered the home of Bill Rhodes, had reasonable grounds or probable cause to, and did suspect, that a felony was being committed therein. That the above rule is apposite is based on the testimony of the sheriff that he smelled liquor and mash before he knocked on the door and while he was ten or fifteen steps from the house on



the private road leading thereto. These facts or knowledge constituted reasonable grounds to suspect that a felony was taking place therein, causing, as we later show, his subsequent entry and that of his deputies to become lawful. That the crime was being committed vested the sheriff with authority to enter, justifying the entry and the arrest without warrant. (McBride v. United States, 287 Fed. 214, affirmed 284 Fed. 416, and certiorari denied, 261 U.S. 614.) That an officer may arrest on probable cause without warrant is shown in McKeon v. National Casualty Co., 216 Mo. App. 507, 270 S.W. 707."

"While we are not unmindful of the provisions of the above section of the Constitution, nevertheless the situation here presented is not embraced within the terms of the section. It has always been adhered to under our form of procedure and theory of government that an officer of the law is clothed with ample authority to arrest a felon while the crime is being committed, and to that end may break and enter a home where he has reasonable grounds to suspect that a felony is then being committed."

The essence of the above doctrine is that a search without a warrant must be based upon probable cause, as well as one made with a warrant and that probable cause consists in a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty. Bedell v. Nichols, 316 Mo., l.c. 881.

It is fundamental that the right to search is incidental to lawful arrest. In the case of State v. Rebast, 267 S.W. 858, the Court said (l.c. 860):

"Being lawfully arrested, the officers had a right to search him and his possessions in the room where he was arrested, and take from him any article which might be used in securing his conviction. State v. Owen (Mo. App.) 259 S.W. 100, 32 A.L.R. 383; Holker v. Hennessey, 141 Mo. 527, loc. cit. 539, 42 S.W. 1090; 39 L.R.A. 165, 64 Am. St. Rep. 524; State v. Laundry (Or.) 204 P. loc. cit. 975, 976; People v. Cona, 180 Mich., loc. cit. 650, 147 N.W. 525;

People v. Kalnin (Co. Ct.) 189 N.Y. 359; Territory v. Hoo Koon, 22 Haw. loc. cit. 602; State v. Fuller, 34 Mont. 12, 85 P. 369, 8 L.R.A. (N.S.) 762, 9 Ann. Cas. 648. The officers had a right to use the information they acquired in making that search in any way which would lead to the conviction of the defendant."

## II.

Where a peace officer has reason to believe, from the use of his senses, that an automobile is being used to transport intoxicating liquors in violation of the laws of the State of Missouri, his search of the automobile and seizure of the liquors without a search warrant is not a violation of Section 11, Article II of the Constitution of Missouri.

In the case of Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, Chief Justice Taft delivering the opinion of the Court, said:

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The 4th Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

\* \* \* \*

"The measure of legality of such seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported."

In the case of State v. Pigg, 278 S.W. 1030 (Supreme Ct. Mo.) the Court said (l.c. 1033):

"We think it clear that, in the circumstances of this case, where the officers detected the odor of whiskey about the automobile, they had reasonable cause to search it without a warrant.

\* \* \* \* \*

"The fact that intoxicating liquor was found in the automobile is proof enough that the search of the car without a warrant was reasonable."

In the case of State v. Loftis, 316 Mo. 878, Judge Walker said (l.c. 880):

"The offense with which the appellant is charged may be said to have been committed in the presence of the officer in that when apprehended the appellant was in the act of transporting the liquor. This being true, and the smell of liquor permeating the nostrils of the officer when he approached the car, he was not precluded from searching the same without a warrant. Where an officer has reason to believe from the use of his senses that an automobile is being used to transport intoxicating liquors, his seizure and search of the same will not be in violation of either the Federal or State Constitution. (State v. Hall, 278 S.W. 1028; State v. Pigg, 278 S.W. 1030; In Re Mobile, 278 Fed. 949; Elrod v. Moss, 278 Fed. 123; Lambert v. United States, 282 Fed. 413)."

#### CONCLUSION

The right to immunity from unreasonable interference with security in person and property is unquestionable. Section 11, Article II of our Constitution was intended to preserve that right; however, the framers of that instrument were also intent upon the proper admission of other governmental functions, among which is the efficacious enforcement of valid laws, to the end that order shall prevail. This aim of government is hardly less important than the preservation of personal liberty, for the latter is obviously dependent upon the maintenance of law and order. State v. Zugrass, 306 Mo. 492.

In construing the right of search and seizure under the Liquor Control Act of Missouri, while we may have recourse to the decisions cited in this opinion as persuasive, nevertheless, it must be remembered that the law under discussion in these decisions made

April 24, 1934.

it a felony to transport intoxicating liquors, while under the Liquor Control Act a violation thereof is merely a misdemeanor. It is fundamental that in the case of a misdemeanor a peace officer may only arrest without a warrant in a case where the misdemeanor is being committed in his presence or view.

The question of "probable cause", as cited in many of the decisions heretofore discussed, is not applicable to the case here under consideration and we are therefore limited in our interpretation of the Liquor Control Act to the following conclusion, i.e., that a peace officer may arrest without warrant any one committing a crime in his presence and view, and if the arrest be lawful, a search of the premises is also lawful, and the evidence there discovered is admissible for a prosecution against the arrested persons.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

LIQUOR CONTROL ACT: If retail dealer sells intoxicating liquor without obtaining license from County Court, it is violation of Sec. 24 of Liquor Control Act. County Court not authorized to license wholesalers, distillers, manufacturers or brewers.

5/24  
May 24, 1934.



Hon. E.J. Becker,  
Supervisor of Liquor Control,  
Jefferson City, Missouri.

Dear Mr. Becker:

This department is in receipt of your request for an opinion with regard to the authority of the respective county courts to assess a license tax against all retail dealers engaged in the business of selling intoxicating liquor in the State of Missouri.

When analyzing the various provisions of the Liquor Control Act it is well to keep in mind the language of the Supreme Court of Missouri En Banc in the case of State v. Parker Distilling Company, 236 Mo. 219, l.c. 274:

"When we bear in mind the foregoing idea, that the liquor traffic in this state has no legal rights, save and except those expressly granted by license and the statute under which it is issued, then we can more clearly see that the state may impose such conditions, burdens and regulations as it may deem wise and proper, and no one who engages therein has a right to complain thereof."

Section 24 of the Liquor Control Act of Missouri provides:

"The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

May 24, 1934.

It will be noticed that power is expressly granted by this section of the Act to the county courts to make a charge for licenses issued to retail dealers. However, the court is not authorized by the Act to license wholesale dealers, distillers, manufacturers or brewers. The charge for the license, however, must in no event exceed the amount provided for in Section 22 of the Act for state purposes.

Section 26 of the Liquor Control Act provides in part as follows:

"Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall revoke the license of said dealer. \*\*\*\*\*"

Clearly, by reason of the power given the county courts by the General Assembly of the State of Missouri, if a retail dealer were to sell intoxicating liquor in the State of Missouri without having first obtained a license so to do from the County Court, it would be a direct violation of Section 24 of the Liquor Control Act.

If these facts be shown, the Supervisor of Liquor Control should, and it is his express duty, by reason of Section 26 of the Act, to revoke the state liquor license held by such person.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH



LIQUOR CONTROL ACT: It is unlawful for holder of permit under Non-intoxicating Beer Act to have or allow another person to have upon premises described in permit, any intoxicating liquor with alcoholic content in excess of 3.2 by weight, and holder of 3.2 permit is prohibited from obtaining license under Liquor Control Act.

131378 + 1315128  
614 Jun - 1933  
June 14, 1934.

Honorable E.J. Becker,  
Supervisor of Liquor Control,  
Jefferson City, Missouri.

Dear Sir:

In connection with recent discussions, we submit to you herewith our opinion on whether or not there is any legal objection to the issuance to and holding by one person at the same time a license to deal with non-intoxicating beer under Laws of Missouri 1933, page 256, and also a license to deal with intoxicating liquors under the Liquor Control Act enacted by the 1933 Special Session of the General Assembly.

There is no provision in the Liquor Control Act dealing in any way with beverages containing an alcoholic content not in excess of 3.2 per cent by weight, and from many provisions throughout such Act it is apparent that the scope of the Act and the jurisdiction of the Supervisor are restricted to intoxicating liquors which are defined as only beverages containing over 3.2 per cent of alcohol by weight. (Liquor Control Act, Sections 2, 17, 21, 22, 37).

It is apparent, therefore, that the Legislature intended to keep intoxicating liquors separate and distinct from non-intoxicating liquors, and the Liquor Control Act can in no way, even by implication, be said to have repealed the Non-intoxicating Beer Act of 1933, for where the Non-intoxicating Beer Act leaves off, the Liquor Control Act begins, and the two acts therefore work together in perfect harmony and both are now valid laws of the State of Missouri.

"Repeals by implication are not favored. This is now axiomatic in the law in this State. (Manker v. Faulhaber, 94 Mo. 430; State ex rel. v. Macon County Court, 41 Mo. 453; State ex rel. v. Slover, 134 Mo. 10.)

A later statute will not repeal a prior one unless there is such repugnancy between them that the two cannot



stand together or be consistently reconciled. (Glasgow v. Lindell, 50 Mo. 60; Railroad v. Cass Co., 53 Mo. 17; State ex rel. v. Dolan, 93 Mo. 467; Kansas City v. Smart, 128 Mo. 272; State ex rel. v. Walbridge, 119 Mo. 383; State ex rel. v. Wofford, 121 Mo. 61; State ex rel. v. Stratton, 136 Mo. 423). If two statutes can be read together without contradiction or repugnancy or absurdity or unreasonableness, they should be read together and effect given to both. (Ex parte Joffe, 46 Mo. App. 360)."

State ex rel. v. Spencer,  
164 Mo., 1.c. 53-54.

The controversy in the instant case arises by reason of two sections of the Non-intoxicating Beer Act. Section 13139h provides:

"Before any permit authorized by this article shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath that he will not allow any intoxicating liquor of any kind or character, including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit, and that such applicant will not otherwise violate any law of this state, or knowingly allow any other person to violate any law of this state while in or upon such premises. 'Provided no permit shall be issued under this act to any person other than a native born or naturalized citizen of the United States of America', and provided further, no manufacturer or distributor, to whom or to which this act applies, shall have any interest, directly or indirectly, in the business of any person, firm, company or corporation, applying for, securing or holding a permit under either sub-paragraph 'a' or sub-paragraph 'd' of section 13139e of this act."

Section 13139z8 provides in part as follows:

\*\*\*\*\*It shall also be unlawful for any holder of such permit to keep or secrete, or to allow any other person to keep or secrete, in or upon the premises described in such permit, any intoxicating liquor including beer having an alcoholic content in excess of 3.2 per cent by weight."

It is clear from the provisions set out above that it is unlawful for the holder of a permit to deal with non-intoxicating beer to have or allow any other person to have in or upon the premises described in the permit intoxicating liquor having an alcoholic content in excess of 3.2 per cent by weight. While the General Assembly was by this Act dealing with non-intoxicating beer, nevertheless, an express prohibition was included with reference to intoxicating liquor. In this connection it must be borne in mind that the possession of intoxicating liquor is not a right, but a privilege granted by the State.

The Supreme Court of Missouri en Banc in the case of State v. Parker Distilling Company, 236 Mo. 219, l.e. 274, said:

"When we bear in mind the foregoing idea, that the liquor traffic in this state has no legal rights, save and except those expressly granted by license and the statute under which it is issued, then we can more clearly see that the state may impose such conditions, burdens and regulations as it may deem wise and proper, and no one who engages therein has a right to complain thereof."

The State of Missouri has the undoubted power to require a person before engaging in the business of selling non-intoxicating beer to obtain a permit so to do. This power is clearly expressed in the case of Ex Parte Flake (Court of Criminal Appeals of Texas), 149 S.W. 146, wherein the Court said (l.e. 153, 154):

"And when we take into consideration current history, as is authorized by the opinions here recited, we know that men have gone into territory where prohibition has been adopted, selling and pretending to sell malt liquors called 'frosty', 'uno', 'ino', 'tin-top', etc., all of which are fermented malt liquors, which were claimed to be non-intoxicating malt liquors, and under the

guise of selling these liquors would engage in selling intoxicating liquors. Bottles of liquor were thrown in tubs of ice water, with these labels floating about, and it was found difficult, yea, almost impossible, to detect violations of the local option laws when intoxicating liquors were in fact sold. The control and regulation of this character of business was the intent, object, and purpose of the Legislature in enacting the law requiring a license to be obtained and a large tax or fee paid.

\* \* \* \* \*

But in this case it cannot be contended that a 'harmless beverage' was being dealt with, in intoxicating and 'non-intoxicating malt liquors'. In the case of *Ex parte Townsend*, 144 S.W. 629, we discussed at length the meaning of malt liquors, and demonstrated that the legal and fixed meaning of 'non-intoxicating malt liquors' was a liquid containing some per cent of alcohol, and it was this ingredient alcohol that gave to the state the right of regulation and control under the police power. \*\*\*\*\*

In the case of *State v. Bixman*, 162 Mo. 1, this court upheld the Inspection Act of 1899, father of House Bill No. 23. This Act included non-intoxicating, as well as intoxicating beer, and hence the decision of the court is pertinent here. The Act was upheld on the theory that the Legislature had the police power to protect the health of the consumers of beer by providing what the ingredients thereof should be. However, the interesting feature of the decision, so far as the problem here before us is concerned, is the citation of the case of *Mugler v. Kansas*, 123 U.S. 623. The Court said:

"In the last mentioned case it was said: 'There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional right; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks, nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, to some degree at least, traceable to this evil.'"

June 14, 1934.

CONCLUSION

In view of the foregoing, it is the opinion of this department that it is unlawful for the holder of a permit under the Non-intoxicating Beer Act to have or allow any other person to have, in or upon the premises described in such permit, any intoxicating liquor having an alcoholic content in excess of 3.2 per cent by weight.

It therefore follows that the holder of a permit to sell such non-intoxicating beer, and operating under the Non-intoxicating Beer Act of 1933, would be prohibited from obtaining any license under the Liquor Control Act of Missouri.

The converse of this proposition is likewise true, i.e., that the holder of a permit under the Liquor Control Act of Missouri would be prohibited from obtaining a permit to sell non-intoxicating beer under the Non-intoxicating Beer Act of 1933.

By reason of these conclusions, it is apparent that if a license be issued contrary to the express provisions of the Non-intoxicating Beer Act of 1933, the officer issuing said license not only condones the violation of the solemn oath made by the permittee to the State of Missouri, but also becomes a party, indirectly, if not directly, to a fraud on the laws of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

**TAXATION:- Personal Property and Merchant Taxes.**

Clause 11, Section 9756, R.S. Mo. 1929, excludes only such merchandise from personal property tax as shall have been actually returned for taxation under the merchants tax law. (Section 10081, R.S. Mo. 1929).

9-12  
September 6, 1934.

Honorable Nat W. Benton,  
Prosecuting Attorney of Greene County,  
Springfield, Missouri.



Dear Sir:-

We have your letter of July 5, 1934, in which was contained a request for an opinion as follows:

"The L. E. Lines Music Company of this city returned for personal property tax assessment as of June 1, 1932, certain notes and chattels covering the installment sale of musical instruments in the sum of about \$24,000. They now seek to have this item of their assessment stricken under the exception of enumeration "eleventh" of Section 9756, R. S. Mo. 1929, upon the ground that the same were returned for taxation theretofore as merchants tax, under Section 10081, R. S. Mo. 1929.

"The merchants tax return for the year 1932, for which year the personal property tax assessment was made, lists \$9,000 as the highest amount of stock on hand between the periods indicated in Section 10081. You will observe that the merchants tax was therefore less than half of the notes receivable returned in the personal property tax assessment. The taxpayer is taking the position that these notes arising out of the sale of musical instruments and the like are within the exception although not arising out of merchandise in stock during the period mentioned in Section 10081. This office, on the other hand, has tentatively taken the position that the exception is not so broad as to include any notes or accounts receivable unless a merchants tax was actually paid on the merchandise from which these accounts arose. The merchants tax is paid on the "greater amount of goods, wares, and merchandise which he or they (merchants) may have on hand at any one time between the first Monday of March and the first Monday of June next preceding."

"With the merchants tax levied only on the highest amount at any one time, it is obvious that much of a moving stock of goods, such as the merchant in this case has, passes



September 6, 1934.

through his store without the levy of any merchants tax on it, or that if the payment of the merchants tax exempts from personal property tax all notes taken in payment of merchandise sold, then a large amount of merchandise sold is not in fact taxed under the merchants tax law or the personal property tax law.

"I would appreciate your view of this exception, under clause "Eleventh" of Section 9756, as it relates as to such notes receivable."

Section 9756, Revised Statutes of Missouri, 1929, provides in part, at line twelve, as follows:

"Sec. 9756. Time of making assessment--what lists shall contain""and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county of this state in accordance with the provisions of this chapter,.""

Clause 11 of section 9756, Revised Statutes of Missouri, 1929, provides farther on as follows:

"eleventh, all other property not above enumerated except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise which have been returned for taxation, under sections 10081, and 10111, R. S. 1929, and its value;""

Section 10081, Revised Statutes of Missouri, 1929, with reference to taxation of merchants, provides in part as follows:

"Sec. 10081. Statement to be filed, when.--On the first Monday in June, in each year, it shall be the duty of each person, corporation or co-partnership of persons, as provided by this article, to furnish to the assessor of the county in which such license may have been granted, a statement of the greatest amount of goods, wares and merchandise, which he or they may have had on hand at any one time between the first Monday in March and the first Monday in June next preceding:""

A reasonable and unbiased construction of the above sections and in their relation to one another can lead to but one conclusion. Exemption clauses, under our laws and the decisions of our courts, are to be strictly construed, particularly where, as here, the language is plain and the legislative intent both evident and reasonable.

Hon. Nat W. Benton--#3

September 6, 1934.

The language of section 9756, quoted in two places above, explicitly by its terms exempts only such merchandise as shall be required to pay a license tax or such merchandise as shall have been returned for taxation under the merchant tax sections. There is nothing in these exemption clauses which could possibly give any weight to the contention that such merchandise was exempted as a whole. We have been unable to find any cases construing that particular point, but, when the matter is so obvious, it is not surprising that it has not been before our courts.

The purpose of the exemption clauses was to obviate the possibility of having certain merchandise taxed twice but was certainly not to render other merchandise tax free.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

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Attorney-General.



TAXATION: Agencies of State Government required to pay both State municipal gasoline taxes.

September 7, 1934



Hon. W. W. Bennett, Steward  
State Hospital No. 2  
St. Joseph, Missouri

My Dear Sir:

We are in receipt of a communication executed by the Honorable John S. Lucas, requesting an opinion of this office on the following matters:

"Will you kindly inform us what taxes we are supposed to pay on gasoline?

The Standard Oil Company are charging us 2¢ for the Missouri State Highway on gasoline delivered outside the city limits.

We have an ordinance in this city which calls for a tax of 1¢ a gallon on gasoline. The other taxes you are familiar with. On our oils purchased they make no charge for taxes."

I.

STATE INSTITUTIONS REQUIRED TO  
PAY MISSOURI STATE GASOLINE TAX.

Section 7794 R. S. Mo. 1929, provides:

"For the purpose of providing funds to complete the construction of and for the maintenance of the state highway system of this state as designated by law, there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this article used in motor vehicles of the public highways of the state, which license tax shall apply and become effective January 1, 1925."

Section 7795 R. S. Mo. 1929, provides:

"Every distributor shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into and distributed or sold by him within this state during such year."

Section 7796 R. S. Mo. 1929, provides in part as follows:

"Every dealer shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two (2¢) cents for each gallon of motor vehicle fuels sold or distributed by such dealer in this state during such year:" \* \* \*

Section 7805 R. S. Mo. 1929, provides in part as follows:

"Provided, however, that any person who shall buy and use any motor vehicle fuels, as defined in this article, for the purpose of operating or propelling stationary gas engines, farm tractors or motor boats, or who shall purchase or use any of such fuels for cleaning, dyeing, or other commercial use of the same, or who shall buy and use such motor vehicle fuels for any purpose whatever, except in motor vehicles operated, or intended to be operated, upon any of the public highways of the state of Missouri, as defined in section 7759, and who shall have paid any license tax required by this article to be paid, either directly or indirectly through the amount of such tax being included in the price of such fuel, shall be reimbursed and repaid the amount of such tax directly or indirectly paid by him, upon presenting to the inspector an affidavit accompanied by the original invoice showing such purchase, which affidavit shall state the total amount of such fuels so purchased" \* \* \*."

From the foregoing quoted sections it appears that the Motor Vehicle Fuel Tax Act is a privilege tax based upon the number of gallons of fuel sold, and providing for an exemption or refund of the tax in case the fuel is used for purposes other than propelling motor vehicles upon the highways of the state. It is pertinent to note that the exemptions are not allowed or remitted to any class of persons or corporations, but refund is allowed only on condition that the motor vehicle fuels were not used to propel motor vehicles upon the highways of the State. The tax is levied upon the use of gasoline and upon the privilege of selling it. Clearly, it is an excise tax. 26 R. C. L. 236 refers to an excise tax as

"an excise tax is a tax imposed upon the performance of an act, the engaging in the occupation, and the enjoyment of a privilege. Every form of tax not imposed directly upon polls or property must constitute an excise if it is a valid tax of any description."

Excise taxes and their distinctive features are further discussed by Cooley on Taxation, Volume 4, 4th Edition, page 3374 et seq. and 26 R. C. L. p. 35.

The power of the state in the matter of taxation is unlimited so long as the exercise of the power does not conflict with the Federal or State Constitutions. American Mfg. Co. vs. St. Louis, 270 Mo. 40, 1. c. 44:

"\* \* \* as is said by Judge Cooley (1 Cooley on Taxation, 25), 'the power of taxation, however vast in its character, and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State.' On the other hand the State may exercise this sovereign right with respect to all persons, things and business activities which exist under the protection of its laws, and, as is said by the same distinguished author (Ibid.), 'Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.' These propositions have ceased to be subjects of discussion or argument.\* \* \*"

This decision was affirmed in the United States Supreme Court and is reported at 63 Law Ed. 1084. The limitations upon the power to tax prescribed by the state constitution respecting the property of the State and the minor political governmental subdivisions are found in Section 6 of Article X, part of which provides:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation." \* \* \*

As heretofore stated, an excise tax cannot in any sense be construed as a tax on property, and as the foregoing constitutional provision applies to property, either real or personal, it cannot be construed as extending to effect a tax upon a privilege. This is true although the tax may be indirectly paid by a county, city or other governmental subdivision. City of Portland vs. Koser, 108 Oregon, 375, 217 Pac. 833. In this case the City of Portland sought to enjoin the Secretary of State of Oregon from the collection of the gasoline tax imposed upon gasoline used by the City. The Court held the charge to be against the dealer and dismissed the action. In the course of the opinion the Court stated:

"\* \* \* The language of the later statute is definite as to the persons who are required to pay the tax therein provided. The municipalities are in no way relieved from the burden of paying any addition that may be added to the price of motor fuels which may be occasioned by the tax. There is no indication in the language of either of the statutes in question that it was the intention of the lawmakers to relieve municipalities from the burden of paying any such enhanced price." \* \* \*

From the foregoing provisions of the Motor Vehicle Fuel Act it is apparent that the tax is primarily one upon distributors and dealers in motor vehicle fuels. The Act has been so construed in the case of Central Transfer Company vs. Commercial Oil Company, 45 Fed. (2d) 400, 1. c. 402:

"\* \* \* Here in the case at bar the gasoline was purchased in Missouri, and under the law attacked was subject to an excise tax payable by the dealer in Missouri." \* \* \* In other words, the party who there attempted to raise the alleged constitutional invalidity of the California law was, as here, a consumer and not a distributor or a dealer; and there as here the tax was directly laid upon the distributor and the dealer, and not upon the consumer." \* \* \*

September 7, 1934.

In view of these similarities it would seem that the ruling in the Oregon case is on all fours with the instant problem. The tax is primarily laid upon dealers and distributors and it is no concern of the party that buys the gasoline as to what portion is a tax upon the dealer or distributor and what portion is the consideration for the commodity itself. The fact that the tax is based upon a gallonage or volume basis in no way changes the nature of the tax. In *Viquesney vs. Kansas City et al.* 366 S. W. 700, the Supreme Court passed upon the gasoline tax ordinance of Kansas City which imposed a tax of one cent a gallon on dealers of gasoline. In the course of the discussion the Court stated, 1. c. 702:

"\* \* \* The first question for determination is whether the tax of 1 cent a gallon on the gasoline sold by the dealer is a property tax or an excise or occupation tax. Where a tax is imposed and is measured by the amount of business done or the extent to which the privilege is conferred or exercised by a taxpayer, irrespective of the value of his assets, it is an "excise tax."  
\* \* \* \* \*

Where a tax is measured by the gross receipts of the business, the amount of premiums received by an insurance company, the number of carriages kept by a livery stable, the number of passengers transported by a street railway company, and other taxes of that nature, it is 'occupation tax'--one form of excise tax. It has been applied to the volume of gasoline sold, such as the tax we have under consideration here. In re Opinion of the Justices (Me.) 121 A. 902; *State v. Hart*, 125 Wash. 520, 217 P. 45; *Altitude Oil Co. v. People*, 70 Colo. 452, 202 P. 180.\* \* \* \*

It is therefore the opinion of this office that your institution is not entitled to any refund of the two cent state gasoline tax paid by you as part of the purchase price of gasoline bought for use in motor vehicles to be propelled upon the highways of the State.



II.

CITY OF ST. JOSEPH EMPOWERED TO  
LEVY GASOLINE TAX.

The City of St. Joseph, Missouri, is a city of the first class, operating under the provisions of Article II, Chapter 38 R. S. Mo. 1929, which was Article II of Chapter 72 R. S. Mo. 1919. Roach vs. Landis, 1. S. W. (2d) 203:

"The City of St. Joseph is a city of the first class governed by provisions of Article II, Chapter 72, R. S. Mo. 1919, relating to charters of cities of the first class."

Under the provisions of Subdivision 17, Section 6171 of said Article and Chapter of the 1929 revision, cities of the first class are authorized:

"\* \* \* to license, tax and regulate, manufacturers, merchants, \* \* \* dealers \* \* \* oil companies \* \* \* and to license, tax and regulate all occupations, professions, trades, pursuits, corporations and other institutions and establishments, articles, utilities and commodities, not heretofore enumerated by whatever name or character, like or unlike \* \* \* and to fix the license tax to be paid thereon or therefor; and in the exercise of the foregoing powers to divide the various occupations, professions, trades, pursuits and corporations \* \* \* articles, utilities and commodities into different classes. \* \* \*"

It therefore appears that it would be within the delegated powers of the City of St. Joseph to exact an occupation tax of one cent per gallon upon gasoline sold or used or stored in the City.

In the Viquesney case supra, the issue before the Court was the power of the City of Kansas City to exact a tax of one cent from merchants and dealers in gasoline. Although it was a special city charter thereunder consideration, still it authorized the licensing of "merchants" just as the statute in the instant case does. The Court stated, 1. c. 703:

"\* \* \* Evidently it was the understanding of the framers of the charter that "merchant" should cover all dealers that might be included in the term, be-

September 7, 1934.

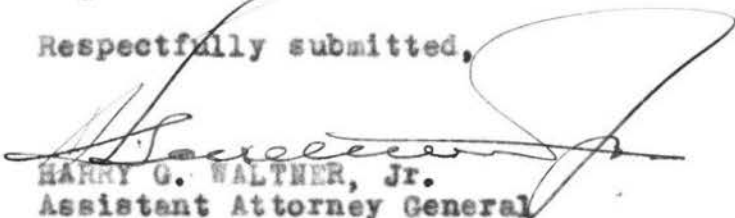
cause the specific dealers mentioned in that section do not include retail merchants of many kinds. Appellant is hardly in position in this case to say the term "merchant" does not cover the case, because he points out that the Appellant was otherwise taxed, without objection from him, as a merchant. He paid an ad valorem merchant's general tax on his property, as shown by evidence introduced by the plaintiff. See, also, St. Louis v. Baskowitz, 373 Mo. loc. cit. 565, 201 S. W. 870.

Thus it appears that the city authorities, as well as the plaintiff, interpreted the charter to include callings like that pursued by the appellant, as that of a merchant.\* \* \* \*

It being clearly within the power of the City to lay an occupation tax upon dealers in gasoline, and the Viquesney case supra, definitely determined among other things the right to assess such tax on a gallonage basis, we find ourselves in the same position relative to this city tax as arises under the State Tax, to-wit, that the tax is laid upon the dealer and the State is in no position to object to the passing on of the tax by the dealers by means of an increase in the price of gasoline sold.

We deem it unnecessary to here recite the applicable law referred to under Section 1 of this opinion, and hold that, providing the St. Joseph gasoline tax is one laid upon the dealer as an occupation tax, your institution would be required to pay the same as a part of the purchase price of the gasoline.

Respectfully submitted,

  
HARRY G. WALTNER, Jr.  
Assistant Attorney General

APPROVED:

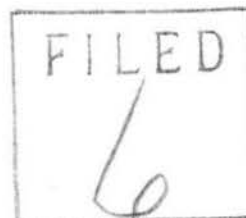
\_\_\_\_\_  
ROY MCKITTRICK,  
Attorney General

HGW:MM



PROBATE COURTS: Nominee for Probate Judge of Pike Co. nominated by Democratic Party at primary was nominated for the regular term. County Democratic Committee should select some one to run for the special term.

10-13  
October 12, 1934.



Hon. Davis Benning,  
Prosecuting Attorney,  
Pike County,  
Louisiana, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"I have been asked for an opinion by one of the county officials of this county regarding a matter in the recent primary election, relating to the office of Probate Judge, and as I am unable to arrive at a definite conclusion on the matter inquired about, I would greatly appreciate your opinion.

The situation is as follows: In November, 1932, Andrew J. Murphy, Jr. was elected Probate Judge of this county to fill out the unexpired term of Judge Blair which would have expired in December, 1934. In March, 1934, Judge Murphy resigned from his office and the Governor of this state appointed Vivian S. Smith to fill the vacancy, which under the decisions was until November 6, 1934 without any hold over. Three candidates filed their declarations for the office on the Democratic ticket for the August primary. One of the candidates designated in his declaration 'regular term', the other two merely filing for the office of Probate Judge.

Two questions have arisen--1st. Were there two terms to be filled in this election, namely, the short term from November 6 until January 1 and a long or regular term to begin January first? 2nd. If there were

two terms would it be presumed that a declaration without designating the term, was to fill the first vacancy or for the regular term and in the event that the two who filed without designation were candidates for the short term by reason of their failure to designate, and the County Clerk under one caption placed all three of the names on the ballot as candidates for nomination for the office of Probate Judge, what would be the effect upon the nomination for this office?"

Section 2047, R. S. Mo. 1929 provides in part as follows:

"At the general election in the year 1878, and every four years thereafter, except as hereinafter provided, a judge of probate shall be elected by the qualified voters in every county. Said judge shall be commissioned by the Governor and shall take the oath prescribed by the Constitution for all officers and shall enter upon the discharge of his duties on the first day of January ensuing his election and continue in office for four years and until his successor shall be duly elected and qualified."

Section 2048, R.S. Mo. 1929 provides as follows:

"When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the Governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

Section 32, Art. VI of the Constitution of Missouri provides:

"In case the office of judge of any court of record shall become vacant by death, resignation, removal, failure to qualify or otherwise, such vacancy shall be filled in the manner provided by law."

It is apparent from a consideration of your letter that the voters of Pike County were not aware that there were two elections to be had in November of this year - one to elect a Probate Judge for the special or short term from November 6 until December 31, 1934 - and one to fill the general or long term from January 1, 1935 until December 31, 1938. Only one judge was nominated at the primary election, and the office for which he was nominated was simply designated "Probate Judge".

The question now before us is whether or not the nominee was nominated for the regular or long term or for the short term. A similar question, but one that is not exactly on all fours with the present case, was before the Court of Appeals of Kentucky in the case of Hobbs, et al. v. Upington, 89 S.W. 128. In that case, however, there were several candidates and the situation was solved by agreement among the candidates. The Court said:

"When the election was held in 1902 and five men were elected, without any indication as to which was to have the short term, the fact that Upington had received less votes than any of the other four was no reason for assigning him the short term period. The proper way of settling the dispute as to who was to take the short term would have been to cast lots. This, no doubt, would have been done, but for the fact that Hobbs agreed to take the short term if they would elect him president. By making this agreement he obtained the office of president and prevented the question being settled by lot as to who should have the short term. When he thus agreed to take the short term, and prevented the question being settled by lot he is estopped, after the expiration of the short term, to claim the long term. The agreement between the five men as to which should take the short term violated no public policy. On the other hand, the law favors the settlement of disputes. Hobbs, having agreed to take the short term, must abide his agreement, just as he would have been compelled to abide an agreement to determine the matter by lot if in the drawing he had drawn the short term." (Emphasis ours)

While this case is not determinative of the point here before us, we cite it as illustrative of the court's desire to

give effect to the intent of the voters and to permit the settlement of controversies of this nature in any reasonable manner.

This same rule is announced in *Murphy v. Spokane*, 117 P. 476, wherein it is said:

"The purpose of an election, whether for men or for measures such as the one before us, is to give effect to the voice of the people."

In order to give effect to the will of the voters, it is necessary to determine, if possible, what "term" the voters had in mind when they cast their votes for the nominee for Probate Judge of Pike County.

In the case of *State v. Superior Court*, 128 P. 1054, the Court said:

"The electors, as is said in *Cook v. Mock*, *People v. Thompson*, *supra*, and the other cited cases, were presumed to know when the regular term of their municipal officers expired. That was, as is said in *Lafayette v. State*, *supra*, knowledge of a matter of law of which courts would presume the people had full knowledge. It was not, as that court also says, an instance of a vacancy in office which would be a question of fact concerning which knowledge would not be presumed."  
(Emphasis ours)

This same rule was approved in the case of *Tillson v. Ford*, 53 Calif. 701 wherein the Court said:

"That case was decided upon the proposition that no special election can be held to supply a vacancy in a state office, under the provisions of the political code unless a proclamation shall be issued informing the voters that the vacancy exists; for, while all are presumed to know the law and the time when the full terms expire, the voters are not presumed to know the fact that an officer has resigned or died."

No notice having been given the voters in the instant case that there was to be a vacancy in office and a special term to be filled by election, there can be no presumption that the voters of Pike County knew of this condition, and the intent of the voters,

therefore, was evidently to elect a Probate Judge for the regular term of four years commencing January 1, 1935. The failure, however, of the voters of Pike County to elect a Probate Judge for the special term does not operate to continue the present appointee in office.

"Where one is appointed to fill a vacancy until the next general election, the fact that no successor was legally elected does not operate to continue him in office." 46 C.J. 978.

This precise question was before the Supreme Court in the case of State ex rel. v. Perkins, 139 Mo. 106, wherein the Court said:

"Besides the legislature, at the revising session of 1879, enacted section 3276, and retained section 7121, and therefore must be deemed cognizant of the difference between those sections, and intentionally used the limiting word 'until', and purposely refrained from using in section 3276 words granting the right to hold over after the expiration of a given time. Nay, more, they made express provision that the residue of the term should be filled by election. This amounts to the exclusion of a conclusion.

These considerations necessarily lead to the conclusion that Judge Crow's official term expired when the general election occurred in 1896, and could not be extended by reason of the fact that the commission he received from the Governor assumed to enlarge his official term (not only 'until the next general election' but 'until his successor qualified'. Mechem's Pub. Off., sec. 395; Hench v. State, 72 Ind. 297.

#### Conclusion

In view of the foregoing, it is the opinion of this department that the nominee for Probate Judge of Pike County, nominated by the Democratic Party at the primary election in August, 1934, was nominated for the regular term of Probate Judge

Oct. 12, 1934.

commencing January 1, 1935 and ending December 31, 1938, and that the voters of Pike County wholly failed to nominate any one on the Democratic ticket for the office of Probate Judge for the short term commencing November 6, 1934 and ending December 31, 1934.

It is further the opinion of this department that in view of the failure of the voters to nominate any one for this special or short term, the Democratic County Committee should select some one to run for the office of Probate Judge of Pike County for this special term.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

COUNTY TREASURER - Laws Mo. 1933, p. 357 do not apply to  
Randolph County.

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December 5, 1934



Honorable J. F. Bentley, Manager  
Huntsville Co-Operative Live Stock Shipping Assn., Inc.  
Huntsville, Missouri

Dear Sir:

We have your request as to whether House  
Bill 315, Laws of Missouri 1933, p. 357, applies to  
a county such as Randolph, whose population is 26,431.

In answer to your inquiry, we quote Section 1,  
Laws of Missouri 1933, p. 357, which is as follows:

"From and after the first day  
of January, 1937, the office  
of County Treasurer shall be  
abolished in all counties of  
this state, which now contain,  
or may hereafter contain, 75000  
inhabitants and not more than  
90000 inhabitants, according  
to the last decennial census  
of the United States."

It is, therefore, the opinion of this office  
that Randolph County does not come within the provisions  
of the above law relating to counties containing 75000  
to 90000 inhabitants, as determined by the census.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE



OFFICER--SURETY BOND--COUNTY COURT: County Court must require new surety bond when newly elected member of the County Court is on the old bond, but this contingency does not make the new judge ineligible to the oath of office.

December 22, 1934.



Honorable C. M. Berrey  
Presiding Judge  
Audrain County Court  
Mexico, Missouri

Dear Sir:

Your request for an opinion of December 12th, is as follows:

"Our County Court would like very much to have your opinion as to whether a man elected as Judge of the County Court is eligible to take office as such Judge while he is surety on the bond of the Collector of the County.

"If you will give me this information by the last of this month, it will be greatly appreciated."

Section 9885 Laws 1933, page 464 provides for the giving of a County Collector's bond and the conditions thereof as follows:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county

and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties. Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as "County Collector's Fund;" provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars (\$100.00); and provided further the collector shall not check on such "County Collectors' Fund" except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

It is no doubt the above statutory bond that you refer to in your letter.

Section 9888, R. S. Mo. 1929, provides as follows:

"Such bond shall be executed in duplicate; one part thereof shall be

deposited and recorded in the office of the clerk of the county court, and the other part shall be transmitted by the clerk to the state auditor."

Section 9891, R. S. Mo. 1929, provides as follows:

"The collector's bond, when received by the auditor, shall be carefully examined, and if found to be made in conformity to law, and the sureties satisfactory, he shall file the same in his office, and immediately certify the fact thereof to the clerk of the county court; but if said auditor finds said bond to be not in accordance with law, or if he has reason to doubt the sufficiency of the security, he shall immediately return the bond to the clerk of the county court, who shall notify the collector to correct said bond, or make a new bond, as may be required by the auditor. If a new bond is required, it shall be approved and recorded, and subject to the requirements of this section, the same as the first bond given by the collector. No tax book or lists shall be placed in the hands of the county collector until the auditor's certificate, under the seal of his office, has been received by the clerk of the county court, showing that the collector's bond has been received and filed in the auditor's office. Any evasion of this section by the clerk of the county court or collector shall subject them each to a penalty of not less than five hundred dollars, and all damages and costs, to be recovered before any court of competent jurisdiction in this state; and the auditor is hereby required to bring suit, without delay, for every evasion of the requirements of this section, as soon as the same comes to his knowledge--the amount recovered on such fines to be paid into the state treasury as revenue fund: Provided, that nothing in this section shall be construed as relieving the sureties of a collector from liabilities incurred under a bond not approved and filed by the auditor."

Thus we see that provision in law is made for recording duplicate copies of the collector's bond, and also

for the giving of a new bond when the occasion demands.

Section 2847, R. S. Mo. 1929, provides as follows:

"No sheriff, collector, constable, county treasurer, attorney at law, clerk of any court of record, judge or justice of any court of record, shall be taken as surety in any official bond that may be given by any officer in this state."

The above section has been construed as directory in State ex rel. Howell County v. Findley, 101, Mo. 368, 14 S. W. 111, 1. c. 112:

"\* \* \* but statutes of this sort are regarded as directory merely, and as not designed to avoid the bonds where the statute has been disregarded."

Section 2848, R. S. Mo. 1929, provides as follows:

"When it shall come to the knowledge of any court whose duty it is to approve the official bonds of any of the officers named in section 2846, that a surety of any of the said officers has become a non-resident of the county in which his official bond was executed and required to be filed, or has died, become insolvent or otherwise insufficient, said court shall make an order requiring the officer for whom any such surety executed the bond, on a day therein named, to appear and show cause why he should not give additional security."

Section 2849, R. S. Mo. 1929, provides:

"If, upon investigation of the matter, it shall appear that any surety has become a non-resident of the county in which the bond is filed, has died, becomes insolvent, or in any otherwise insufficient, the court shall require the officer for whom such surety executed the bond to give additional security by a day named; and, in default thereof, the said office shall be forfeited, and the same shall become vacant, and the facts shall be certified to the court or officer whose duty it is to fill such vacancy."

Section 2850, R.S. Mo. 1929, provides:

"When the additional bond is given and approved, the former sureties shall thereby be discharged from any misconduct of the principal after the approval of said bond."

There is nothing in the above statutes that provide for ineligibility to office, at such a contingency outlined in your letter. The office of county judge is a constitutional office provided for in Article VI, Section 36 of the Missouri Constitution as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

We find nothing in the Constitution that would prohibit the elected judge from taking his oath of office, at such a contingency outlined in your letter.

#### CONCLUSION.

It is the opinion of this office that where one's name appears as a surety on the county collector's bond he is liable personally as such surety, even though such name appears there contrary to the intendments of Section 2847, *supra*. On the other hand where the surety was qualified at the time he became surety on the collector's bond, and was not then disqualified by reason of any statutory inhibition as set out in Section 2847, *supra*, (at the time the bond was signed), the disqualification which came about subsequent to the signing of the bond does not operate as a bar to the surety taking over the office of county judge, to which said surety was elected. The happening of such a contingency which brings about an unhealthy condition, which has been frowned upon by the Legislature, is sufficient reason for the County Court to require a new bond. Anticipating the emergency to which you relate, the Legislature has provided a corrective measure. The Legislature made it mandatory on the County Court to require a new bond, for in Section 2848 they said, "said court shall make an order requiring the officer for whom any such surety executed the bond, on a day therein named, to appear and show cause why he should not give additional security." For a failure to

Honorable C. M. Berrey

-6-

December 22, 1934.

comply with the orders the collector forfeits his office, but if the new sureties be approved, the former sureties are discharged. The fact that the new judge is liable as surety on the collector's bond at the time he takes over his office does not make him ineligible to said office.

Respectfully submitted

WM. ORR SAWYERS

Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

WOS:H

(An opinion on question of whether present county treasurers are eligible as candidates for office of county collector in election of 1934.)

FILED

1-31  
Jefferson City, Mo.  
January 25th, 1934

Hon. Walter W. Biehle  
Treasurer of Perry County  
Perryville, Missouri

Dear Sir:

I have your letter of January 15th 1934 in which you inquire as follows:

"Will a present County Treasurer be allowed to run for County Collector in this coming campaign? What procedure will follow in the event of an election? Could both offices be combined to become effective as of January 1st 1936 such as is outlined to take place on January 1st 1937? I shall appreciate your opinion on those questions."

Within your inquiry is found three questions, which may briefly be stated as follows:

- (a) Are present County Treasurers, eligible candidates in their respective counties for office of County Collector, in election of 1934?
- (b) If qualified and elected what would be the effect?
- (c) Could offices be combined to become effective January 1st 1936.



We will take up these questions for solution in the order named, however it is rather difficult to take the first and second separately, so we will treat them together.

- (a) Are present County Treasurers eligible candidates in their respective counties, for office of county collector, in election of 1934?
- (b) If qualified and elected what would be the effect?

Article II Section 19 of the Constitution of Missouri provides as follows:

"That no person who is now or may hereafter become collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all public money for which he may be accountable."

The above section of the Constitution, clearly makes a person, who is now or may hereafter become a collector or receiver of public money, ineligible to hold any office of trust or profit in this State, until he shall have accounted for and paid over all public moneys for which he may be accountable. In as much as a county treasurer comes under that class he would therefore be ineligible. The question thus arises as to when an accounting must take place.

In State ex. rel. Major v Breuer 235 Mo. 240, the Court has constructed the word 'eligible' to refer not to time of election or appointment but to the time of the actual qualification and taking office. Judge Valliant in said case said:

"The word 'eligible' in reference to a candidate for public office, is not always used by law writers with the precise point in view, that is presented by the learned counsel for the relator in this case, that is whether it means eligible at the date of the election or appointment, or at the date of taking possession of the office. It may sometimes be used in reference to the one date and sometimes to the other and whether the reference is to the one or the other depends on the context in which the word 'eligible' is used in Section 19 of Article II of the Constitution, and of the particular subject to which it relates, I am satisfied that it refers to the date that the candidate is to take possession of the office."

In view of the provisions of the Constitution referred to above, and the Court's construction, thereof we rule that present county treasurers are qualified candidates for county collector, however before they or anyone of them if elected to such office, could qualify, they or either of them so qualifying would necessarily have to resign the office of treasurer, and account for and pay over to his successor all the public money for which he may be accountable before taking office of collector.

- (c) Could offices be combined to become effective January 1st, 1935?

Section 12132a, Laws 1933 page 338, provides as follows:

"On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according

to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

We construe the above section to mean that the law goes into effect on December 31st, 1936, and not before. It might be contended that the law is to become effective on the happening of the contingency of the present county treasurer ending his personal term by death, resignation or otherwise, but we do not so interpret the meaning. The limitation set by the date above mentioned must be considered. It is a well established law in this state that in construing a statute effect must be given to every word, clause and sentence within such statute; and that no part shall be considered meaningless.

In *exparte Andrews*, 18 S W (2d) 1. c. 582, this Court said:

"The legislative intention is to be ascertained from the words used in a statute. Another rule of construction is that effect is to be given to every word, clause and sentence within a statute."

Also in Cook v Sears, Roebuck and Co. 51 S W (2d) 1. c.  
this Court said:

"In considering this statute as amended we are bound to give effect to all the provisions thereof and so to rule, if possible that no part is destroyed or made meaningless by the construction of other parts."

In view of the reasoning of the appellate court in the foregoing cases, this department rules that the office of county treasurer and county collector are separate and distinct county offices, under the terms of said section 12132a (Supra) until December 31st 1936.

Very truly yours,

W. W. Barnes  
Assistant Attorney General

APPROVED

\_\_\_\_\_  
Attorney General

BANKS & BANKING:

Right of subrogation of Federal Deposit Insurance Corporation in event of failure of banks in Missouri.

5-14

May 12, 1934.



Hon. L. E. Birdzell  
General Counsel  
Federal Deposit Insurance Corporation  
Washington, D. C.

Dear Sir:

This Department is in receipt of your letter of recent date in which you requested an expression of our opinion relative to certain questions. For convenience, we are herewith setting forth a copy of your letter as follows:

"I write to solicit your cooperation in making more completely effective the provisions of the Banking Act of 1933, relating to the insurance of deposits. Adequate provision for the effective operation of the insurance requires definite answers from each State to the following questions:

1. Whether the laws of the State authorize or permit State banks, trust companies, or mutual savings banks, organized or doing business under the laws of the State, to purchase Class A Stock of the Federal Deposit Insurance Corporation and to assume the obligations incident to the ownership of such stock.

2. Whether the laws of the State authorize or permit this Corporation to be appointed Receiver of a State bank, trust company or mutual saving bank, organized or doing business under the laws of the State in the event the bank should be closed on account of inability to meet demands of its depositors.

May 12, 1934.

3. In the event the law of the State does not permit the appointment of the Corporation as Receiver, how may the Corporation be assured of the enjoyment of its right to receive dividends on the same basis as in the case of a closed National bank? Will such recognition in your State: (a) be accorded by State law; (b) be evidenced by the allowance of claims by appropriate State authority; (c) be effected by assignment of claims by depositors; or (d) be accorded by some other method? Recognition in one or more of the forms indicated must be accorded before the amount of insured deposit liabilities so recognized can be made available in a new bank; hence the importance of knowing in advance which method may legally be sought and the most advantageous procedure for obtaining it.

For your convenience in considering these questions, as they may arise under the law of your State, I am enclosing a copy of the Banking Act of 1933 and will direct your attention particularly to subsections (d), (e), (f), (g), (h), (m), (n) and (y) of Section 12B of the said Act.

In the event any added legislation is required in your State to secure more effective operation of the insurance provisions of the Banking Act of 1933, I shall be very glad indeed if I may have an expression of your opinion to that effect, and as to how soon same may be secured. Also, if it should be necessary in your State to resort to one of the alternative modes of obtaining a recognition of the rights of this Corporation to receive dividends as indicated above, I shall very much appreciate an expression of your opinion as to which mode is the most practicable and desirable in view of the need that would exist for immediate recognition.

It will be evident to you, I am sure, that these questions are of the utmost importance, in that if and when occasion arises to pay losses, it will be immediately imperative that action be both expeditious and effective. "

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We wish to take up each of the questions asked in the same order as set forth in your letter and use the same subdivisions as you have used.

I.

Replying to your first question, will say that the Legislature at the 1933-1934, Extra Session, enacted legislation which provided for and authorized banks and trust companies to purchase stock of the Federal Deposit Insurance Corporation and to assume the obligations incident to the ownership of such stock.

Section 5354, of Article II, of Chapter 34 of the Revised Statutes of Missouri, 1929, relating to the rights and powers of banks, was amended at the 1933-1934, Extra Session of the Missouri General Assembly, in this particular as follows (Page 136, Laws of Mo., 1933-1934, Extra Session):

"3a. To subscribe for and purchase such stock in the Federal Deposit Insurance Corporation and to become a member of the Temporary Federal Deposit Insurance Fund and to make such payments to and to make such deposits with said Federal Deposit Insurance Corporation and to pay such assessments made by such corporation as will enable the bank to obtain the benefits of the insurance of deposits under the Act of Congress known as the 'Banking Act of 1933' and any amendments thereto."



Also, at the same session of the General Assembly, Section 5421 of Article II, Chapter 34 of the R. S. of Mo. 1929, and found at pages 140-141, Extra Session Acts of 1933-1934, the law was amended as to trust companies purchasing stock in the Federal Deposit Insurance Corporation, and is as follows:

"15. Any trust company doing a banking business may subscribe for and purchase such stock in the Federal Deposit Insurance Corporation and may become a member of the Temporary Federal Deposit Insurance Fund and may make such payments to and make such deposits with said Federal Deposit Insurance Corporation and pay such assessments made by such corporation as will enable the trust company to obtain the benefits of the insurance of deposits under the Act of Congress known as the 'Banking Act of 1933' and any amendments thereto."

So, it will be seen that the Laws of Missouri have been amended to permit banks and trust companies to purchase stock in the Federal Deposit Insurance Corporation.

In your first question you inquire as to the authority of mutual savings banks in Missouri being authorized to purchase such stock.

Article V, Chapter 34, R. S. Mo. 1929, governing savings banks in this State, was not amended. But, upon inquiry at the Department of the State Finance Commissioner, we ascertained that there were no savings banks existing in Missouri chartered under Article V, supra; that all banks are chartered under Section 5354, and trust companies under Section 5421.

## II.

Replying to the second question asked in your letter, we do not think that under the Laws of Missouri the Federal Deposit Insurance Corporation may be appointed receiver, liquidator or

conservator of a state bank or trust company or mutual savings bank organized and doing business under the laws of this State in the event of a failure of such institution. Our State laws provide, under Section 5323, R. S. Mo. 1929, for the appointment of an individual, or individuals, as special deputy commissioners of finance, who under the law perform the functions of a receiver, liquidator, or conservator. This section further provides that a bank or trust company may be appointed special deputy commissioner of finance in charge of a failed bank and shall be fully authorized and empowered to do any and all acts and things which the Commissioner of Finance may deem necessary and advisable in liquidating the business and assets of a corporation or private banker in his possession.

We do not think that our statute authorizes the appointment of the Federal Deposit Insurance Corporation as receiver, liquidator or conservator of a bank or trust company or savings bank in Missouri in the event of failure.

### III.

Replying to your third question, will say that Section 5354, of Article II, Chapter 34, of R. S. Mo., 1929, relating to the rights and powers of banks, was amended, Laws of Missouri, 1933-1934, Extra Session, and found at page 136 thereof, and subdivision 3b was added thereto, which we hereafter set forth, viz.:

"3b. In order that banks organized under the Laws of the State of Missouri and the depositors thereof may have the same opportunity and enjoy the benefits of the Act of Congress known as the 'Banking Act of 1933' in relation to the insurance of deposits and all amendments thereto, as national banks, the Federal Deposit Insurance Corporation shall, with like force and effect as if the closed bank were a national bank, be subrogated to all the rights against a closed bank or private banker, of the owners of insured deposits therein and shall be entitled to receive such dividends from the process (proceeds)

of the assets of such closed bank as would have been payable to such depositor, until such dividends shall equal the insured deposit liability to such depositor; and the Federal Deposit Insurance Corporation may, if it shall deem it expedient or necessary so to do, present and procure the allowance of the claim or claims of any insured depositor or depositors, or may require insured depositors to make due proof of their claims or to assign their claims to said Federal Deposit Insurance Corporation, or to do any other act which may be deemed necessary or expedient to enable the Federal Deposit Insurance Corporation to fully avail itself of the above right to subrogation."

Also, Section 5421, Article II, Chapter 34, R. S. Mo. 1929, relating to the rights and powers of trust companies was further amended by adding thereto subdivision 16, Laws of Missouri, 1933-1934, Extra Session, found at page 143 thereof, which is as follows:

"In order that trust companies organized under the Laws of the State of Missouri and doing a banking business and the depositors thereof may have the same opportunity and enjoy the benefits of the Act of Congress known as the 'Banking Act of 1933' in relation to the insurance of deposits and all amendments thereto, as national banks, the Federal Deposit Insurance Corporation shall, with like force and effect as if the closed trust company were a national bank, be subrogated to all the rights against a closed trust company, of the owners of insured deposits therein and shall be entitled to receive such dividends from the proceeds of the assets of such closed trust company as would have been payable to such depositor, until such dividends shall equal the insured deposit liability to such depositor; and the Federal Deposit Insurance Corporation may,

if it shall deem it expedient or necessary so to do, present and procure the allowance of the claim or claims of any insured depositor or depositors, or may require insured depositors to make due proof of their claims or to assign their claims to said Federal Deposit Insurance Corporation, or to do any other act which may be deemed necessary or expedient to enable the Federal Deposit Insurance Corporation to fully avail itself of the above right of subrogation."

The above two subdivisions, 3b and 16, of Sections 5354 and 5421, respectively, provide fully that the Federal Deposit Insurance Corporation may be subrogated to all the rights against a closed bank or private banker or trust company of the owner or owners of insured deposits therein and shall be entitled to receive such dividends from the proceeds of the assets of such closed bank as would have been payable to such depositor; and the statutes further provide that the Federal Deposit Insurance Corporation may present and procure the allowance of claim or claims of insured depositor or depositors or the Federal Deposit Insurance Corporation may require the insured depositors to make due proof of their claims and to assign their claims to the Federal Deposit Insurance Corporation and do any other act which the Federal Deposit Insurance Corporation may deem necessary or expedient to enable it to fully avail itself of the rights of subrogation.

It will be seen that the above statutes afford ample machinery whereby the Federal Deposit Insurance Corporation may be protected. The corporation may require the insured depositor to assign his claim against the failed bank to the corporation before allowance or require the insured depositor to make due proof of his claim and have allowance made by the proper authorities and then assign the allowed claim to the corporation, in either event the assignee, Federal Deposit Insurance Corporation, would receive the dividends as they may become due and payable.

It would seem that the plan of having the insured depositor have his claim allowed by the proper authorities and then assign to the Federal Deposit Insurance Corporation the allowed claim might be preferable, the consideration for the assignment being

May 12, 1934..

the payment to the insured depositor, the amount of his insured deposit by the Federal Deposit Insurance Corporation. However, there might be some minor complications where only a portion of the depositors deposit was insured, in that event the depositor would assign only a part of his deposit. This, we are sure can be taken care of by arrangement being made with special deputy commissioner of finance in charge of the failed bank permitting the depositor to assign a part of his deposit.

We think, under the above amendments of the Missouri statutes, that the insurance corporation is fully and amply protected in its rights of subrogation. We might add that in the event other legislation is necessary to make more effective the Federal Banking Act of 1933, and particularly Section 12B relating to the Federal Deposit Insurance Corporation, that the Missouri Legislature will meet in regular session in January, 1935.

If we have not made ourselves clear on any of the questions above discussed, we shall be glad to cooperate in any way possible to bring about effective administration of the laws concerning failed banks as it affects the Federal Deposit Insurance Corporation.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

COUNTY TREASURER: County treasurer cannot serve as deputy to County Collector while remaining Treasurer.

8-30

August 25, 1934.



Hon. Walter W. Biehle,  
County Treasurer,  
Perryville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of July 20, same being a supplemental letter to your previous request for an opinion. Your letter is as follows:

"Would it be legal or permissible for me to serve as deputy to the County Collector of Revenue, while being Treasurer of the county, beginning January 2, 1935?

Two of the three local candidates have mentioned this to me and asked that I serve provided it is legal.

I am operating an electrical business now, while I am serving as County Treasurer, but if I may also serve as deputy to the collector, I shall arrange accordingly."

We take for granted from the tenor of your letter that you are familiar with the law passed in 1933 whereby the office of treasurer in certain counties is automatically abolished on January 1, 1937. The county of Perry being within the limitations of the provisions as prescribed by the new law, would naturally be affected, and the office of County Treasurer will therefore be abolished at that time.

The case of State ex rel. McAllister v. Dunn, 277 Mo. 38 is decisive on this question. While it does not contain the same facts as in the instant case, the court took occasion to give its views on the incompatibility of the two offices. The Court said:



"What did the Legislature mean when it enacted, in this connection, the provision that 'no sheriff, clerk or collector, or the deputy of either, shall be eligible to the office of treasurer?' If we assume the word 'eligible' was then used in the sense respondent now seeks to give it, a collector could have been appointed treasurer by the county court, then could subsequently have resigned as collector and lawfully qualified as treasurer. This construction, reduced to its lowest terms, would mean that what the Legislature intended was that one could not be both collector and treasurer at the same time. It is a well settled rule that the Legislature is not to be held to have done a vain and useless thing. It is elementary law that one may not hold two offices the duties of which are incompatible. What greater incompatibility could be conceived than the duty of paying and the duty of receiving and granting acquittance for public money? If one person could be both collector and treasurer, he would pay over the money as collector and receive it as treasurer, and as treasurer, issue a receipt to himself as collector. Under the general law, it is settled no man could have held these two positions. Construed as respondent construes it, the statute added nothing whatever to the law and was a useless enactment, a vain and foolish thing. The general law, already in force, covered the whole matter. So far as it concerns the collector, the evil designed to be averted by the statute was not merely that one man could not hold two incompatible offices, but that no man should be put in the possible position of receiving payment from himself though he hold but one office, that of treasurer."



CONCLUSION

Even though our Legislature has seen fit by its acts to abolish the office of County Treasurer and place the duties of the same under the office of the County Collector, thereby holding the two offices compatible we are constrained to hold that until those events transpire, the two offices are incompatible.

Therefore, it is the opinion of this department that you could not serve as deputy to the county collector of revenue while you remain treasurer of Perry County, until January 1, 1937.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

COUNTY COURTS: -- AUTHORIZED TO EXAMINE COLLECTOR'S BONDS.  
COLLECTORS' BONDS: -- MAY BE EXAMINED BY COUNTY COURT.  
" " -- "ADDITIONAL BOND" MEANS A NEW BOND.

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1-24  
January 23, 1934.

Honorable Joseph M. Bone, Jr.  
Prosecuting Attorney  
Audrain County  
Mexico, Missouri



Dear Sir:

We have your request of December 27, 1933, for an opinion upon the following state of facts:

"That the present collectors bond of Audrain County, as required by the county court was set at approximately \$430,000.00. He gave a personal bond to qualify, since giving this bond, two of the sureties are deceased, some have made assignments of their property and others have become insolvent.

"The county court wishes to require an additional bond. As I understand the law, this requires the giving of a New Bond. The Sections applicable are 9885, 9892 and 9893, R. S. of Mo. 1929.

"Also, Section 9885 R. S. of Mo. 1929 was amended by the laws of 1933, page 464, which makes the minimum requirements of the bond, to be 'in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment plus 10 per cent of said amount'. This amendment makes the minimum requirement less than that required in the original Section 9885 R. S. of Mo. 1929.

"Kindly advise me whether if an additional or new bond is given, the original or the amended Section is applicable."

The amount of the collector's bond was originally controlled by Section 9885, R. S. Mo. 1929, which is now repealed and a new section covering the amount of said bond enacted - Laws of 1933, page 464.

Section 9892, R. S. Mo. 1929, provides:

"The county court shall, at the end of the first year, carefully examine the bond given as collector, and may again examine the same at any time before the tax book of the second year of his term shall be delivered to him, and by such examination ascertain if the bond be sufficient, and the sureties thereto still solvent and sufficient, and upon such examination, if found to be necessary, the court shall require an additional bond, as collector, with good security, to be approved by the court, as in the taking of the original bond."

Under the above statute, the duty to examine the bond of the collector is mandatory upon the county court, since the statute uses the word "shall." This section also provides that the court "may" again examine said bond before the tax book for the second year of the collector's term is delivered to the collector. This second examination of the collector's bond by the county court is a matter resting in the discretion of the county court, because the statute uses the term "may". At either examination of the collector's bond, it is the duty of the county court to ascertain if the bond is sufficient, and the court may require an additional bond. This statute (9882) is silent as to any examination of the collector's bond during the third and fourth years of the collector's term.

Under Section 2848, R. S. Mo., 1929, a general power is vested in all courts whose duty it is to approve official bonds, to examine them at any time whenever such court possesses knowledge that, first, a surety has become a non-resident; second, has died; third, has become insolvent or otherwise insufficient. This section reads as follows:

"When it shall come to the knowledge of any court whose duty it is to approve the official bonds of any of the officers named in Section 2848, that a surety of any of the said officers has become a non-resident of the county in which his official bond was

executed and required to be filed, or has died, become insolvent or otherwise insufficient, said court shall make an order requiring the officer for whom any such surety executed the bond, on a day therein named, to appear and show cause why he should not give additional security."

The officers referred to in this section include the collectors, - Section 2848, R. S. Mo. 1929.

When this section (2848) and Section 9892, supra, are considered together, we see no conflict between them. Section 9892 imposes first, a mandatory duty - second, discretionary duty to examine the collector's bond at specific times, namely, when the bond is first given and thereafter before the tax book of the second year is delivered to the collector.

Section 2848 vests in the county court, which has the power to approve the collector's bond, authority at any time to make inquiry into sufficiency of the collector's bond. Under this Statute, provision is made for a hearing upon this question, at which time the collector is entitled to appear and offer such evidence as he may have to show that his bond is sufficient. At any such hearing, it is a question of fact for the county court to decide as to whether or not the bond under examination is sufficient, and in deciding this question of fact, it is the duty of the county court to hear testimony - State ex rel. Adamson v. Lafayette County Ct., 41 Mo. 545 (1867). If at this hearing, the county court finds as a matter of fact that the bond is insufficient, then such court may require the collector to give an additional bond within such time as the court may fix - Section 2849, R. S. Mo. 1929. It must be noted in passing that Section 2848 uses the term "additional bond".

However, Section 2850, R. S. Mo. 1929, provides:

"When the additional bond is given and approved, the former sureties shall thereby be discharged from any misconduct of the principal after the approval of said bond."

When Sections 2848 and 2850 are read together, the only meaning that the term "additional bond" contained in Section 2848 can be given is that the collector shall give a new bond, because upon the execution of the second

bond, the sureties on the first bond are released.

A new section, 9885, Laws of Missouri, 1933, page 464 was approved May 12, 1933, and went into effect July 24, 1933. This new section imposed additional duties upon the collector and placed in the hands of the county court power to require the collector to deposit daily collections in a depository of the county court's own selection. Prior to the amendment, the collector was required under Section 9885 to give a bond "in a sum equal to the largest total collection made during any two months of the year preceding his election or appointment plus 10% of said amount." Under the new section, Laws of Missouri, 1933, page 464, the collector is required to give a bond "in a sum equal to the largest total collection made during any one month of the year preceding his election or appointment plus 10% of said amount." Prior to the enactment of this new section, the collector selected his own depository and deposited his collections therein daily, and distributed said collections monthly to the State and County treasuries - Section 9937, R. S. Mo. 1929.

It will be seen that the total amount of money in the hands of collector at any time has been greatly reduced by the 1933 new section and therefore, in justice to the collector, the amount of his bond was reduced.

It is, therefore, the opinion of this office that the county court has ample authority to inquire at any time into the sufficiency of collector's bond, and if in the opinion of the county court said bond is insufficient, then the county court may require the collector to give a new bond. In the giving of such new bond, the collector shall give it in accordance with Laws of Missouri, 1933, page 464.

Yours very truly,

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK  
Attorney-General.

\_\_\_\_\_  
FRANKLIN E. REAGAN  
Assistant Attorney-General.

FER/J

FILED

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( Opinion relating to the annual financial statement of  
counties as provided under section 12165. Laws 1933  
page 363.)

Jefferson City, Mo., January 18, 1934

Mr. Paul Boone  
Prosecuting Attorney of Ozark County  
Gainsville, Missouri

Dear Sir:

This department acknowledges receipt of your letter of  
date January 15th, 1934, in which you state and inquire as  
follows:

"The County Court of this county has  
refused to designate a person to make the  
financial statement of the county as  
provided by the 1933 Session Laws.  
Please advise me whether or not is the  
duty of the County Clerk to prepare  
this statement under these circumstances  
without being designated by the Court."

The answer to the question raised in your letter must find  
solution under Sections 12165 and 12166 Laws 1933, pages 363-7.  
That portion of said sections pertinent here, reads as follows:

Section 12165

"On or before the first Monday in March  
of each year after the taking effect  
of this act the County Court of each  
county in this state shall prepare and  
publish in some newspaper of general  
circulation in such County, if such  
there be, and if not by notices posted

in at least ten places in such County,  
a detailed financial statement of the  
County for the year ending December 31,  
preceding.....  
At the end of the statement the person  
designated by the County Court to pre-  
pare the financial statement herein  
required shall append the following  
certificate:.....  
Or if no one has been designated said  
statement having been prepared by the  
County Clerk, signature shall be in  
the following form: Clerk of the  
County Court and Ex-officio officer  
designated to prepare financial  
statement required by Section  
12165 R.S., 1929."

Section 12166 (Supra):

".....The County Court shall not  
pay the Publisher until proof of  
publication is filed with the Court  
and shall not pay the person designated  
to prepare the statement for the pre-  
paration of the copy of said statement  
until, etc.....If the County  
Court shall employ any person other  
than a bonded County officer to pre-  
pare the financial statement herein  
required the County Court shall require  
such person to give bond, etc."

Statutes imposing duties and conferring powers on  
officers or either mandatory or directory.

This department holds that it is mandatory upon County  
Courts of this State to have a financial statement published,  
as provided under sections 12165 and 12166 (Supra). For the  
reason the exercise of the power granted the County Court  
therein is necessary to protect the public interest.

It is also the opinion of this department that under the  
provisions of sections 12165 (Supra) that the County Court  
may designate someone other than the County Clerk to make out



and prepare said financial statement, but if no one has been designated, by the Court, then under Section 18166 (Supra) the County Clerk may prepare the statement.

In State ex rel Hydee v. Jackson, 276140 L.C. 116, the Court said:

"But it is also well settled, if not fundamental law, that whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties, effectual, is conferred by implication."

So much being true, and the statute which defined the duty of the County Court, that "they shall prepare and etc.," and further: "or if no one has been designated said statement having been prepared by the County Clerk etc." It follows by necessary implication that the Clerk is authorized to make said financial statement. We think this construction should be sustained.

However notwithstanding the right of the Clerk to prepare the financial statement under the circumstances herein outlined, perhaps a better plan would be for some interested tax payer to proceed against the County Court by mandamus to force the Court to act by designating of record someone to prepare said financial statement.

Respectfully submitted

*Barnes*

Assistant Attorney General

APPROVED:

\_\_\_\_\_, Attorney General

(An Opinion relating to payment of delinquent school warrants.)

Jefferson City, Mo.  
January 24, 1934



Hon. Paul Boone  
Prosecuting Attorney, Ozark County  
Gainesville, Missouri

Dear Sir:

We acknowledge receipt of yours of January 15, 1934, in which you state and inquire as follows:

"About the first of October 1933 I wrote you for an opinion as follows: I would appreciate an opinion from your office on the question of the county or township treasurer paying school warrants with money collected after the close of the school year, June 30th, each year. It has been the custom in this county of crediting the school taxes collected after June 30th of each year for which they were delinquent and the money used by the Treasurer to pay warrants issued in prior school years in accordance with the delinquent collections. Please advise me whether or not this may be legally done in view of Section 9233, R. S. Mo. 1929, I received a copy of opinion addressed to Hon. H. B. Schroeder Treasurer, Crawford County, Steelville, Missouri, with the explanation that the opinion covered the question asked in my letter. I desire an opinion on the

above question in view of Section 9233, R. S. Mo. 1949 together with other law on this question."

Section 12, Article X of the Constitution of Missouri begins as follows:

"No county, city, town, township, school district, or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, etc..."

In Book v. Earl 87 Mo. 1. c. 251, the Court said in part as follows:

"The evident purpose of the framers of the Constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a County for County purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the Treasury for that year. Section 12 (Supra) is clear and explicit on this point. Under this section the County Court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the County to the extent of the revenue provided for that year, but not in excess of it."

It is clear from the reasoning of the Supreme Court in the above case, that what is true with reference to County Courts is likewise true with reference to schoolboards. That is current revenues cannot be used to pay obligations of a

different year, unless there remains an excess after all obligations of the current year have been paid.

The school year begins July 1st. and ends June 30th of each year.

For an example, school taxes levied for the year 1933, are to be used to pay obligations for the school year beginning July 1st. 1933, and ending June 30th. 1934, it matters not when the taxes are collected, they shall first apply, when collected, to obligations incurred for that period.

School boards have a right to anticipate the revenue for a given year, and contract obligations for ordinary school expenses for that year, which are binding on the school district to the extent of the revenue provided for that year, but not in excess of it. And this department so rules.

  
\_\_\_\_\_  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
Attorney General

ELECTIONS: Necessity of registrar elect having property qualification in order to receive certificate of election.

12-27  
December 20, 1934.



Honorable Walter C. Borgelt,  
County Clerk,  
St. Charles, Missouri.

Dear Sir:

This department wishes to acknowledge receipt of your letter dated November 24, 1934, requesting an opinion upon the following proposition, the pertinent portions whereof I am herewith setting forth.

"After the election returns were made it was found that the party on the Democratic ticket received the highest number of votes and therefore was elected. In looking up the law, I find that on page 241 under Section 5, relating to the qualifications that the person so elected must be an owner of real estate in this State. When the party appeared to file her statement of cost under the Corrupt Practice law, and before I issued the Certificate of Election, I asked her if she was a qualified voter of her ward, to which she answered yes, and there is no question about it at all. However, when I asked her if she owned real estate in this State, her reply was no. Thereupon, I advised her of the requirements of Section 5 of the Registration Law, and I have held up the Certificate of Election, until I could get some information thereon. It is my desire to issue the Certificate of Election if I can do so under the law. However, my duty under the law surpasses all desires.

The question that I desire your written opinion on is, can I (as Clerk of the County Court, vested with the authority and duty of issuing Certificates of Election) issue to this party a Certificate of Election, in view of the law setting out the qualifications and requirements. Your reply on this matter will be appreciated."

I believe Section 5 of the Laws of Missouri, 1933, page 241 is decisive of your question. Said Section reads as follows:

"In all cities of this state which now contain or may hereafter contain 10,000 inhabitants and less than 30,000 inhabitants, at each general election for State Officers, there shall be elected

In each election district or ward of such cities, by the qualified voters of such election district or ward, one registrar of election, who shall have the qualifications of an elector in his election district or ward and be the owner of real estate in this State, and who shall hold office for four years and until his successor is elected and qualified. "

I read the phrase "who shall have" as applying to the phrase "be the owner of real estate in this State", so that such law should read for the purpose of interpretation in our instant case, "who shall be the owner of real estate in this State." The use of the verb "shall" indicates a mandatory intention upon the part of the Legislature, and leaves nothing optional to you, or anyone else. It requires a strict fulfillment of the statutory requirements. This, apparently, is the intention of the Legislature as is expressed.

Therefore, it is our opinion that you are without authority to issue a certificate of election in the instant case, unless the party applying therefor has the necessary qualifications.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

DEPARTMENT OF AGRICULTURE - FARM- WAREHOUSE AT-  
HOUSE BILL NO. 79: Act requires insurance to be carried  
on grain in Warehouse but may be  
waived by Federal Government.

1.22  
January 18, 1934

Honorable J. C. Breshears  
Commissioner of Agriculture  
Jefferson City, Missouri



Dear Mr. Breshears:

This Department acknowledges receipt of  
your letter dated December 30, 1933, as follows:

"This is a request for rush  
opinion on Sections 10 and 11  
of House Bill No. 79, the Farm  
Warehouse Act, which became  
law with emergency clause when  
signed by the Governor, December  
22, 1933.

We have been notified by the  
United States Government that  
their officers do not desire fire-  
tornado-windstorm insurance on  
Missouri corn, having expressed the  
hope that Section 10 is not operative,  
or at least not mandatory to the Com-  
missioner of Agriculture.

We earnestly beseech you for imme-  
diate opinion, since everything  
about this new law is seemingly  
hanging fire until we can get this  
point settled."

Attached to your letter is copy of House Bill  
No. 79 passed by the Fifty-seventh General Assembly in Extra  
Session. Sections 10 and 11 of the Bill are as follows:



"Section 10. Any person to whom warehouse receipts are issued shall keep the grain in such warehouse or warehouses, owned or controlled by him, insured against loss by fire, tornado, and windstorm with a company authorized to do business in the state and approved by the Commissioner of Agriculture, to the extent of the full insurable value thereof, and it shall be the duty of the Sealer at the time of making his examination to determine that this provision has been complied with.

Section 11. The Commissioner of Agriculture shall have general supervision of the administration of the provisions of this act. He shall make and promulgate such rules and regulations, not inconsistent herewith, as shall be necessary or desirable to effectually carry out the purpose thereof. He shall make such reasonable regulations with respect to the construction and maintenance of granaries, cribs, bins or other receptacles as may be necessary to protect the grain to be stored therein under the provisions of this act. The Commissioner of Agriculture shall prepare and have printed the necessary blanks, forms, books and other printed matter, and furnish the clerical help necessary for administering this act, which said printing and services shall be paid from an appropriation made therefor by the General Assembly."

Section 10 is explicit in its requirements and provides it is the duty of the Sealer at the time he makes examination of the proposed warehouse to determine that Section 10 has been complied with. We assume it was thought necessary to make the provision as set out in Section 10 in

Honorable J. C. Breshears

-3-

January 18, 1934

order to procure the Federal funds mentioned in Section 17 of the act. While the requirement in Section 10 appears to be mandatory and not directory we see no reason why the taking out of insurance may not be omitted if the Federal Government sees fit to waive the same, and if the owner of the grain does not desire to carry such insurance for his own protection. The act does not make such insurance a pre-requisite to an approval of the premises as a warehouse or the sealing of the same by the Sealer.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

FUNDS: "County public school fund", "seminary fund" and "public school fund" discussed.

1-22  
January 19, 1934.



Hon. Roland Boynton  
Attorney-General  
Topeka, Kansas

Dear General Boynton:

This office acknowledges receipt of your letter dated January 2, 1934, as follows:

"In Kansas the law requires the State School fund Commission to invest the income from our Permanent School Fund in certain government, state, and municipal bonds and warrants, and provides that in investing this income no more than par be paid for bonds, nor more than the actual market price. It has been the custom in Kansas for years, in investing this fund, to pay par for municipal bonds when they are offered by the various municipalities.

It would be of material assistance to me if you would write me and tell me whether or not in Missouri a similar condition exists; that is, do you have a method provided by statute for the investment of moneys received from school lands, and if so, what is the practice in your state and under whose supervision does it fall? Any information you can give me will be gratefully received."

I.

Section 9247 R. S. Mo. 1929, reads as follows:

"The proceeds of the sixteenth section, or other lands selected in lieu thereof, the

interest of such proceeds, the rents and profits of such lands, and all the public school moneys which shall be apportioned to any unorganized township, arising from dividends, proceeds and profits of the public school fund, shall constitute a township school fund."

Section 9248 R. S. Mo. 1929, provides:

"The county courts, respectively, shall have the care and management of the school funds of the several townships within their respective jurisdictions, and shall cause accounts thereof to be stated and kept so as to exhibit the funds of each township separately, and the disposition thereof."

Section 9245 R. S. Mo. 1929, provides:

"Whenever any county in this state may have, separate and apart from the township funds, any public school fund arising from any source whatever, the same shall be under the jurisdiction of the county court of said county, who shall be governed in its care and investment by the same rules and regulations as govern its actions in the township funds--the proceeds of said funds to be collected annually and distributed as provided in sections 9257."

Section 9250 R. S. Mo. 1929, reads as follows:

"Whenever there shall be in the county treasury any money belonging to the capital of the school fund of any township therein, the county court of such county shall loan the same for the highest interest that can be obtained, not exceeding eight nor less than four per cent. per annum, upon conditions and subject to the restrictions hereinafter set forth."

Section 9251 R. S. Mo. 1929, provides in part as follows:

"When any moneys belonging to said funds shall be loaned by the county courts, they shall cause the same to be secured by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; \* \* \* \* \* But before any loan shall be effected, the borrower shall file with the county court an abstract of title at the time he files his bond and mortgage to the real estate which is to be mortgaged."

In *Veal v. Chariton County*, 15 Mo. 412, 1. c. 414, the Supreme Court of Missouri said:

"In relation to these funds, the county courts are trustees. They have no authority to dispose of the principal entrusted, or any of its interest, otherwise than is prescribed by law."

See also, *Montgomery County v. Auchley*, 103 Mo. 492;  
*Lafayette County v. Hixon*, 69 Mo. 581.

From a reading of the above statutes you will see that the county courts of the several counties have complete custody and control of the "permanent school fund" derived from the sale of land in their respective counties. The statute only permits the investment of this fund in real estate; provision being also made for the giving of a bond to secure the faithful performance of the conditions surrounding the loan. The Supreme Court has declared this fund to be a sacred one and the management of same strictly construed.

## II.

In addition to the above fund there is a "state public school fund" (Art. 24, Chap. 57, R. S. Mo. 1929).

Section 9712 R. S. Mo. 1929, provides in part as follows:

"There is hereby created a public school fund, the annual income of which shall be applied as hereinafter directed. The proceeds of all lands that have been or may be hereafter granted by the United States to this state, and not otherwise appropriated by this state or United States; also, all moneys, stocks, bonds, lands or other property now belonging to any fund for the purposes of education, except wherein the vested rights of townships, counties, cities or towns would be infringed; \* \* \* \* the income of which, together with not less than twenty-five per cent of the state revenue, shall be applied annually to the support of the public schools provided for in this chapter, to be apportioned as hereinafter provided."

Section 9715 R. S. Mo. 1929, relates to the investment of such funds and provides in part as follows:

"Whenever there shall be in the treasury or elsewhere, subject to the order of the treasurer, any money belonging to the capital of the public school funds, the state auditor shall make reports thereof to the state board of education, who shall direct the investment of the same in bonds of the United States, bonds of the state of Missouri, or state certificates of indebtedness. That portion of the income and revenue to be distributed for the support of the public schools shall be payable on the warrant of the auditor, in favor of the treasurers of the several counties, in each year, immediately after the apportionment of such moneys shall have been made and filed: Etc."

The statutes also create a "seminary fund" (Art. 25, Chap. 57, R. S. Mo. 1929).

Section 9717 R. S. Mo. 1929, provides in part as follows:

"There is hereby created and especially established a fund for the support of the university of the State of Missouri, the college of agriculture and the school of mines and metallurgy, to be denominated the seminary fund, which shall consist of: Etc."

Laws of Missouri, 1933, page 389, Section 9720, provides:

"The State Board of Education, as constituted by Sec. 4, Article XI, of the Constitution, shall be Commissioners of the Seminary Fund."

Section 4, Article XI, of the Constitution of Missouri, provides:

"The supervision of instruction in the public schools shall be vested in a 'Board of Education,' whose powers and duties shall be prescribed by law. The Superintendent of Public Schools shall be president of the board. The Governor, Secretary of State and Attorney-General shall be ex officio members, and, with the Superintendent, compose said Board of Education."

Section 9724 R. S. Mo. 1929, pertains to the investment of the "public school fund" and "seminary fund" and reads as follows:

"The state board of fund commissioners shall invest all money belonging to the 'public school fund' and to the 'seminary fund' that has accumulated or may hereafter accumulate in the state treasury, in registered county, municipal or school district bonds of this state, or in their discretion in the approved registered bonds of any drainage or levee district in this state,



at not less than par value, and shall at all times keep said fund so invested as far as possible. Whenever said board shall contract with the holder of any such bonds for the purchase thereof, the bonds shall be delivered to the state treasurer and a certificate of that fact filed with said board, and thereupon a requisition shall be made by the board of fund commissioners upon the state treasurer, payable out of the fund for which the investment is to be made, in favor of the holder of such bonds, for the purchase price agreed upon between him and said board. The board of fund commissioners shall enter in full upon its records a description of all bonds purchased by it, the particular fund out of which the bonds were purchased, the person from whom the said bonds were bought, the price paid therefor and the date of the transaction, and shall also require the state treasurer to give a receipt for said bonds, which shall be filed with the state auditor."

Article 26, Chapter 57, R. S. No. 1929, pertains to gifts to public schools and university, and designated as a "fund", and makes the state treasurer responsible for the safe keeping, reinvestment and disbursement of this fund.

The supervision of the "state public school fund" and the "seminary fund" vests in the board of education; the Governor, Secretary of State and Attorney-General being ex officio members with the Superintendent. These funds may be invested in registered county, municipal or school district bonds of this State or in their (Board) discretion in approved registered bonds of any drainage or levee district in this State at not less than par value.

Trusting the above is the information you desire, and if we may be of further assistance, please let us know.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK  
Attorney-General.

JLH:EG

OPTOMETRY BOARD: OFFICERS: -- COMPENSATION: FEES: Members of State Board of Optometry are entitled to per diem for days necessarily used in travel to and from **necessary** meetings of the board, when travel is made by the usual and most direct route. Fraction of day spent in service at meeting taken as a whole day.

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1-23  
January 22, 1934



Dr. J. F. Brawley  
Secretary State Board of Optometry  
Jefferson City, Missouri

Dear Doctor Brawley:

This Department acknowledges receipt of your letter dated December 30, 1933, as follows:

"I would like an opinion from you, if the members of the State Board of Optometry have a right to charge seven dollars per day while going to a Board meeting and returning from same.

It has been the custom in the past where the board met for one day for the members of the State Board of Optometry to charge for three days.

Will you please give me your opinion, if it is right for them to charge this amount, or, are they entitled to seven dollars per day only when the Board is in session.

Section 13498 provides that the members of the Board of Optometry shall within thirty days after appointment, and annually thereafter in the month of July, organize by the election of a president and secretary of the board.

Section 13499 provides it shall be the duty of the board to examine applications for registration and to grant certificates of registration to such persons as the same are entitled to be issued, and to cause the prosecution of all persons violating the provisions of the law, to report annually to the Governor and furnish a record of the proceedings of the board for the year and an itemized statement of all

moneys received and disbursed by the board. Under the latter section the president of the board may call a special meeting at any time.

Section 13505 requires the board of Optometry to hold examinations of applicants for certificates of registration at such times and places as the board may determine.

Section 13509 states the grounds upon which the State Board of Optometry may either refuse to issue or renew or may suspend or ~~revoke~~ any certificate of registration. This section also provides for a hearing by the board on such matters.

Section 13500 requires the board to hold meetings for the examination of applicants for registration and the transaction of such other business as shall pertain to its duties, at least once in three months, one of which meetings in every year shall be held in the City of St. Louis and one in Kansas City.

The foregoing epitomizes the general duties of the State Board of Optometry and indicates a rather wide scope of activities.

Section 13500 further provides:

"\* \* \* Each member of the board shall receive as compensation for his service the sum of seven dollars for each day engaged in this service, and all legitimate and necessary expenses incurred in attending the meeting of the board \* \* \* \* \*."

Section 13498 empowering the Governor to appoint the State Board of Optometry requires that the members thereof be selected from among the practicing optometrists of the state, and such members shall have had not less than five years' practical experience in optometry. As stated above, the board is required to hold meetings for the purpose of examination of applicants for registration and the transaction of such other business as shall pertain to the duties of the board. These meetings shall be held at least once each three months and special meetings may be called by the president of the board at any time. We take notice of the fact that it is the custom to appoint members of state boards, such as the Board of Optometry, from different localities over the state. Members of the Optometry Board may be selected from among optometrists not living in either Kansas City

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or St. Louis or any other place where a meeting of the board might be held. In view of the powers of the board with reference to hearings, it is apparent that it might be necessary to hold meetings at many different points in the state, other than Kansas City and St. Louis.

We are not unaware of the settled law of this state that before certain officers are entitled to fees such officers must be able to point to some provision of the constitution or statute law entitling them to receive such compensation. However, the case of Board of Commissioners v. Blakely 123 Pac. 72,77, distinguishes between the fees of officers and the compensation of members of boards. We do not find any decisions in this state dealing directly with the question of law your letter presents, but there are decisions by foreign courts, which if followed, control our conclusion thereon.

The case of State ex rel Van Horn v. Briggs, State Auditor, 63 N. W. 206, was decided by the Supreme Court of North Dakota in 1895. Van Horn was a member of the Board of Trustees of the penitentiary of North Dakota. The capital of North Dakota was Bismark where the penitentiary was located. Van Horn lived at Hillsboro some distance from Bismark. Van Horn consumed a day or part of a day in traveling from Hillsboro to Bismark, attended a session of the trustees one day and traveled a day or part of a day in returning to Hillsboro. He traveled in the most usual and direct route from Hillsboro to Bismark. The Auditor contended the trustee was not entitled to compensation for the days spent in going to and returning from Bismark. The statute controlling the compensation of such trustees, as quoted in the opinion, reads:

"The said trustees shall be entitled to receive the sum of three dollars per day for each day employed in attendance upon said sessions, and all traveling expenses necessarily incurred therein."

Our section 13500 allows compensation for service

"\* \* \* for each day engaged in  
this service \* \* \* \* \*".

It would seem that the North Dakota statute allowing compensation only for 'attendance' would be stronger against the allowance of compensation for time spent in going to and from the

January 22, 1934

meeting than is our statute which allows compensation for 'service'. Disposing of the case the court at page 207 of the opinion held:

"The legislative purpose is clearly manifested that the office of a trustee shall not be a purely honorary office. The intention to compensate for their services by a per diem is clearly expressed in the statute; and we are unable to see, either in the language employed by the legislature or in reason, why members should not be compensated for all the time necessarily and actually employed in the service of the state as members of such board. Our views are strengthened by the consideration that no mileage is given to members of the board, which is often done as a compensation for time spent in traveling in the public service, as well as for disbursements therein."

Later the Supreme Court of North Dakota ruled in the case of State v. Richardson, et al, 109 N. W. 1026 that certain officers were not entitled to their per diem for time spent in going to and from meetings of the board, but in that case the statute provided mileage for the distance traveled in attending such meetings, which was held to exclude the right to per diem on account of such travel. The court at page 1029 of the opinion said:

"Provision is only made for mileage for travel. The per diem is for 'time they are necessarily employed in the duties of their office', and five cents per mile is allowed for the 'distance actually traveled in attending the meetings of the board.' "

The case of State v. Howard 74 Atl. 392, decided by the Supreme Court of Vermont, involved the same question of law presented here. The court at page 398 of the opinion said:



"The statute allowed the defendant a fixed sum per day for his services, and his necessary expenses when away from home. No question regarding time spent in the actual performance of official duties is involved. The time necessarily spent by a commissioner in traveling to and from the place of his appointment is time spent in the service of the state, so no distinction is to be made between the two classes of items under consideration. The law allows for this service and these expenses if they are necessary, and the question of necessity depends upon the facts, and the auditor is empowered to determine the facts. Whether the running time of available trains is such that the official is justified in traveling to or towards his destination the day before his services are to be rendered, or in deferring his return until the morning after they are concluded; and whether the public conveyance in some stage of his journey is of such a character that the particular official is justified in going by private conveyance; and whether in a case of this kind the circumstances were such as required that the conveyance be summoned by telephonic message - are all matters to be determined by the auditor in the proper exercise of his discretion, and his determination thereof so made will be binding on the state."

Board of Commissioners v. Blakely 123 Pac. 72, decided by the Supreme Court of Wyoming, presented the same question, on principle, as we have before us. The controlling statute of Wyoming provided that county commissioners should receive

"\* \* \* a per diem and compensation of five dollars for each day actually employed in the discharge of the duties of his office, and his traveling expenses, not exceeding ten cents per mile for each mile actually and necessarily traveled in going to and returning from the meetings of the board, and no other compensation whatever."

Determining the case, the court at page 77 of the opinion held:

"Coming to a consideration of our own statute, we are to determine whether it covers time that is actually taken and necessarily required to go to the county seat to attend a board meeting, and thereafter to return home. During that time is the commissioner employed in the discharge of the duties of his office? The answer to the question does not depend, we think, upon whether he may individually bind the county, or whether county business can be transacted only by the board when assembled as such. When a public officer is required by law to travel away from his home or the place of his official residence to perform an official act, such business, though more time may be necessarily occupied in such travel than in the actual transaction of the business which has required it. And we do not regard it as a misuse of language to say that all the time so occupied is employed in performing the duty imposed. It is only upon that principle that mileage or actual traveling expenses are allowed by law to a public officer."

On the same page and distinguishing between fees for official acts and the statute then under review the court further said:

"It is, of course, essential that authority for the payment of compensation by the day or otherwise for time employed in traveling upon public business or for any service by a public officer be found in the statute. The statute in question is not like one prescribing fees for particular official acts. It prescribes a daily compensation for time employed, and it was unquestionably intended that, in addition to the annual salary allowed to each commissioner, he should receive a compensation for the discharge of the duties of his office measured by the time actually and necessarily employed therein."



January 22, 1934

And on the general issue, further on page 77,

" The time employed by a commissioner in discharging his duty to attend a meeting of the board necessarily includes, not only the days upon which he attends the meeting, but as well those occupied in going to and returning from the place of the meeting. The necessity of returning is caused by the duty to attend. This is recognized by the statute, for it provides for the payment of the commissioner's actual traveling expenses incurred in going to and returning from the meetings of the board. It is not to be supposed that such expenses would have been declared a charge upon the county treasury, except upon the theory that they are incurred in the performance of a duty of the office. "

We believe it to be a rule of the federal government that, unless the statute or terms of employment expressly or by clear implication provide otherwise as to compensation, an officer or employe who is paid by the day is during his term of office, or the period of his employment, entitled to the daily pay while traveling in the performance of his duty. See *Wertz v. U.S.*, 40 Ct.Cl. 397."

The Kansas City Court of Appeals in *Holman v. City of Macon* 155 Mo. App. 398, in passing on the right of the police judge of the City of Macon to certain claimed compensation, said;

"A recognized rule of statutory construction is that a public officer can not demand any compensation for his services not specifically allowed by statute, and that statutes fixing such compensation must be strictly construed."

If the above declared principle of statutory construction applies to compensation of boards as well as to fees of officers, using the word fees in its strict sense, then construing 'service' as used in Section 13500 and as rendered by the State Board of Optometry it seems to us, in view of the above quoted

January 22, 1934

declaration of the courts, that for all practical purposes the time necessarily spent by a member of the board in going to and returning from a meeting of the board is as much a part of the service of the member of the board as is the time actually spent in and at a meeting of such board.

#### CONCLUSION.

The foregoing seem to be the controlling authorities on the matter at issue here, and, from which, and a construction of Chapter 101, we are of the opinion that the members of the State Board of Optometry are entitled to their per diem for the days necessarily spent in traveling to and from necessary meetings of the board, when such travel is made by the usual and most direct route.

According to the case of State ex rel. Greb v. Hurn 1 A. L. R. 274, where a statute fixes a per diem compensation, the official entitled thereto is entitled to such compensation named for every day on which he performs substantial service, although the time actually consumed was merely a fraction of a day.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

LIQUOR CONTROL ACT: County Court may charge for licenses  
issued to retail dealers.

3-13

March 10, 1934.



Hon. William H. Bray,  
County Counselor,  
County Court of St. Louis Co.,  
Clayton, Missouri.

Dear Sir:

This department is in receipt of your letter of March 2, 1934 requesting an opinion as to the following state of facts:

"The County Court as well as myself are in a quandary relative to their rights under the Liquor Control Bill, of the State of Missouri, as to what amount they can collect as their share of the tax.

We were informed that you had already written an opinion for various counties and take this means of asking whether or not you would advise us as to what, in your opinion, we can legitimately charge the various liquor stores in our county."

I.

The County Court may charge  
for licenses issued to re-  
tail dealers.

Section 24 of the Liquor Control Act provides:

"The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

March 10, 1934.

It will be noticed that the only power given to the County Court is to make a charge for licenses issued to retail dealers. The Court is not authorized by the Act to license wholesale dealers or distillers, manufacturers or brewers.

While the Court is authorized to make a charge for licenses, the charge may not exceed the amount provided for in Section 22 of the Act for state purposes.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

LIQUOR CONTROL ACT: Country club is not entitled to a license to sell intoxicating liquor by the drink unless located in city where sale by drink is authorized

3-13

March 12, 1934.



Hon. Fred A. Boxley, Counselor,  
County Court Jackson County,  
1112 Commerce Building,  
Kansas City, Missouri.

Dear Sir:

This department is in receipt of your letter of March 3, requesting an opinion as to the following state of facts:

"The County License Inspector of Jackson County has asked me for an opinion as to whether or not Country Clubs, having a charter but lying outside of the city limits of Kansas City and outside of the corporate limits of any city, are entitled to a license to sell liquor by the drink to be consumed on the premises.

"As I read the law, there is no provision whatever to cover such a case. Section 4525g-15 seems to actually prohibit such sales. Have you given an opinion on this subject?

"Our Country Clubs would very much like the privilege of selling by the drink. They are built out in the country where it is necessary to go to have golf clubs. I think there are only two of them where the club houses are within the city limits."

I.

Country Clubs situated outside the corporate limits of a city of 20,000 inhabitants are not entitled to a license to sell liquor by the drink to be consumed on the premises.

When analyzing the various provisions of the Liquor Control Act the ruling of the Supreme Court of Missouri, en banc, in the case

of State v. Parker Distilling Company, 236 Mo. 219, l.c. 274, should be kept in mind:

"When we bear in mind the foregoing idea, that the liquor traffic in this State has no legal rights, save and except those expressly granted by license and the statute under which it is issued, then we can more clearly see that the State may impose such conditions, burdens and regulations as it may deem wise and proper, and no one who engages therein has a right to complain thereof."

Section 22 of the Act provides:

\*\*\*\*\*Provided however, that no license shall be issued for the sale of intoxicating liquor in the original package, not to be consumed upon the premises where sold, except to a person engaged in, and to be used in connection with the operation of one or more of the following businesses: A drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionery and/or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least fifteen hundred (\$1500.00) dollars, exclusive of fixtures and intoxicating liquors.\*\*\*\*\*

A Country Club can hardly qualify as a drug store, a cigar and tobacco store, etc., as required by the Act, and therefore no license could be issued authorizing a Club to sell intoxicating liquor in the original package.

Section 13-a of the Liquor Control Act provides:

\*\*\*\*\*Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants,\*\*\*\*\*

"Provided further, that no license shall be issued for the sale of intoxicating liquor,

other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities.\*\*\*\*

This section definitely prohibits the issuance of a license to sell intoxicating liquor by the drink at retail for consumption on the premises where sold, other than malt liquor containing alcohol not in excess of 5% by weight outside the limits of incorporated cities. In other words, intoxicating liquor may be sold by the drink for consumption on the premises only in cities having a population of 20,000 inhabitants or more, or in cities where sale by the drink has been authorized by vote of the people.

#### CONCLUSION

We recognize that it is usually necessary for Country Clubs to be located outside the limits of the city from which the membership is drawn, and that the members, living in a city wherein it is permitted to sell intoxicating liquor by the drink, would like the same privilege for their club; however, "the propriety, wisdom, and expediency of legislation enacted in pursuance of the police power is exclusively a matter for the Legislature" (Star Square Auto Supply Co. v. Gerk, 30 S.W. (2d) 447, l.c.462) and we are constrained to hold that a Country Club, unless it be located in a city wherein sale by the drink is authorized, is not entitled to a license to sell intoxicating liquor other than malt liquor having an alcoholic content of not in excess of 5% by weight.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General



PROSECUTING ATTORNEY:

Township assessor who fills a vacancy after a change in law as to compensation is entitled only to compensation under the old law until end of term.

3-14  
March 12, 1934.



Mr. Herbert M. Braden,  
Prosecuting Attorney,  
Chillicothe, Missouri.

Dear Mr. Braden:-

We have your letter of December 30, 1933, in which was contained a request for an opinion as follows:

"I am writing for an opinion as to whether or not a Township Assessor in a county under township organization who filled a vacancy after the change in compensation was made in 1931, is entitled to the increased compensation, or whether he must serve out the term at the 25¢ rate in effect at the time his predecessor took office."

Article XIV Section 8 of the Constitution of Missouri provides as follows:

"Sec. 8. Compensation of officers, not to be increased nor term extended. The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

The applicability of the above section to our question is perfectly clear. The problem which readily presents itself, however, is whether the section refers to the actual individual officeholder or to the term of office as disassociated from any individual. We are of the opinion that it refers to the latter.

In the case of *State ex rel. v. Farmer*, 271 Mo. 306, the Supreme Court sitting in banc upheld our point of view, Judge Faris at page 314 stating as follows:

"Each official term stands by itself. The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

Mr. Herbert M. Braden

-2-

March 12, 1934.

The above case involved a different set of facts but the language used by the Court is unmistakeably clear on our point. Applying said language and theory to our set of facts we can say that although the individual officeholders may change one or more times during a term, their rights as such officeholders during that particular term remain exactly the same.

In view of the above, therefore, we are of the opinion that the constitutional provision above quoted forbids the compensating of the township assessor under the new law until the end of the present term.

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General.

CMHJr:LC

Approved:

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Attorney General.

STATE ATHLETIC COMMISSION: Has no authority to waive collection  
of tax provided by Sec. 12999, R.S.'29.

3-16  
March 15, 1934.



Mr. C.L. Brewer,  
Director of Physical Education,  
University of Missouri,  
Columbia, Missouri.

Dear Sir:

This department is in receipt of your letter of March 12, 1934, requesting an opinion as to the following state of facts:

"I just have a letter from Mr. Brundage, President of the Amateur Athletic Union, asking that the state tax on the Amateur Championships that have been assigned to St. Louis, April 4th, 5th, and 6th, be waived.

The awarding of this championship to St. Louis and to our state is of course a fine thing. I think we should here in Missouri do everything we can to show our appreciation. I understand the event is being handled by prominent St. Louis citizens who serve without compensation and that all net proceeds will be used for the further promotion for amateur sport.

I do not know that the law will permit waiving the tax; it certainly cannot be done by the State Athletic Commission without the approval of your office."

I.

The State Athletic Commission is without authority to waive the tax provided by Sec. 12999, R.S. Mo. 1929.

Sec. 12999, R.S. Mo. 1929 provides in part as follows:

"That the athletic commission of the State of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the State of Missouri, and it shall have the power, and it shall be its duty: \*\*\*\*\*Third, to collect fees for such license of ten dollars (\$10.00) for every license issued, and to collect five per cent of the gross receipts of every boxing, sparring or wrestling exhibition held, such funds to be accounted for by the said athletic commission of the State of Missouri and deposited monthly in the state treasury, and by the state treasurer set apart into a fund to be known as the athletic commission fund."

This section imposes a positive duty upon the State Athletic Commission to collect five per cent of the gross receipts of every boxing exhibition held in the State of Missouri.

In the case of State v. Hackmann, 254 S.W. 53, a public officer is defined as follows:

"A public officer is one elected or appointed in the manner prescribed by law, as an agent of the public in the performance of duties imposed by law and exercise of authority necessary and incidental to a proper discharge of such duties."

Applying this definition to the State Athletic Commission, it follows logically that the members of the Commission are public officers. Being public officers, the authority of the Commission is prescribed by law. As was well stated in State v. Hackman, supra (l.c. 56):

"An 'officer' is simply an agent of the public, whose power of attorney is the law, which prescribes his duties and limits his authority to such acts only as are necessary and incidental to a proper discharge of such duties as it imposes. Callaghan v. McGown (Tex. Civ. App.) 90 S.W., l.c. 327."

March 15, 1934.

There is no authority conferred by reason of Sec. 12999, supra, that would enable the Commission to waive the tax provided for, since the statute makes it the plain and unequivocal duty of the Commission to collect five per cent of the gross receipts of every boxing exhibition held in the State of Missouri.

In respect to the duty imposed by Sec. 12999, we respectfully call the attention of the Commission to the words of the Court in the case of Smith v. Berryman, 272 Mo., 1.c. 374:

"Those cases simply hold that an action will lie against an officer whose duty it is to perform, but who refuses to perform, a ministerial act. There can be no doubt upon this point, and no one would be so bold as to contend otherwise, especially in a case which does not call for the exercise of official discretion. If the rule were not so, no suit would lie against an officer upon his official bond by a citizen, injured by a failure to correctly or timely perform a ministerial duty."

#### CONCLUSION

It is the opinion of this department that since Sec. 12999, R.S. Mo. 1929 imposes a positive duty on the State Athletic Commission to collect five per cent of the gross receipts of every boxing exhibition held in the State of Missouri, the State Athletic Commission has no authority to waive the collection of this tax.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

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L  
SANATORIUM: Transportation of Patients to Missouri State Sanatorium and Compensation Therefor.

5-21  
May 16, 1934.



Honorable Herbert M. Braden,  
Prosecuting Attorney Livingston County,  
Chillicothe, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of May 2, 1934, such request being in the following terms:

"I am writing you for an opinion as to whether or not a County Court may hire individuals to transport persons to the Missouri State Sanatorium, under the provisions of Article 4, Chapter 46, Missouri Revised Statutes for 1929. I might say in this connection that there is a dispute between the County Court and the Sheriff as to whether or not the sheriff is entitled, under the law, to transport these free patients and collect mileage under the regular rate.

The theory of the sheriff is that they are admitted under Court order and that he is the proper person to carry out the orders of the Court, the same as in the transportation of persons to the different State hospitals. If it is your opinion that the sheriff is entitled to transport these patients, I would also like to have an expression from you as to the compensation to which he is entitled for this service."

Revised Statutes Missouri 1929, Chapter 46, Article 4 deals with the Missouri State Sanatorium for persons afflicted with tuberculosis. Section 8686 contained therein which deals with free patients after providing that a person applying to be received as a free patient shall apply to the County Court of the County in which he resides, that the County Court if it finds that such person is unable to pay for hospitalization shall certify this fact to the Board of Managers of said Sanatorium and that when there is a vacancy for said applicant in the Sanatorium the Superintendent thereof shall have such applicant examined and if eligible to be received in the Sanatorium the physician shall certify this fact, continues:

"Every person who is certified as herein provided to be unable to pay for his or her care or treatment shall be transported to and from the sanatorium at the expense of the county of which they are a resident,"

There is no further specific provision in the statutes as to the person or officer who shall transport such patient or about compensation for



May 16, 1934.

such transportation, and therefore it will be necessary to determine this question from other provisions of the statutes and the implications thereof. Since the controversy about which you are concerned deals mainly with the claim of the Sheriff of a right to transport and be compensated therefor, the duties and rights of the Sheriff will first be considered, and then the rights and duties of other persons or entities.

I.

RIGHTS AND DUTIES OF SHERIFF

The Sheriff, according to the terms of your request, bases his claim partly on an analogy to his duty and right to transport insane persons to the various state hospitals which is specifically granted by Revised Statutes Missouri 1929 Section 8662 (amended immaterially as to this controversy by Laws of 1933, page 408). However, the method of commitment and transportation of an insane person to a state hospital for the insane follows an entirely different procedure from that involved in the admission and transportation of a person afflicted with tuberculosis to the Missouri State Sanatorium, because to commit an insane person to a state hospital a warrant must be issued for his arrest under Revised Statutes Missouri 1929, Section 8649, and by Section 8662 above referred to the Sheriff's duty to transport and right to receive compensation for transporting a person adjudged by the court to be insane is from the "place of arrest" to the hospital. On the other hand the procedure with relation to a person afflicted with tuberculosis does not involve any arrest, but involves (1) a finding of the County Court as to the inability of the person to pay for hospitalization and the certification thereof to the Superintendent of the Sanatorium, (2) a finding by the examining physician that the applicant is suffering from tuberculosis and the certification thereof by the physician, and (3) a vacancy for an applicant at the Sanatorium. No arrest or detention is involved. The apparent reason for requiring the arrest of an insane person and his transportation under arrest would seem to be that the insane person must be in the strict custody of arrest because of possible danger to members of the public during his transportation to a hospital, and the Sheriff would seem to be the logical person for so protecting the public. No such reason exists for a person with tuberculosis because there is no reasonable fear of apprehending danger to the public from him as there is reason to fear such danger in the case of an insane person or a criminal. There would seem to be no reason logically why any other person could not transport a person afflicted with tuberculosis to the state hospital equally as well as a Sheriff. The duty of a Sheriff to transport convicts to the penitentiary (R. S. Mo. 1929 Section 3717) and his right to receive compensation therefor (R. S. Mo. 1929, Section 11791) furnishes even less of an argument for the right of the Sheriff to transport a person affected with tuberculosis. R. S. Mo. 1929 Section 5035 relates to the transportation of minors to a training school and provides that:

"\* \* \*the sheriff, constable, marshal, or other person charged with the delivery of any boy to such training school, shall be allowed for such delivery the necessary travelling expenses of himself and such boy and a reasonable per diem,



May 16, 1934.

which account shall be allowed by the county court, if correct, when presented to the court."

As to such minors the person selected to transport them is left to the discretion of the County Court presumably because the character of some minors may be such as to make the Sheriff a proper person to transport them, whereas other minors committed might not require such custody. This statute shows that the Sheriff is not necessarily the only person eligible to transport inmates to a state institution.

The Sheriff is not mentioned in Article 4 of Chapter 46 dealing with the Missouri State Sanatorium, and because of the differences above pointed out between the transportation of insane persons or convicts, and the transportation of persons afflicted with tuberculosis, we are unable to see any reason why a Sheriff should be under a duty or have a right to transport patients to the Missouri State Sanatorium.

## II.

### DUTIES AND RIGHTS OF COUNTY COURT

Clearly since the statute relating to transportation of persons to the Missouri State Sanatorium provides that such persons shall be "transported" to the Sanatorium the statute must contemplate someone accompanying the patient where it might be necessary. Since the Superintendent of the Sanatorium, subject to the control of the Board of Managers, has the care of the patient, and since the method of transportation might have a definite effect upon the health of the patient, it might well be that the Superintendent would have the right to arrange for the transportation in whatever way he saw fit, and to have the County pay for such transportation. However, as we understand it, the Superintendent has expressed no demand to arrange for transportation, and since from your letter there is no indication that he desires to do so we shall only consider what county authorities would have the right to make such arrangements, and in our opinion the County Court would have the proper authority to make the arrangements and could designate any agency suitable in its opinion (including the Sheriff if it so desired) to transport the patient.

Our reasons for this conclusion are found in the general powers of the County Court. Revised Statutes Missouri 1929, Section 2078, provides that the County Court "shall have control and management of the property, real and personal, belonging to the County \* \* \*" and the County Court in the case of *Kansas City Disinfecting and Manufacturing Co. v. Bates County*, 273 Mo. 300, 201 S. W. 92 (1918) is called "the general statutory, contracting, auditing and fiscal agency of the County", 272 Mo. 306. Revised Statutes Missouri 1929, Section 12107 provides that "The County Court may, by an order entered of record, appoint an agent to make any contract on behalf of such County for erecting any county buildings, or for any other purpose authorized by law." Furthermore, although the County Court does not in the case of a person applying to be admitted to the State Sanatorium make an order of commitment, such County Court does furnish one of the two certificates to the

4. Honorable Herbert M. Braden

May 16, 1934.

Superintendent of the Sanatorium which are conditions precedent to admission. Furthermore, by the statute the transportation is to be "at the expense of the County" and since the County Court is the general fiscal agent of the county, and since it participates in the proceedings admitting the patient to the Sanatorium, the County Court would seem to be the proper and reasonable authority to designate the person who is to accompany the patient to the Sanatorium. Since the County must pay the expense it would seem that its fiscal agency would properly have the most vital interest in the terms on which the transportation is to be paid for.

In conclusion, it is our opinion that the Sheriff would have no right, unless designated by the County Court, to transport and receive compensation for transporting a person afflicted with tuberculosis to the Missouri State Sanatorium, and that in the absence of an expressed interest in such transportation by the Sanatorium authorities, the County Court would have the right and power to designate the person to transport such applicant to the Missouri State Sanatorium and reasonably to fix his compensation, or to pay the reasonable expenses of such transportation if the applicant did not need to be accompanied.

Yours very truly,

EDWARD H. MILLER

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ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

COUNTY DEPOSITARIES: Rate of Interest to be paid by County Depository  
for County funds.

June 1, 1934. 6-19



Hon. John M. Bragg  
Prosecuting Attorney  
Douglas County  
Ava, Missouri

Dear Sir:

Acknowledgment is herewith made of your letter of January 27, 1934, requesting an opinion of this office on the following matter:

"Our county has had no depository for its funds since last May. The County Treasurer has the funds deposited in the only bank we have left in the County. Several weeks since the County Clerk advertised that the County Court would receive bids for a depository for the County funds at our February term of the County Court. We have received no bids and the local bank informs us that it does not intend to make any bid and that it will not pay any interest if the funds are left with it. The bank does inform us that it will give us a bond for the funds if we leave it in that bank. The Banks in the adjoining counties are taking the same position. That is, none of them will pay any interest, they inform us, that they can not pay interest and at the same time have the Government guarantee on their deposits. Now what I would like to know, will the County Court have the right to allow the funds to remain in this bank, with it giving a bond and at the same time not charge the Bank any interest. I would appreciate your opinion at the earliest possible time."

The sections of the statutes pertinent to this question are found in Article IX, Chapter 85, R. S. Mo. 1929. Section 12188 being applicable to your case reads in part as follows:

"If for any reason the banking corporations, associations or individual bankers in any county shall fail or refuse to submit proposals to act as county depositaries as provided in section 12185, then, and in that case, the county court shall have power to deposit the funds of the county with any one or more of the banking corporations, associations or individual bankers in the county or adjoining counties, in such sums or amounts, and for such period of time, as the court may deem advisable, at such rate of interest, not less than one and one-half per centum, as may be agreed upon by the court and the banker or banking concern receiving the deposit;" \* \* \*

After advertising for bids as provided for in Article IX, and when no bids are received, the County Court shall have the power to deposit the funds of the County with any banking corporation, association or individual banker in your county or adjoining counties. Provided, however, a minimum of 1½% interest is obtained and bond given as provided in said Article.

Apparently from what you say, none of the banks in the neighboring counties desire the money strongly enough to pay interest upon it. In that case the County Court may readvertise for bids and they may designate a bidding bank as the depository even though the interest rate is small or even fractional. The Legislature in writing this Section evidently foresaw that emergencies would arise when funds of the county would be inadequate to form a desirable account or such a time when it would not be profitable for a bank to pay interest, and the Legislature did not set a minimum interest rate when bids were received after advertising.

We cannot find any provision in the statutes that would prevent a County Court from selecting a depository without receiving interest, provided, however, that a written bid or offer is made in response to an advertisement for bids and a bond given and all statutory requirements are fulfilled. We have been unable to find any decisions in this State which might assist us.

Hon. John M. Bragg.

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June 1, 1934.

CONCLUSION.

When banks fail or refuse to submit proposals to act as county depositaries the County Court may select any bank or banks in the county or adjoining counties, provided however, that the interest rate be not less than  $1\frac{1}{2}\%$ , or the County Court may re-advertise for bids at the next term and may in their discretion accept bids for depositaries and let the county funds without the payment of interest, but of course, with the requisite bond being given, and for a term not longer than to the next regular time for advertising for bids.

Respectfully submitted,

Covell R. Hewitt,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

CRH:MM

**LICENSES FOR CREAM STATIONS: ARE MILK AND CREAM GATHERING ROUTES ENTITLED TO BE LICENSED AS MILK STATIONS?**

7-16  
July 9, 1934.

Hon. J. C. Breshears,  
Commissioner,  
Department of Agriculture,  
State of Missouri,  
Jefferson City, Missouri.



Dear Sir:

Receipt of your letter of June 26 is hereby acknowledged. Therein you request an opinion based on the following communication:

"The present plan of issuing licenses under Section 12396, 12397, 12398 and 12399, R. S. Mo. (said Sections being a part of Missouri Dairy Laws) is to issue to cream station operators a license to operate a milk or cream testing apparatus.

This practice was begun at a time when the cream was taken to the several cream stations by the producer and the one license was sufficient. However, conditions have changed materially in recent years and now there are hundreds of milk and cream gathering routes operating throughout the State, taking much of the business from the licensed cream stations.

Naturally those who operate cream stations and pay their license fee are making serious complaint against such routes operating without paying a license.

We kindly ask your opinion as to whether this Department can legally require from those operating routes an application and a license fee the same as is required from those operating cream stations.

Some cream station operators have license to operate cream station and also operate several trucks gathering cream. Could we require a license for each truck they operate in addition to the license they have for their station?

We further ask your opinion as to whether one license could be worded so as to cover both the cream station operator and the truck operator."



## I.

"The state dairy commissioner shall inspect and license milk or cream gathering, buying and receiving stations within this state, and it shall be unlawful for any person, firm, association or corporation engaged in the business of buying milk within the state for the purpose of shipping same to any city, town or village in this state for consumption or to be used for the manufacture of butter, cheese, condensed milk, or other human food, unless such business shall be transacted at a legally licensed office or station within the state, as in this article provided. (R. S. 1919, 11975)." R. S. No. 1929, Sec. 12306.

This section provides for the licensing of all milk or cream gathering, buying and receiving stations. It does not provide for the licensing of any truck lines engaged in the gathering of cream. But the section does expressly state that it shall be unlawful, i.e., a misdemeanor, for anyone engaged in the business of buying milk for the purposes mentioned, unless such business be transacted at a licensed cream station. Thus, if the trucks in question are not operating in connection with a licensed cream station, their use is unlawful.

" \* \* \* \* \* The term 'station' or 'milk gathering station' or 'milk buying station' as used in this article, shall be held to include any established office or place where the business of buying milk or cream is carried on, whether with or without a place or premises in connection therewith for the physical handling of milk. \* \* \* \* \*

R. S. No. 1929, Sec. 12307.

The definition quoted from the above section clearly contemplates that a cream station shall consist of an established office, a definite location. Anything coming within this definition is a cream station within the meaning of the statute, and must be licensed. Anything falling without the terms of this definition, such as a truck line, unconnected with any parent office for buying cream, is not a cream station, has no right to be licensed, and is unlawful, as provided by Section 12306 (supra).

" \* \* \* \* \* A license issued under the provisions of this section shall also authorize the licensee to buy milk, cream and other dairy products mentioned in section 12307 of this article without additional license therefor, but no person shall operate more than one station under the same license. (R. S. 1919 Sec. 11977)" R. S. No. 1929, Sec. 12308.



Hon. J. C. Broshears,

-3-

July 9, 1934.

The last clause of this section indicates that the license provided for therein is to be coextensive in scope and application with the license provided for in Section 12596, supra. In other words, such license when granted to any but operators of cream stations, does not have the effect of authorizing the licensee to buy milk, cream, etc.

## II.

Conclusions: (1) Cream gathering routes, which do not operate in connection with a cream station, are unlawful, their use constituting a misdemeanor. (2) Trucks which are operated by owners of cream stations may lawfully be used to gather milk and cream, and do not need to be separately licensed, so long as all the milk and cream gathered thereby is handled through the central cream station. (3) An ordinarily worded license will cover both the cream station operator and the truck operator when the latter is an integral part, functionally, an adjunct of the former. Attempted independent operation of the trucks, however, is unlawful.

Respectfully submitted,

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FRANKLIN E. REAGAN,

Assistant Attorney-General.

APPROVED:

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ROY McKEETRICK,

Attorney-General.

CRIME AND PUNISHMENT: Obtaining a signature to promissory note  
by false pretenses.

8-13  
August 9, 1934.



Hon. F. M. Brady  
Prosecuting Attorney  
Benton County  
Warsaw, Missouri

Dear Mr. Brady:

This is to acknowledge your letter as  
follows:

"I have a complaint against a person for obtaining a promissory note from a man here by some trick or to state it in plain words without the man knowing that he signed the note at all. The man was an oil salesman and he talked the man here into signing a contract to buy some oil and while there were misrepresentations as to the contract and the man here did not know that he was to make any down payment on the contract at all, yet, after two or three months his note turned up at a local bank where it had been discounted by the salesman.

"However, when it is boiled down the man here tells me that he knew he was signing a contract and the man told him he would have to sign in three or four places on the contract and copies, but nothing was said about a note and that he did not see any note and that the note must have been folded in and covered by the other papers or he would have seen it, and that nothing was said about any note at any time during their conversation, and that if anything was to have been paid he had the money in his house at the time to pay.

"I would like to know what this party should be charged with. I had thought it might be

forgery, but do not find anything directly in point, or he might be charged with obtaining the note by trick, but don't know just how to charge it.

"I would like to know what you think of this and what this man should be charged with."

From the facts as stated in your letter, we are of the opinion that the man whom you seek to charge is not guilty of any crime.

Section 4095, R. S. Mo. 1929;  
State v. Zingher, 259 S. W.  
451;  
State v. Mullins, 237 S. W.  
502;  
State v. Olice, 252 S. W.  
465.

In the second paragraph of your letter you state that nothing was said about a note, that is, if a note was signed it was part of the contract or was concealed in such a manner therein so that the party who signed it did not read it. Nowhere do you state that there was any representation made concerning the note or any trick or device used to keep the party from seeing same. We gather that this was just a transaction in which a salesman induced a party to enter into a contract and same was signed in three or four places by the party who now says he was defrauded.

In a case such as this, as stated in State v. Zingher, supra, page 453,

"By the very terms of the statute the intent to cheat or defraud is an essential element and the very essence of the offense. Absent this element, there is no crime. \*\*\*"

And, in State v. Mullins, supra, page 504,

8/9/34

"So the only evidence offered which proved any of the alleged misrepresentations was the promissory statement of the defendant that his check would be paid. As seen above, that is not a false pretense within the meaning of the statute.\*\*\*\*\*"

And in State v. Olice, supra, page 466, the Court said:

\*\*\*\*\* The criminal act of obtaining the draft was complete when by means of his false and fraudulent representations the defendant induced the insurance company to issue the draft and indorsed it to the mortgagee. \*\*\*\*

Deciding the question before us, solely upon the facts presented, it is our opinion as stated above that the person sought to be charged has not committed any offense or crime. However, you might not have stated the facts fully; and after reading the above authorities, if you have left out any material fact or facts in your letter, you may readily ascertain whether or not such fact or facts not stated, if any, is enough to change our conclusion herein. If you find that there are facts not stated in your letter that make out a case of obtaining a note by false pretenses then, of course, prosecution follows. However, we are leaving that up to your judgment as we may only pass upon the matter as submitted in your letter.

Yours very truly,

APPROVED:

JAMES L. HORNBUSTEL  
Assistant Attorney-General.

ROY McKITTRICK  
Attorney-General.

JLH/afj

JACKSON COUNTY BOARD OF ELECTION COMMISSIONERS: May conduct intermediate registration in any manner they deem advisable.

8  
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August 24, 1934.



Hon. Fred A. Boxley,  
County Counselor,  
1112 Commerce Building,  
Kansas City, Missouri.

Dear Sir:

This department is in receipt of your letter of August 17 with reference to the power of the Board of Election Commissioners of Jackson County to hold intermediate registration.

Section 10524, R.S. Mo. 1929 provides in part as follows:

"The board of election commissioners may from time to time, as in the judgment and discretion of the board may seem necessary cause intermediate registration to be made in such manner and form as to said board may be deemed advisable. Said board of election commissioners may require the judges and clerks to make such intermediate registration in the various precincts in said county or the board of election commissioners as a board of registry may hold sessions in each township in said county for the purpose of making an intermediate registration, said board of election commissioners acting as judges and the clerks of said board of election commissioners acting as registry clerks.\*\*\*"

Section 10525, R.S. Mo. 1929 provides in part as follows:

\*\*\*\*\*Said board of election commissioners shall also have full power and authority to make any necessary rules and regulations for the conducting of the business of said board and for the expeditious and efficient handling of the business

of said board and of the board  
of registry thereof."

The question now before us is whether or not the Board of Election Commissioners may provide for intermediate registration in a manner other than that provided or "suggested" in Section 10524, R.S. Mo. 1929. This point, of course, resolves itself into the question of whether or not the statute is mandatory or directory only. In this connection it must be remembered that the word "may" is only to be construed as mandatory for the purpose of sustaining or enforcing a right, but never for creating one.

The correct rule is announced in the case of Granite Bituminous Paving Company v. McManus, 129 S.W. 448, 144 Mo. App. 593, wherein the Court said (l.c. 607):

"The distinction between mandatory and directory enactments has often been under consideration by the courts. Into which of these classes any given statute falls is to be determined by its character and purpose. If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory."

There is no question but that substantial rights depend upon the having of an intermediate registration in Jackson County. In view of this fact, we conclude that the word "may", as used in line 2 of Section 10524, R.S. Mo. 1929, is mandatory in that the Board of Election Commissioners must have an intermediate registration; however, the method of having this intermediate registration is a matter upon which no substantial rights depend, and the word "may" as used in the second line of said section may be construed to be directory only. We conclude that it was also the intention of the Legislature to leave to the Board of Election Commissioners the manner and form of having such an intermediate registration.

#### CONCLUSION

It is therefore the opinion of this department that by reason of the plain language of Section 10524, R.S. Mo. 1929, and the power to make rules and regulations granted to the Board of Election Commissioners under Section 10525, R.S. Mo. 1929, that

the Board of Election Commissioners may conduct intermediate registration in Jackson County in any manner they may deem advisable.

In the instant case it appears that the handling of the intermediate registration in a manner other than that provided in Sec. 10524, R.S. Mo. 1929 will make for a more expeditious and efficient handling of the business of said Board, and if such be the case, it is the opinion of this department that the Board of Election Commissioners of Jackson County has full power to handle the intermediate registration in this manner.

Respectfully submitted,

GILBERT LAMB,  
Assistant Attorney General.

APPROVED:

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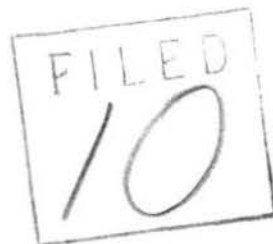
ROY McKITTRICK,  
Attorney General

GL:AH



LIQUOR CONTROL ACT: Intoxicating malt liquor is excepted from provisions of Sec. 13-a and may be sold by the drink providing other qualifications of act are complied with

September 4, 1934.



Hon. C.D. Bray, City Attorney,  
City of Campbell,  
Campbell, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

\*\*\*\*\*In view of these provisions, can a person legally engage in said business by obtaining a license from the state and county but not from the city? Would he not be violating the state law by so doing because the state law says he must have a license from the city. It is mandatory, not optional.

Assuming that the city had failed, neglected, or even refused to license said business, or failed, neglected or refused to pass an ordinance providing for such license, would this fact bar a prosecution by the state for engaging in said business without having first obtained the city license? Please keep in mind the state law says he must have the city license. No exceptions or exemptions in any contingency."

Section 22 of the Liquor Control Act of the State of Missouri provides in part as follows:

"Malt liquor containing alcohol in excess of three and two-tenths (3.2%) per cent by weight and not in excess of five per cent (5%) by weight, manufactured from pure hops and/or pure extract of hops and/or pure barley malt and/or wholesome grains or cereals and wholesome yeast and pure

water, may be sold by the drink at retail for consumption on the premises where sold, when the person, partnership or corporation desiring to sell said malt liquor by the drink at retail for consumption on the premises where sold shall have been licensed so to do by the incorporated city and county in which he proposes to operate his business, and has procured a license so to do from the State Supervisor of Liquor Control."

Section 25 of the Liquor Control Act of the State of Missouri provides:

"The Board of Aldermen, City Council or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

It will be noticed that in Section 25, supra, the Legislature of the State of Missouri said in effect that cities may charge for licenses, etc. In the case of State ex rel. Kyger v. Holt County Court, 39 Mo. l.e. 524, the Court said in construing the word "may":

"Quite a list of authorities, touching the proper construction of the word 'may' as used in statutory enactments, has been presented in the petitioner's brief, all of which have been carefully examined. These authorities are uniformly to the effect that the word is only to be construed as mandatory for the purpose of sustaining or enforcing a right, but never to create one."

It is apparent from a consideration of Section 25 that the Legislature merely intended to give cities the power to charge for licenses, and did not intend in any way to make it mandatory upon them to do so. In other words, Section 25 is directory only

and cannot be construed to be mandatory.

Section 22 of the Liquor Control Act requires as conditions precedent to the legal sale of intoxicating malt liquor that the vendor shall obtain a license from the city, county and state. It is apparent from the face of the Act, therefore, that if the vendor fails to obtain any one or more of these licenses, he is guilty of a violation of the Liquor Control Act of Missouri and is subject to prosecution therefor.

Section 43 of the Liquor Control Act provides:

"Any person violating any of the provisions of this act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor."

However, Section 22 must be construed in connection with Section 25, and, if the city fail to provide for a license, the failure of the vendor to have such license could not be construed to be a violation of the Act. In other words, Section 22 only makes it mandatory to have county and city licenses if the county and city provide for same.

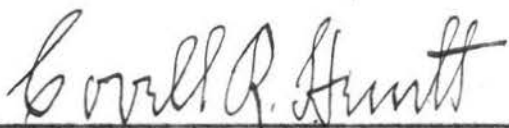
The City of Campbell is a city of less than 20,000 inhabitants. Therefore, by Section 13-a of the Liquor Control Act of Missouri, intoxicating liquor may not be sold by the drink until such sale shall have been authorized by a vote of the majority of the qualified voters of said city; however, the Legislature saw fit to except intoxicating malt liquor from the provisions of this section so that under the Liquor Control Act of Missouri intoxicating malt liquor may be sold by the drink at retail for consumption on the premises where sold, provided the other qualifications of the Act are complied with.

If the City of Campbell has failed or neglected to pass an ordinance providing for the license as required under Section 22 heretofore referred to, it is our opinion that since Section 25 of the Act granting to cities the power to charge for such licenses is a directory statute only and not mandatory, it is not a violation of the Liquor Control Act to sell intoxicating malt liquor by the drink in the City of Campbell without a license from said city, provided the required licenses are obtained from the state and county.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:



(ACTING)

JWH:AH

Ice Cream

Manufacturer of ice cream operating chain of stores and selling ice cream at retail through said stores with no element of resale is a retail manufacturer and subject only to the \$5.00 license tax under section 13071, Laws 1933, page 254.



September 12, 1934.

Hon. J. C. Breshears,  
Commissioner of Agriculture,  
Jefferson City, Missouri.

Dear Sir:-

We have your letter of July 11, 1934, in which an opinion was requested as follows:

"With reference to Article 5, Chapter 93, sections 13,068 to 13,076 inclusive, Ice Cream, as amended 1933, from the standpoint of revenue collection, we urgently need your advice upon the following question:

"Can a wholesale license be required of a manufacturer of ice cream who operates a chain or group of retail stores located in different sections of a city and sells the product at his places of business?

"For example, the Walgreen Company operates not less than 27 stores in St. Louis, yet seeks to get by with paying \$5.00 for a retail license, which retail license of \$5.00 we hold was intended for one store only, but which Walgreen insists should license all their 27 stores. This seems unfair and inequitable to the individual store making its ice cream for its own use, yet paying \$5.00.

"This is not the only instance, yet this is the outstanding case."

Section 13071, Revised Statutes of Missouri, 1929, as reenacted in Laws 1933, page 254, provides a license tax in cities of over five thousand inhabitants of one hundred dollars for manufacturers of ice cream for sale at wholesale, and five dollars for manufacturers of ice cream for sale at retail. The terms "wholesale manufacture" and "retail manufacture" are defined in the above mentioned section as follows:

"For the purpose of this article, the term 'wholesale manufacture' shall include every manufacturer of ice cream who sells at wholesale for resale, and the term 'retail manufacture' shall include every manufacturer who manufactures and sells ice cream at retail."

Hon. J. C. Breshears

-2-

September 12, 1934.

The above definition is identical with the definition contained in the 1929 section.

We can readily see the point of view as expressed in your letter, but in view of the above definitive section we have no choice but to hold that the mere fact that a manufacturer of ice cream operates a number of stores through which he sells his ice cream at retail does not make him a wholesale manufacturer. As long as he sells the ice cream direct to the public through his stores, and there is no element of resale, he qualifies as a retail manufacturer and can operate on the five dollar license fee.

In our opinion, the only way to correct the evil alluded to in your letter is through legislative enactment further qualifying "retail manufacture".

Very truly yours,

CMEJr:LG

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

Approved:

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Attorney General.

OFFICERS OF COUNTY:

One cannot be candidate for both the office of Justice of the Peace and Probate Judge at same time.

September 18th, 1934.



Mr. John M. Bragg,  
Prosecuting Attorney Douglas County,  
Ava, Missouri.

Dear Sir:-

We have your letter of August 25, 1934, in which was contained a request for an opinion as follows:

"Mr. Wm. Fletcher of Douglas County, Missouri, has received the nomination for Probate Judge and also for Justice of Peace of Benton Township. He contends that he can hold both offices as the office of Justice of Peace is excepted from the provision of Section 18 of Article 9 of the Constitution of the State of Missouri, however, Section 10244 of R. S. Mo. that:

"' No person shall accept a nomination to nor be published as a candidate for more than one office.'

"I would appreciate very much your opinion as to whether or not his name should be printed on the ticket for the general election as a candidate for both offices."

Section 10244, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 10244. CERTIFICATE TO CONTAIN ONE NAME, etc.- No certificate of nomination shall contain the name of more than one candidate for each office to be filled. No person shall join in nominating more than one nominee for each office to be filled; and no person shall accept a nomination to nor be published as a candidate for more than one office. (Underlining ours).

The above quoted statutory section is very plain to the effect that one shall not be a candidate for more than one office at the same time, hence, we have no choice but to hold that Mr. Fletcher does not have the right to have his name placed on the ticket for more than one of the offices mentioned. The office of probate judge is, of course, a constitutional office and in the case of State vs. Pollock (276 S. W. 20, l.c. 21) the office of justice of the peace was held to be such also.



John M. Bragg--#2

Sept. 18th, 1934.

We do not here pass on the question of whether or not a man already holding one of the aforesaid offices could legally run for or hold the other one in addition thereto. We merely say that under the section above quoted he cannot be a candidate for both offices at the same time.

In view of the above, we need not consider the constitutional section referred to by Mr. Fletcher. It may be well to add, however, that in the case of Nickleson vs. City of Hardin, 221 S. W. 358, l.c. 360, that section of the constitution was held to apply only to cities and counties having a population of more than two hundred thousand inhabitants.

Mr. Fletcher's name, therefore, should not be printed on the ticket for the general election as a candidate for both offices.

Very truly yours,

CHARLES M. HOWELL, Jr.,  
Assistant Attorney-General.

CMHjr:MB

APPROVED:

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Attorney-General



UNCLAIMED MONEY. Who has right to money seized with gambling device when no claim is made therefor?

October 23, 1934.

Hon. Herbert M. Braden,  
Prosecuting Attorney Livingston County,  
Chillicothe, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of September 20th, such request being in the following terms:

"I am writing for an opinion as to what should be done with the money taken out of devices, such as slot machines, which are seized under Section 3783 Mo. R. S. 1929 and destroyed under Section 3787 Mo. R. S. 1929, where no claim is made by any person to the ownership of said slot machines and where no criminal prosecutions are instituted."

I

WHO OWNED MONEY WHEN SEIZED?

Before discussing the practical problem of what should be done with this money, it is important to trace the ownership of it. The most usual type of slot machine is constructed in the manner of a strong box, access to which is by a key controlled by the owner. Such machine has within it a mechanical device which displays one or more dials consisting of series of numbers or symbols and when a coin, usually a five-cent piece or a twenty-five-cent piece, is inserted in the slot machine, which insertion allows a lever to be released which sets the machinery in motion, the dials move, and after rotating so as to show the various numbers or symbols on them they come to rest with only one number or symbol showing on each dial, and if this number or symbol or combination of the same is designated on the machine as a winning number or symbol or combination, the number of coins to which it entitles the player are released and ejected from the machine.

When a player inserts a coin into the machine it is his intention permanently to part with the possession of it. Even if he should succeed in securing as the result of that particular play the

October 23, 1934.

maximum return of coins, he would not receive back the particular coin with which he has played because such coin would be the last coin in the machine to be paid out, and if the machine is working properly it will only ultimately pay out a certain proportion of the total coins put in, which fact would presumably be known to the player. His intention at the time of playing is important because upon it will depend the ownership after play of the coin which he has inserted. To pass title to a coin it is necessary to deliver it with the intention of passing title from ones self and it seems not open to doubt that the man who inserts his coin in the slot machine and pulls the lever does deliver it into the possession of the person owning the machine and makes such delivery with the intention of permanently conveying away both title and possession. Consequently at the time these machines and the money therein were seized the persons who had put their coins into the machines no longer had title to them and are not now the owners. Of course, under the Missouri statutes one who has lost money gambling is entitled to bring an action for its recovery, (R.S.Missouri, 1929, Section 3005), but by Section 3013 the statute of limitations for such an action is only three months. Assuming that it would be possible for a person who has played these machines within the last three months to sustain the burden of proof as to the number of coins which he played, it would seem that the possibility of such a suit being successfully maintained would be sufficiently remote so that it might be disregarded. The statutes which have just been cited show clearly that title to money lost in a gambling transaction does pass to the winner and there would seem no doubt that the title to these coins in these slot machines did pass at the time of pay to the owner of the machines (or the persons entitled to the same under contract with the owner).

One difficulty might exist as to the acquisition of title by the owner of the machine in that an acceptance of delivery and title and some sort of an intent to take possession is usually necessary on the part of the person acquiring possession or title, and presumably the owner of this machine would not know at any given time how many coins had been inserted in the machine and consequently it might be argued that he could not intend to take possession of something of the existence of which he was not aware. However, under the law of this State the possession of and intent to possess the container in which something else has been deposited carries with it a sufficient intent to possess that which is deposited in it. See *Foster v. Fidelity Safe Deposit Company*, 162 Mo. App. 165, 145 S. W. 139 (1912), affirmed 264 Mo. 89, 174 S. W. 376 (1915).

The statute under which these slot machines and money were seized provides that they shall be returned to the owner if they are not objectionable per se (R. S. Missouri, 1929, Section 3787). Consequently, under the facts as set out in your letter, the owner of this money, who is the owner of the slot machine or his assignee, would have a present right (as soon as it was decided that this money was not to be used in a criminal proceeding as evidence and the judge had so ordered under Section 3787) to claim such money and have it de-

livered over to him.

## II

### WHAT IS NOW TO BE DONE WITH THIS MONEY?

As we understand the facts as set out in your letter, the owner of the slot machines has definitely by his acts indicated that he has given up any idea of ever claiming any of this money, and we assume that such acts are such that a jury or a court would regard them as indicating a definite intention to give up any claim to this money. As was pointed out above, there is no doubt that the slot machine owner owns the money and could claim it. The question that remains is what the County officials are to do with it now that the owner has abandoned it.

R. S. Missouri, 1929, Chapter 126 (Sections 14227-14237) relates to the disposition of lost and unclaimed property. Section 14227 defines the scope of the chapter and provides as follows:

"If any person finds any money, goods, right in action, or other personal property, or valuable thing whatever, of the value of ten dollars or more, the owner of which is unknown, he shall, within ten days, make an affidavit before some justice of the county, stating when and where he found the same, that the owner is unknown to him, and that he has not secreted, withheld or disposed of any part thereof."

The use of the underlined word "finds" eliminates the present facts from the scope of such chapter because it is impossible to have a finder of something which has not been lost.

"Property in the possession of another cannot be found, in the sense of the law of lost property, for the reason that it is not lost. Even if discovered in possession of the thief who stole it, the discoverer has not found it, for the reason that being in the thief's possession, it is not lost. If, therefore, the money in controversy was in the possession of defendant when discovered by plaintiff, plaintiff could not have found it, as that word is understood in the law of lost property." (Foster v. Safe Deposit Co., 162 Mo. App. 165, 167, 145 S. W. 139 (1912), affirmed 264 Mo. 89, 174 S. W. 376 (1915).)

At the time of the seizure of these slot machines and money the possession and title to the money was in the owner of the machines.

Chapter III of R. S. Missouri, 1929, Article I, relates to escheats to the State, but an examination of such article will show that the facts under consideration do not fall within that article and consequently there is no escheat.

In the case of Foster v. Safe Deposit Co., supra, the Court was attempting to analyze the possible methods by which one could divest himself of title to his own property (aside from conveyances to particular persons). The Court said:

"Property may be separated from the owner by being abandoned, or lost, or mislaid. In the first instance, it goes back into a state of nature, or, as is most commonly expressed, it returns to the common mass and belongs to the first finder, occupier or taker. In the second instance, to be lost, it must have been unintentionally or involuntarily parted with, in which case it is also an object which may be found and the finder is entitled to the possession against every one but the true owner. But, if it is intentionally put down, it is not lost in a legal sense, though the owner may not remember where he left it, and cannot find it. For 'the loss of goods, in legal and common intentment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner at any given moment.'"

In the case under consideration it is apparent that there has been no sale, assignment or conveyance to any particular person, nor has there been any loss of the property or mislaying of the property in a legal sense. The only other remaining way of divesting ones self of title to property is in the opinion just quoted, that of abandonment, and it would seem that the facts furnished by you would warrant an inference of legal abandonment.

It is perfectly possible to abandon possession and title to something which might involve one in liability if title were retained. Thus in the case of State Banking Co. v. Hinton, 172 S. E. 42 (Ga. 1933), bank stock which by statute imposed liability to a 100% assessment was held susceptible of abandonment by the legatees thereof. The Court said:

"The plaintiff also seems to entertain the idea that some one must of necessity own the stock. That theory is not sound. Property of any kind, valuable or otherwise, may be disowned. 1 C. J. 12, Sec. 20. More especially may one disown or refuse to accept things once of value, but now worthless. A worthless check, a promissory note, can be cast away or destroyed by its owner. It is not property because it is worthless, and no one is required to own it."



Where property has been abandoned for any reason the first person to take possession of it with intent permanently to appropriate it to his own use becomes the owner thereof because as was pointed out above in the quotation from Foster v. Fidelity Safe Deposit Company, when property is abandoned its ownership and possession return to something akin to a state of nature. In the case of Crosson v. Lion Oil & Refining Co., 275 S. W. 899 (Ark. 1925), the ownership of oil, a portion of which was abandoned by the owner of the well as it came out of the well, was involved, and the Court is adjudicating the rights of the claimants thereto said:

"Property is said to be abandoned when it is thrown away or its possession voluntarily forsaken by the owner, in which case it will become the property of the first occupant. \* \* \* Hence it will be seen that \* \* \* when the oil operators in the California case abandoned the waste oil by voluntarily letting it flow into the creek without any intention of reclaiming it, the first owner proprietor would have the right to acquire it."

See also Duvall v. White, 42 Cal. App. 305, 189 Pac. 324 (1920); Humphreys Oil Co. v. Liles, 262 S. W. 1058 (Tex. 1924), affirmed 277 S. W. 100 (1925).

From the above principles it is deduced that when the owner abandoned this property the possession of the Sheriff ripened into title which the Sheriff held, of course, only in a representative capacity on behalf of the County.

One more word must be added. We have assumed in the foregoing that the acts of the owner have been sufficient to constitute a complete abandonment, in which event the title of the County is now complete and the money could be directly turned into the general revenue fund of the County. However, if this assumption is incorrect and the only basis for the inference of abandonment is the fact that no claim has been made by the owner, as was pointed out above, the owner can make such claim until the statute of limitations against such claim would expire (and this would presumably be three years under R. S. Missouri, 1929, Section 863), so if no definite acts constituting abandonment have transpired the money should be held by the Sheriff or officer now having custody of it until such three year period from the date of the decision that such money is no longer necessary as evidence elapses.

In conclusion it is our opinion that this money should now be turned into the general revenue fund of the County and that no further claim therefor can be made if there has been a definite abandon-

6. Hon. Herbert M. Braden.

October 23, 1934.

ment, but that if such abandonment has only consisted to date of a failure to make claim for such money, the true owner, who is the owner of the slot machines or his assignee, could make claim for it and it should be delivered to him if such claim is made within three years, and that if no such claim is made within three years at that time it should be turned into the general revenue fund of the County as having been abandoned.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

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Attorney-General

SCHOOLS: Right of non-resident pupils to attend in district where parent pays taxes.

November 9, 1934.

11-20



Honorable John M. Bragg  
Prosecuting Attorney  
Douglas County  
Ava, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"I want your opinion on Section 9207  
Revised Statutes of Missouri, 1929.

"Mr. Riley owns land in an adjoining School District and pays taxes on the same. The School District or the Board have refused to allow Mr. Riley's children to attend the school in the adjoining district. One of our local attorneys has advised the school board that it can refuse attendance on non-resident children, when the parents own land in the district and pay taxes on the same.

"Please give me your opinion on this Statute."

The answer to your inquiry is found in Section 9207, R. S. Mo. 1929, which provides as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district-- said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the



power to suspend or expell a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and my admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax." (Underlining ours).

You state that a local attorney advised the school district that it can refuse attendance to non-resident children of parents owning land in the district and paying taxes on the same. Evidently the local attorney is confusing the case of State ex rel. Mildred Burnett v. School District of the City of Jefferson (not yet reported) when he arrived at such a conclusion. It is true that in the Burnett case, supra, the Supreme Court of Missouri recently held that a high school receiving state aid would not have to admit non-resident pupils; neither could such be compelled to admit same by mandamus. However, in that case the question of a person owning property in Jefferson City and paying taxes thereon was not involved. The only matter before the court being that a non-resident pupil, properly qualified as to age, desired to attend high school in Jefferson City without paying tuition. It was not shown in that case that Mildred Burnett was an orphan or that her parents

owned property in the Jefferson City District and paid taxes thereon. Thus, the Burnett case is not authority for a school to refuse admittance unless the facts are analogous.

In Section 9207, supra, the broad general proposition is, "and may admit pupils not residents within the district", but such broad principle has certain exceptions, namely, "that the following children if they be unable to pay tuition shall have the privilege of attending school in any district in this State in which they have a permanent or temporary home etc. \* \* Provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid\* \*." Therefore, it would follow that while Section 9207 is discretionary in part, yet it is mandatory upon the district if one pays tax in that district, even though he is a non-resident, as the Statute says "shall be entitled" to send his or her children to that district. In other words, Section 9207, supra, gives the board some discretion as to admission of non-resident pupils and makes it mandatory in other particulars such as the one here under consideration.

Article XI, Section 1, Missouri Constitution provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

The school laws are remedial and should be given liberal interpretation. State ex rel. Halbert v. Clymer, 164 Mo. App. 671.

It is our opinion that the school district or board does not have a right to refuse admittance to Mr. Riley's children because he resides in another district as he pays tax in the district in which he desires to send his children to school.

Respectfully submitted

APPROVED:

WM. ORR SAWYERS  
Assistant Attorney General.

ROY McKITTRICK  
Attorney General.

WOS:H

Optometry, State Board of

One who has passed state examination but has waited over five years before applying for a certificate of registration, is not entitled thereto.

Filed: #10

November 16, 1934



Dr. J. F. Brawley, Secretary  
State Board of Optometry  
114 East High Street  
Jefferson City, Missouri

Dear Sir:

We have your letter of October 30, 1934 in which is contained a request for an opinion as follows:

"Will you please render me your opinion on the following case?

"We had a man who took the State Board Examination in 1921 and passed the examination. He paid \$10.00 for his Examination Fee but never sent in the \$15.00 for his certificate. After a period of thirteen years he is demanding that the State Board of Optometry issue him a certificate so that he can start practicing.

"As Optometry has made a great progress in the past thirteen years and this gentleman not being in active practice has not kept up with the progress we have made, therefore, the State Board feels as if we should issue his license that we would be putting the man on the public who would not be qualified to practice today as a registered optometrist."

The state laws regarding optometry are set out in Chapter 101 of Revised Statutes of Missouri, 1929, Section 13497 to 13513 inclusive. There is, however, no provision that would expressly take care of the peculiar situation as stated in your letter.

Sections 13503, 13504 and 13506 provide in effect that a certificate of registration shall be issued on application therefor after the examination shall have been passed and the provisions of Chapter 101 complied with. This would seem to place no limit on the length of time that might elapse between examination and application for a certificate of registration. In this connection, however, we direct your attention to Section 13508, quoted infra, which section we believe by analogy shows the clear legislative intent to limit the time referred to above.

Section 13508, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 13508. Renewal of certificate of registration.-- Every registered optometrist and every registered apprentice who continues in active practice or service, shall, annually, on or before the first day of April, renew his certificate of registration and pay the required renewal fee. Every certificate of registration which has not been renewed during the month of April in any year shall expire on the first day of May in that year. A registered optometrist or a registered apprentice whose certificate of registration has expired may have his certificate of registration restored only on payment of the required restoration fee. Any registered optometrist who retires from the practice of optometry for not more than five (5) years may renew his certificate of registration upon payment of all lapsed renewal fees." (Underlining ours.)

From the last lines of the above quoted section it is apparent that the legislature placed the period of five years as the limit of time during which one might be inactive in the practice of optometry and yet have a right to reinstatement. In so much as under Section 13497 Revised Statutes of Missouri, 1929, it is unlawful to practice optometry without a certificate of registration, we must assume that the man referred to in your letter has not engaged in the practice of optometry for thirteen years if indeed he has ever done so. Surely the fact that he never applied for and obtained his certificate can place him in no better position than one who has obtained a certificate and allowed same to lapse.

In the case of State v. Etzenhouser (Mo.) 16 S. W. (2d) 656, the court in speaking of Chapter 101, stated at page 659 as follows:

"The object of the law, in protecting the unwary from being imposed upon with glasses which would not only fail to serve the purpose expected of them, but which may be the cause of actual injury to health and nerves, is a beneficent and proper one. Such statutes should be liberally construed to carry out their purposes. 29 C. J. 243. Price v. State, supra."

In view of our statutes referred to above and the attitude of our courts as expressed in the case quoted from, we are of the opinion

Dr. J. F. Brawley

-3-

November 16, 1934

that the man referred to in your letter is not now entitled to a certificate of registration on the basis of the 1921 examination.

Very truly yours,

CHAS. M. HOWELL, JR.  
Assistant Attorney General

Approved:

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Attorney General

CORPORATIONS; A Foreign corporation incorporated to make loans, secured by real estate, chattel mortgages, or otherwise than to carry on a general mortgage business in all its forms may be domesticated in the State of Mo.

1-15  
January 10, 1934.



Hon. Dwight H. Brown,  
Secretary of State,  
Jefferson City, Mo.

Attention: Corporation Dep't.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"We are handing you the enclosed copy of certificate of incorporation of Union Mortgage Loan Company and ask that you furnish us an opinion as to whether or not we are authorized to domesticate this corporation in Missouri as a foreign corporation. You will note first, that it takes for its name Union Mortgage Loan Company. It is not and does not purport to be a business or manufacturing corporation such as are contemplated in our statute under Article 7, Chapter 32. The purpose of this corporation, as we understand, is to borrow money from the Reconstruction Finance Corporation and then to loan this money to the various telephone companies. I don't think they intend to loan money to anyone except companies organized for the purpose of carrying on the telephone business.

This matter has been submitted to us before and at that time we took the view that since it was a mortgage loan company, it properly belonged in the Finance Department. It was submitted there and I understand refused on the ground that corporations could be organized in Missouri for the purposes mentioned in this copy, but that no provision was made for domesticating such companies. It has now come back to the Corporation Department and they are very anxious to have the question determined. We are at a loss to know whether the Secretary of State is authorized to issue a certificate on



Jan. 10, 1934.

proper certification of the articles of incorporation from the state of origin, which is Delaware in this case, and with the other necessary affidavits which are to be supplied together with the designation of principal agent for Missouri. We will appreciate your early advice in this matter."

I.

A foreign corporation incorporated to make loans secured by either real estate or chattel mortgages or otherwise than to carry on a general mortgage business in all its forms may be domesticated in the State of Missouri.

Section 4936, R.S. Mo. 1929 provides as follows:

"No corporation organized or incorporated under the laws of any other state shall do business in this state, if such company, if organized in this state, would organize under article 7 of chapter 32, R.S. 1929, without first procuring a license therefor, which license shall be granted by the Secretary of State."

Section 4937, R.S. Mo. 1929 provides as follows:

"In order to procure such license it shall be necessary for the corporation applying therefor to file with the secretary of state a copy of its articles of association and charter granted by the state or territory under which it is organized, and if it shall appear that such company or corporation could not organize under the laws of this state, license shall be refused: Provided, that foreign corporations otherwise qualified to engage in business in this state, but whose authorized capital stock exceeds ten million dollars, may obtain such license, if the proportion of the capital stock of such corporation employed in this state shall not exceed the amount of capital which domestic corporations are permitted to have: Provided, that sections 4936 to 4939, inclusive, shall not be construed so as to permit any corporation violating the anti-trust laws of this state to have license to transact business."



The above sections of the statutes of Missouri set out the general rules necessary for foreign companies to follow in order to do business in the State of Missouri. These sections of the statutes are found under Art. VII, Chapter 32, R.S. Mo. 1929, referring to manufacturing and business companies.

Chapter 32, Art. VIII, R.S. Mo. 1929 provides specifically for the incorporation of loan and investment companies. Sec. 4980 of Article VIII provides:

"Corporations may be organized under and by virtue of this article in the same manner as manufacturing and business corporations, under and by virtue of article 7 of chapter 32, R.S. 1929, except as otherwise herein provided."

This section of the statutes declares that corporations may be organized under Article VIII in the same manner as they may be organized under Article VII. In other words, foreign corporations may be formed under Article VIII, providing they comply with the rules as set out in Article VII.

Sec. 4982, R.S. Mo. 1929, referring to the powers of loan companies under Article VIII has been amended by Sec. 4982, Laws of Mo. 1933, p. 200, which provides in part as follows:

"In addition to the general powers conferred upon corporations by articles 1 and 7 of said chapter 32, R.S. 1929, as amended, every loan and investment company organized under the provisions of this article shall have the following powers:

First: To lend money to any person, firm or corporation, secured by the obligation of such person, firm or corporation, or otherwise.

Second: To sell or offer for sale its secured or unsecured evidences or certificates of indebtedness or of investment and to receive from investors therein or purchasers thereof payments therefor in installments or otherwise with or without allowance of interest on such installments, whether such evidences or certificates of indebtedness or of investment be hypothecated for a loan or not, and to enter into contracts in the nature of a pledge or otherwise with said investors or purchasers with regard to said evidences or certificates

of indebtedness or of investment securing any loan, and no such transaction shall in any way be construed to effect the rate of interest on such loan, nor to constitute a violation of any other law, conditioned that there be compliance with the limitations thereon in this section contained: \*\*\*\*\*

It is the disposition of this state as manifested by its statutes to be liberal in its comity towards outside corporations applying for admission into this state. In the case here before us we have a foreign corporation seeking to come into the State of Missouri and carry on business such as is contemplated by Article VIII, Chapter 32, R.S. Mo. 1929. The public policy of the State of Missouri with respect to a corporation of this nature is well stated in the case of State ex rel. v. Cook, 181 Mo. 596:

"Looking to our statutory provisions for the public policy of the State, it will be readily observed that we have adopted a most liberal comity towards corporations organized under the laws of other states and countries. Indeed, we have placed them upon substantially the same footing as our own domestic corporate bodies and given them the same powers, and subjected them to the same obligations that are provided for like corporations in this State..... When, therefore, such foreign corporation presents itself for admission to the State, and not only shows that its articles provide powers and a business not opposed to our laws, but such as we grant to our own like domestic corporations, there is nothing in the proviso of the Act of 1903 (namely that companies shall not be formed in other states by citizens of Missouri to evade its laws) which would exclude them."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the Secretary of State is authorized to domesticate this corporation in Missouri as a foreign corporation upon proper

Jan. 10, 1934.

certification of the Articles of Incorporation from the state of origin, together with the other necessary affidavits required by the statutes of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

JWH:AH

SECRETARY OF STATE - LAND DEPARTMENT ;

Right to patent land  
granted to Cairo and  
Fulton Railroad.

1-22  
January 16, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Brown:

This Department acknowledges receipt of your  
letter dated January 5, 1934, as follows:

"We have received a request from the  
Keystone Mortgage Investment Company  
of Kansas City, Missouri, requesting  
a Grant or Patent from the State of  
Missouri in favor of the St. Louis-  
Iron Mountain and Southern Railway  
Company to the following land located  
in Dunklin County, Missouri, viz: N  $\frac{1}{2}$   
of the NE  $\frac{1}{4}$  of section 27, Township  
22 N. R. 9 E.

This land was Patented to the State for  
the use and benefit of the above mentioned  
Railway Company as embraced in Patent No.  
6, dated Jan. 23, 1877; we find no record  
of a patent having been issued to the  
said Railway Company, by the State.

We desire to know if in your opinion it  
will be legal to issue a patent to the  
St. Louis - Iron Mountain and Southern  
Railway Company, embracing this particular  
tract of land.

The St. Louis-Iron Mountain and Southern  
Railway Company was formerly the Cairo and  
Fulton Railway Company and is now a part  
of the Missouri Pacific Lines."

January 16, 1934

We note from your letter that the land inquired about was patented to the State by the United States Government on January 23, 1877. We take it therefore that in the opinion of the Land Department of the Department of the Interior of the United States that all of the conditions of the Act of Congress approved February 9, 1853, 10 (Stat.) 155 and Act of Congress approved July 28, 1866, 14 (Stat.) 338 were complied with so far as the United States Government was concerned. Section 3 of the Act approved July 28, 1866, provides in part that,

"All lands \* \* \* \* proposed to be granted by this Act for the use or in aid of the road herein named, and lying in said State of Missouri, shall be granted and patented to the said State\* \* \* \* which lands may be held by said state and used towards paying the state the amount of bonds heretofore issued by it to aid said company and all interest accrued or to accrue thereon."

It appears from in Re: Advisory Constitutional Opinion 37 Mo. 129 that there was a mortgage in existence in favor of the State and against the land in this state granted by the latter Act.

It appears from the case of Moore, et al v. Whitcomb 48 Mo. 543, that the property and franchises of the Cairo and Fulton Railroad, to which railroad the land above described was granted by Act of Congress, was foreclosed under a state lien, which foreclosure amounted to an extinguishment of the Cairo and Fulton Railroad Company. The fact of the dissolution of the Cairo and Fulton Railroad further is to be gathered from Laws of Missouri 1868, page 92. Laws Missouri 1868 at page 96 authorizes the St. Louis and Iron Mountain Railroad Company to purchase and consolidate with the Cairo and Fulton Railroad. By Section 8 of the Act it appears that there was then an unpaid balance due or thereafter to become due to the state for the purchase of the St. Louis and Iron Mountain Railroad and for the purchase of the Cairo and Fulton Railroad from Thomas Allen, but it does not appear that this amount was secured by bonds or a reserved lien of any other kind. Section 2 of the Act, page 95, refers to a mortgage executed by A. J. McKay, John C. Vogel and Samuel Simmons to the State on the

January 16, 1934

property then owned by the St. Louis and Iron Mountain Railroad Company. The Act providing that such mortgage should remain in full force and effect.

Accompanying the files transmitted by you to us is what purports to be a copy of an affidavit executed by Eugene S. Cronk, former land agent of the St. Louis- Iron Mountain and Southern Railway Company, in which the history of the lands involved in the Act of Congress approved July 28, 1866 is set out in detail. Some of the purported facts set out in the affidavit should appear of record in Dunklin County, Missouri, but the same are not before us. It is stated in the affidavit that the St. Louis and Iron Mountain Railroad Company consolidated with the Cairo and Fulton Railroad.

We do not know what the facts are with reference to whether or not the State received payment for the bonds, liens reserved or purchase money above referred to; that is a matter of fact which you must determine for yourself but until you have informed yourself on that subject and are convinced that such payment has been made, then in view of the recital in the Act of Congress approved July 28, 1866, we think you should not make conveyance of this land.

The United States Government; the Land Department of your office seems to have assumed the right to patent this land to the successor of the Cairo and Fulton Railroad. Since, by issuing the patent by the United States Government, we assume that all of the provisions of the Act approved July 28, 1866 were met, so far as the United States Government was interested, we think the State of Missouri would be authorized in issuing a patent to the now successor of the Cairo and Fulton Road, if and when, you are satisfied of the payment or payments above mentioned having been made.

We are returning you your files in connection with the above matter herewith.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General.

GL:LC



SECURITIES\* GUARDIAN FOUNDATION\*\* TRADE ACCEPTANCE CERTIFICATES:

Right to service on cost plus basis and subscription to education magazine if securities within R. S. Mo. 1929, Sec. 7734c.

January 24, 1934.



Hon. Dwight M. Brown  
Secretary of State  
Jefferson City, Missouri

Attention: Securities Division.

Dear Sir:

Your request for an opinion has been received by this office under date of December 18, 1933. Such request being in the following terms:

"Please find attached hereto, letter dated December 11, 1933 from George W. Hussar, Manager, Better Business Bureau of Kansas City, Mo., with affidavit of Edwin C. Pollitt, printed 'Application for Registration with the Guardian Program', photostat of receipt given Mr. Pollitt, and photostat of 'Trade Acceptance'. Also, copy of report made to the Commissioner of Securities by his Examiner and Auditor, dated December 15, 1933.

The question at issue is whether or not the so-called \$36 subscription or memberships are 'securities' within the meaning and intent of the Missouri Securities Act, Sec. 7734 (c) R. S. 1929. If they are securities, I must attempt to regulate their sale. If they are not securities, I must avoid action in accordance with your recent ruling in re American Assurance Association, and leave any question of fraud to the local prosecuting authorities.

In the opinion of the Commissioner of Securities, these \$36 memberships or subscriptions are not investment contracts. Such contracts have been defined, in securities act disputes, as contracts providing for the investment of capital in a way intended to secure income or profit from its employment. (State v. Evans, 154 Minn. 90, 191 N. W. 425.)

Neither are these \$36 memberships or subscriptions beneficial interests in or title to property or profits, in his opinion. The purchaser received no right to vote or aid in controlling the corporation, nor does he receive any property right in the assets of the corporation. In a ruling issued by the Attorney General of Indiana July 27, 1925, it is said-

'Where life membership certificates of a proposed club entitles the holder thereof to certain rights and privileges as a member of the club but does not entitle the holder to any beneficial interest in any property of business, or any stock in the organizing company, such certificates are not securities.'

The securities acts of various states do not attempt to include all classes of contracts which may be instrumentalities for the perpetration of fraud. There is evidently no hard and fast rule for determining whether a contract is a security within the purview of the blue sky law. (State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937.)

You have been given, above, the opinion of the commissioner of securities, that the 'Trade Acceptance' or subscription or membership which is being sold in Kansas City is not a matter within the definition of 'security' in the Securities Act.

Mr. Husser of the Better Business Bureau has a contrary view of the case, and thinks the \$36 membership, subscription, trade acceptance is clearly a 'security' and should be the subject of a cease and desist order by the Commissioner of Securities. Mr. Husser's arguments are included in the letter and exhibits attached.

You are requested to favor me with your opinion in the premises."

From the documents attached to your request and referred to therein and from information supplied by members of your Department, we understand the facts in the transaction under consideration to be as follows, and our opinion will be rendered upon the assumption that these are the true facts.

Members of the public are solicited to pay the sum of \$36 to a common law trust organized in Oklahoma, known as the Guardian Foundation, the application to enter into the transaction bearing caption however of "Application for Registration with the Guardian Program," although, checks are requested in such application to be made out to the Guardian Foundation, and where the entire sum is not paid in cash the note which is signed is payable to the Guardian Foundation. There is a Missouri Corporation known as Guardian Foundation of Kansas City, but this name does not appear on any of the documents furnished to us.

For the \$36 so paid the applicant receives a twenty year subscription to a magazine called "The Guardian Shield" which is described as an educational publication, which is also the name of an alleged division of the American Extension Press Association, a non profit making corporation. The applicant likewise receives a document executed by C. H. Blackman & Son Funeral Directors, under the title of "Interest bearing Trade Acceptance", which states that the funeral directors for value received allow the Guardian Shield, a credit in amount of \$30 if used within one year, which is increased in amount each year until the tenth year when it reaches the amount of \$60.00, which Trade Acceptance bears the following provision:

"This Trade Acceptance may be used or assigned by the Guardian Shield according to any terms agreed upon by them."

And it likewise bears a notice that it will be credited at par to any funeral home operating under the Guardian Program and holding a franchise from an approved Guardian Foundation. Below this Trade Acceptance and upon the same document is an assignment by the Guardian Shield to the applicant, stating that such applicant is a registered holder and that this certificate must be presented by the registered holder or members of his family, dependents, etc., for credit on funeral services, and that it shall not be assigned except with the written consent of the Guardian Shield. It is our further understanding that the third benefit received by applicant is an agreement by the funeral directors to allow to the registered holder of a certificate and members of his family funeral services at cost plus 10%, although we have seen no written document setting out this contract.

The Missouri Securities Act in R. S. Mo. 1929, Section 7724 (c) provides as follows:

"(c) The term 'security' or 'securities' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, interim certificates or receipts, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate or any transferable share, investment contract, or beneficial interest in or title to property or profits, pre-organization certificate or receipts, or any other instrument commonly known as security."

The only question is whether the relationship created by the transaction above described could be designated as a security within the meaning of the above statute.

I.

THE WHOLE TRANSACTION IS  
ONE CONTRACT.

As was described above in the facts, three different items are furnished to each applicant when the \$36 is paid to the Guardian Foundation. If any one of these three benefits constitutes a security within the meaning of the statute it would have the same effect as if it were the sole benefit furnished as far as regulation is concerned, for it is provided by R. S. Mo. Section 7724(d) that:

"(d) Any security given or delivered with or as a bonus on account of any purchase of securities, or any other thing, shall be deemed to constitute a part of the subject of such purchase and have been sold for value."

Thus even if it is assumed that the magazine subscription would be specifically exempt even if it were a security under R. S. Mo. 1929 Section 7725(e) which provides that there is exempted from the act:

"Any security issued by a corporation organized and operated exclusively for educational, benevolent, fraternal, charitable or reformatory purposes, and no part of the net earnings of which inures to the benefit of any private stockholder or individual."

still if either of the other two benefits furnished could be considered as security the transaction would be subject to regulation. This point arose in the case of *Brownie Oil Co. of Wisconsin vs. Railroad Commission of Wisconsin*, 240 N. W. 827 (Wisconsin 1932) wherein the Court said:

"(1) It will not be necessary to consider whether the coupon book, or the good-will contract, standing alone, is a security, because we are of the opinion that the two must be treated as a single contract. The only consideration for the good-will contract is that the customer, if convenient, will make his purchases from one of plaintiff's service stations, and that he will recommend plaintiff's products to his friends and neighbors. In our judgment this is entirely too shadowy and vague to have been the intended consideration for this good-will contract. It is to be noted that the good-will contract is only entered into with those who purchase coupon books and who pay the \$35. The two contracts are inseparable in the view of the plaintiff, for the purposes of sale, and the conclusion seems to us inevitable that the good-will contract is based upon the same consideration which supports the promise contained in the coupon book."

## II.

IS EITHER THE TRADE ACCEPTANCE  
OR THE COST PLUS AGREEMENT A  
SECURITY?

A number of different items are defined in R. S. Mo. 1929, Section 7724(c) above set out as securities. Several of these can be immediately eliminated such as stock, treasury stock and others, and it is believed that the only relevant words and phrases in such statute are the following, "note," "bond," "debenture," "evidence of indebtedness," "transferable certificate of interest or participation," and "investment contract."

### A.

NOTE, BOND, DEBENTURE, EVIDENCE  
OF INDEBTEDNESS.

These four items are all of the same general class as all



of them are obligations to pay. Very little difference is perceived between a note and an evidence of indebtedness since both are legally enforceable rights to collect, as are likewise bonds and debentures, although these latter two are usually secured, as a general rule although not always, bonds being secured by specific property and debentures not always being secured by specific property and not always indeed by any property. However, all of these four classes have this characteristic that they only in rare cases, if ever, carry with them any right to share in the profits, management or affairs of the issuer thereof, and in fact they are usually nothing more than promises to pay principal and interest at certain fixed times or at indefinite times (e.g.) demand notes or notes or bonds payable upon the happening of contingencies, or callable bonds. In at least one case it has been held that a bond or note need not be the obligation of the person offering it to the public to be a security. In the case of *People vs. Leach*, 106 Cal. App. 443, 290 Pac. 131--1930, affirmed *Matter of Leach*, 12 Pac. (2d) 3--1932, a promoter organized the "A" company to which he conveyed certain land and he then organized the "B" company in favor of which the "A" company executed and issued notes secured by mortgage on such land and the promoter then caused the "B" company to sell such notes to the public and it was held that they were securities within the California Securities Act which defines Securities as:

"All bonds, debentures and evidences of indebtedness" \* \* \* "excepting" \* \* \* promissory notes not offered to the public."

A further reason which would seem to make it immaterial that the promises offered to the public by the Guardian Shield or the Guardian Foundation are not obligations of the offeror but are obligations of the funeral directors would be the fact that the Guardian interests could not offer to the public promises by the funeral directors as described above without acting as agents of the funeral directors in view of the broad authority given by the funeral directors to the Guardian Shield as to assignment and offer to the public of these certificates.

As set out above, if the four classes treated in the foregoing paragraphs do not as they are generally understood, carry with them any rights to profits or management of the issuer it would seem that a right to share in the profits or management could hardly be necessary to make a relationship into a security within the statutes, or that such rights could be the test as to whether a document or relationship or contract constitutes a security or not. And yet in North Carolina, which has a statutory definition of security which is the same as that in the Missouri statute, the Supreme Court seems to feel that the absence of these elements prevents a certain right from being a security.



In the case of State vs. Heath, 199 N. C. 135--153 S. E. 855--1930, a sale was made of an exclusive right to use a certain method for selling real estate, whereby the purchaser paid a certain sum for his right, the profits and expenses to be divided according to certain fixed terms. The Court throughout the opinion seemed to regard the element of right to share in the profits of the seller as important and it was held that the sale involved was not a sale of a security under the statute. On the other hand in the Matter of Leach, 12 Pac. (2d) 3, 1932, supra, the Court took the following position as to whether or not a right to share in the profits of the seller is an essential element of a security:

" \* \* \* Petitioner makes the further contention that a real estate mortgage is not a security within the purview of the Corporate Securities Act of this state. In support of this contention petitioner argues that: 'The intent and purpose of the Corporate Securities Act of this state, as of all other states, was to restrict only the sale of such securities, that give the investor a right to participate in the earning or assets of a company. It was never the intent or purpose of such laws to regulate the ordinary business transactions of an individual or a company, nor to restrict an individual or company in its right to sell or mortgage property owned by it, whether real or personal.' This contention was made by petitioner on his appeal before the District Court of Appeal, and it was decided adversely to him. We are satisfied with the disposition which that court made of this question. It is not necessary to repeat here the discussion of the District Court of Appeal in reaching its conclusion that real estate mortgages of the class involved herein were within the purview of the Corporate Securities Act. This discussion may be found on pages 448, 449, and 450 of the reported decision of that case. People vs. Leach, 106 Cal. App. 442, 290 P. 131, 134, 135."

Another important question to be considered is whether or not a promise to give credit in fixed amounts on further purchases is the same as a promise to pay money. Under the certificates involved in the case under consideration there is no promise to render services as opposed to paying money. On the contrary, the certificate can only be used where a purchase or purchases of funeral services are

made and the certificates are then used as credits so that these certificates fall between a strict promise to pay money and a mere promise to furnish services. Also it might be noted that aside from the question of the quality of the commodity promised, the certificate bears interest at a fixed rate. As to whether or not a promise to give credit on further purchases is the same as a promise to pay money there is likewise a split of authority. Thus in the case of *Lewis vs. Creasey Corporation*, 198 Kentucky 408, 248 S. W. 1046--1923, a sale made by wholesale grocers of a promise to retail grocers to furnish groceries for a twenty year period at cost plus 5%, and to give stipulated discounts and to allow the purchaser a \$300 credit, the prices of these promises being \$300, was held not to be a security within the Kentucky Securities Act which defined securities as "contract, stock, bonds or other securities," and the same contract was also held not to constitute a security in the case of *Creasey Corporation vs. Enz Brothers*, 177 Wis. 49, 187 N. W. 666--1922.

In the Wisconsin case the Court, although in the statutes "bonds" \* "notes or other obligations or evidence of indebtedness," were defined as securities, seemed to feel that the absence of the right to share in rights or profits of the company prevented the contract from being a security. The Court said:

"\* \* \* In the contract in question there is no obligation to pay money on the part of the plaintiff. Its obligation is to render a certain service to the defendant for a period of 20 years, which service it has fully rendered up to the date of the suit. The service consisted in selling its goods to the member for cost plus a very small per cent of profit. The member acquired no rights either in the capital or profits of the company. The contract would be fully discharged by plaintiff rendering the specified service for the required length of time. It is clear that our Railroad Commission correctly held, as the evidence shows, that the contract in question does not come within the purview of the statute." \* \* \*

However, in the case of *State vs. Evans*, 154 Minnesota 95, 191 N. W. 426--1922, where the statute defines Securities as "stocks, bonds, investment contracts or other securities," it was held that a contract to buy an undescribed piece of land in a certain subdivision with an option to receive back the purchase price with a bonus, or to apply the investment plus interest to building on the property, the seller to lend the balance of money necessary for building, there being no promise by the purchaser to make any fixed number of payments, was a security, this contract really being in effect

as far as the purchases were concerned, a promise to give credit on certain subsequent purchases just as is the certificate in the case under consideration. However, there was a further element in the Minnesota case of a right to receive back the money in the event the purchase was not made which might distinguish it from the instant case.

In the case of Brownie Oil Co. vs. Railroad Commission, 240 N. W. 827 (Wis.) 1932 supra, this distinguishing element between the last cited case and the instant case was not present and it was held that the issued instrument was a security. In the Brownie Oil Company case the company issued coupon books for \$35 each, entitling the owner to a credit of one half cent per gallon on gasoline purchased at the company's stations, and twenty-five cents per gallon on oil purchased, and the company also entered into a good-will contract whereby the purchaser agreed to recommend the company's gas to his friends and to use it when convenient, and the company agreed to pay one half cent per gallon on all gasoline sold by it to a trustee for distribution to the holders of these good-will contracts. The Court says of the contract as follows:

" \* \* \* The contract stipulates that it does not represent any indebtedness of the plaintiff; that the one-half cent per gallon is to be charged to advertising expense and payable out of gross sales. It is further provided that the owner of the contract has no interest in the present or future profits, capital, or assets of the plaintiff, or any lien thereon. \* \* \* "

The contract expressly attempts to remove itself from the various characteristics which have been relied upon by various courts as the distinguishing characteristics of securities. The Court held that these contracts were securities and this case seems very closely in point because as above discussed it does not seem to make any difference whether the obligation is one of the issuer or of someone else.

#### B.

#### TRANSFERABLE CERTIFICATE OF INTEREST OR PARTICIPATION.

The Trade Acceptance in question was transferable when originally issued by the funeral directors but was registered by the Guardian Shield before being transferred so that probably it is immaterial as to whether it is a certificate of interest or participation. However, aside from this element of transferability there

seems to be no interest in the business either of the funeral directors or the Guardian Shield or right to participation in such business, so probably this definition would not apply to the document in question. The fact that the member has paid to the Guardian Foundation a certain amount of money, a part of which has gone into the business of the funeral directors, and that the member has very definite interest in the continued solvency and operation of the funeral directors because only if these continue can he receive his credit from them would seem to be too remote to make such interest or the document representing it a certificate of interest or participation, although the fact that the interest if any would be in the funeral director's business and not in the business of the Guardian Foundation or the Guardian Shield would seem to be immaterial. *People vs. Leach supra.*

## C.

## INVESTMENT CONTRACTS.

As was stated above the statutory definition of Security in North Carolina is the same as that in Missouri, and the North Carolina Act was adopted in 1927, two years before the Missouri Act, although no indication has been found that the Missouri Law was taken from the North Carolina Act.

In the case of *State vs. Heath*, 199 N. C. 135, 153 S. E. 855, 1930, *supra*, the Supreme Court of North Carolina discussed the meaning of the term "investment contract." The Court said:

"\* \* \* The term is not defined in the act, but it implies the apprehension of an investment as well as of a contract. The word "investment" has no technical definition, and its meaning in particular cases is often determined by its relation to the context. It has been variously defined as the conversion of money into property from which a profit is to be derived in the ordinary course of trade or business; an expenditure for profits; the placing of capital to secure an income from its use. We have found comparatively few cases in which the meaning of "investment contract" has been given. In *State v. Gopher Tire & Rubber Co.* 146 Minn. 52, 177 N. W. 937, 938, the Supreme Court of Minnesota in analyzing a statute denouncing "investment contract" said: 'The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an "investment" as that word

is commonly used and understood. If defendant issued and sold its certificates to purchasers who paid their money justly expecting to receive an income or profit from the investment, it would seem that the statute should apply. The certificate set out in the case recited this provision: 'That defendant will annually set aside as a bonus to certificate holders all of its excess earnings after paying operating expenses, fixed charges and dividends to stockholders, the same to be distributed at its option in the form of preferred stock.'

The definition of "investment contract" in the case just cited, was adhered to in *State v. Evans*, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165, in which the contract gave to the purchaser an option to surrender his contract and take back the money he had paid, with a bonus of \$70 for each \$1,000, from the profits obtained on the sale of contracts. It was adhered to in *State v. Ogden*, 154 Minn. 435, 191 N. W. 916, in which the "unit holders" were to participate in profits in proportion to their holdings, and in *State vs. Bushard*, 154 Minn. 455, 205 N. W. 370, the defendant was to participate in profits as the result of his investment, and eventually to receive certificates of corporate stock." \* \* \* \* \*

The contract does not contemplate the placing of Freeman's money with the partners in a way intended to secure an income from its employment by them in the conduct of the business.

The result is obvious. In our opinion the contract included in the special verdict is not an "investment contract" within the terms of the statute upon which the indictment is drafted. And by the same reasoning we are led to the conclusion that the contract is not a "certificate of interest in a profit-sharing agreement." \* \* \* \* \*

The meaning of the word "contract" in the Kentucky statute was discussed in the case of *Lewis vs. Creasey Corporation*, 198 Kentucky 408, 248 S. W. 1046, 1923, *supra*, the contentions in this case raised the issue being as follows:

"\* \* \* It is the contention of plaintiff that the word 'contract' as used in the statute, viewed



from the standpoint of its connection, has only a restricted meaning, and has reference only to security contracts, which latter it is argued were the only class of contracts that the statute attempted to regulate, and in which the company or individual dealt, and to procure which the purchaser invested his money or property.

On the other hand defendant, through his counsel, argues that the word 'contract' in the statute means more than what is ordinarily understood as a security investment, and that it is broad enough to cover all classes of contracts which may be an instrumentality for the perpetration of fraud and in which one may invest his money or property.\*\*\*\*\*

And the Court decided the term Security

"\* \* \* means the investment of funds in a designated portion of the assets or capital of a concern, with the view that the latter by using and operating with, the investment will earn a profit for the investor. In other words, it carries with it the idea that the investor will earn his profit through the efforts of others than his own. It thus includes bonds, stock certificates, shareholder certificates, and other similar investments, but its definition does not include interest income from the lending of money, or the profits which one might make by his own efforts as the result of any ordinary commercial contract which he might enter into." \* \* \*

The three opinions of Attorneys General which have passed on the question as to whether or not these contracts are securities have not likewise been in accord. The exact contract here in question or at least the contract of the Guardian Foundation as it was operating in Oklahoma was declared not to be a security by an opinion of the Attorney General rendered March 18, 1932, and a certificate of service of a mortuary company entitling its holder to a funeral for \$60 was declared not to be a security in an opinion of the Attorney General of Oregon rendered on April 28, 1930. But in an opinion handed down August 20, 1926, the Attorney General of Utah declared that such a "certificate of service" which gave the owner a right to a funeral on a "cost plus basis" but no right in the voice of the affairs of the company was a "certificate of interest" or "indebtedness" and a



January 24, 1934.

security, and apparently this contract did not even involve a right to receive a credit in a fixed amount on such funeral.

## III.

## CONCLUSION.

After analyzing the above opinions we have come to the conclusion that since there is no authority at all in the state of Missouri on this point (although the Securities Act does apply to associations and common law companies, Schmidt vs. Stortz, 208 Mo. A. 439, 236 S. W. 694--1922, State vs. Hudson, 214 Mo. A. 260, 259 S. W. 877--1924) and since the authorities in other states are so scanty and fail to be in sufficient harmony to justify the laying down of any general principles of law on the subject, that the matter of treating the certificate in question as a security or not should be a matter of administrative policy with your department, that you would not be subject to criticism in the event you decided to take either position, and that therefore it is the opinion of this department that you are free either to treat these certificates as securities and to take jurisdiction or to refuse to treat them as securities and decline to take jurisdiction.

Respectfully submitted,

EDWARD H. MILLER,  
Assistant Attorney General

APPROVED:

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ROY McKittrick,  
Attorney General.

EHM:MM

TRADE-MARKS: Ownership and right to use trade-mark not to be determined by Secretary of State or this office; Secretary of State not required to make investigation to ascertain whether trade-mark registered will be used solely, and Act does not provide for cancellation of registration.

February 14, 1934.



Hon. Dwight H. Brown,  
Secretary of State,  
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We are today in receipt of communication from the Better Business Bureau of St. Louis regarding trade names registered with the Secretary of State under the provisions of the "Trade Marks, Names and Emblem" Act, Sections 14329 to 14337 inclusive, applicable to the sale and distribution of coal and coke. They are asking for an opinion on two matters, which we are quoting below:

I. Coal Company A has been using the term 'Superior' for ten years in the sale of coal, but has never registered this trade name under the Act.

Coal Company B, who has never previously used the trade name 'Superior' in the sale or distribution of coal, decides to register the name under this Act.

Can Company B prevent Company A from continuing the sale of 'Superior' coal despite their ten years priority of usage?

II. Coal Company A registers, under this Act, the word 'Smokeless' as a trade name for coal. Investigation by the Better Business Bureau discloses that the coal which Coal Company A sells under this name is in fact, not smokeless. Is there any way that Coal Company A can be prevented from registering a misleading and untruthful trade name? Or, is there any way that such a company can be compelled to relinquish the right to use this inaccurate trade name? It is our opinion, that, despite the registration of this inaccurate and untruthful

trade name, the company can still be held under the various statutes of obtaining money under false pretenses or false advertising, but it seems incongruous to permit a company selling coal to officially register with the State a trade name which is misleading, untruthful or inaccurate. Will you please furnish us with the information asked for?"

I.

Section 14329, R. S. Mo. 1929, among other things, provides as follows:

"\*\*\*\*No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by any person other than the owner thereof."

Under the foregoing section it is the duty of the Secretary of State to register a trade-mark upon application of any person unless the trade-mark "resembles or would probably be mistaken for a label or trade-mark already registered."

As we interpret the above section, the Secretary of State is required to register the trade-mark unless it resembles one already registered. If the trade-mark presented for registration resembles one already registered, then the Secretary of State may refuse to register the trade-mark. This section does not put upon the Secretary of State the burden of attempting to decide the right of claimants as to the ownership or usage of a trade-mark. We do not believe it would be proper for the Secretary of State to attempt to decide, as among various claimants, who is the owner or who is entitled to the use of a particular trade-mark. Such a decision by the Secretary of State would be of no effect because any claimant might bring an action in a Court of competent jurisdiction to adjudicate the right of the respective claimants as to the ownership and right to use the trade-mark.

The question as to whether Company A or Company B is entitled to register and use the name of "superior" in the selling of their coal is a private matter to be determined by these parties in a Court of competent jurisdiction. This office cannot attempt to pass upon the right of either of these persons so far as the ownership or use of this trade-mark is concerned. If either company makes application in proper form for the registration of this trade-mark and you,

as Secretary of State, find that it does not resemble or would be mistaken for a trade-mark already registered, then the applicant is entitled to have the trade-mark registered. Whether or not the trade-mark sought to be registered by the applicant is owned by another concern is a matter not for this office or your office to pass upon, but is a matter to be determined in a Court of competent jurisdiction by the parties interested.

In answer to your first inquiry, therefore, we cannot attempt to decide an involved question of law affecting the rights of these claimants as to the ownership or right to use the trade-mark "Superior." The right to register this trade-mark is to be determined under Section 14329, quoted above, but the property rights of any claimant in this trade-mark is a matter which will have to be determined by them or other interested parties in a Court of competent jurisdiction.

## II.

In answer to your second inquiry, we believe that if Coal Company A registers the word "Smokeless" and under that trade-mark sells coal which is not as a matter of fact smokeless coal, such party would be obtaining money under false pretenses and may be prosecuted under the general criminal statute. We find no provision in the statute that requires the Secretary of State to determine whether the person applying for the trade-mark intends to use it honestly or fraudulently. We find no provision that authorizes the striking from the registration list any trade-mark where the owner has used it for a fraudulent purpose. However, we are of the opinion that it might be possible to obtain an injunction where a person uses a trade-mark falsely and for a fraudulent purpose. We are of the further opinion that when a person does register a trade-mark and uses it for a false or fraudulent purpose, that such person loses his right to have the trade-mark protected, and as a practical matter would be the same as losing the effect of registration.

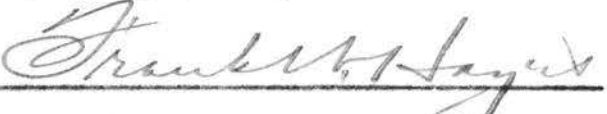
In 38 Cyc. page 798, it is said:

"Plaintiff must come into court with clean hands. Names and marks which are themselves a misrepresentation, or which are wrongfully used by plaintiff, and operate to deceive the public, will not be protected. The illegal use of a name in violation of law will not constitute it a trade-mark entitled to protection as such. False statements in advertisements or labels as to material matters, such as the ingredients of medicines or beverages, will bar relief."

February 14, 1934.

In answer to your second inquiry it is our opinion, therefore, that if a person applies for the registration of a trade-mark the Secretary of State has no right and cannot be compelled to ascertain whether the trade-mark fairly represents the article which will bear its name, or whether the applicant intends to fraudulently or dishonestly sell another article under that name, and that the statute does not provide for the cancellation of the registration but the applicant may be prosecuted for the fraud which he practices.

Very truly yours,



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Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

CIRCUIT CLERKS - Compensation beginning in 1935 - Pay of Deputies,  
and constitutional question of Laws 1933, p. 369.

March 7th, 1934.

3-9



Hon. Birt P. Bryant  
Clerk of Circuit Court  
Dunklin County  
Kennett, Missouri

Dear Sir:

This acknowledges receipt of your request for  
an opinion upon the following query:

"Replying to your letter under date  
of December 2nd in which you enclosed  
copy of opinion on salary of circuit  
clerks and deputies affected by sec-  
tions 11786 and 11812, p. 369, Laws  
1933, addressed to Hon. Dale H. John-  
son, Circuit Clerk of Bollinger County,  
Marble Hill, Missouri, but this opinion  
does not touch upon the proposition  
which I made inquiry as to your opinion,  
to-wit: (1) After the present term of  
the Circuit Clerk's office expires,  
will the salary be on a fee basis al-  
together? (2) If on fee basis, will  
the county be liable for the difference  
in salaries if the collection of fees  
are insufficient to pay the salary of  
the clerk and his deputies?"

I.

AFTER THE CIRCUIT CLERK'S PRESENT TERM OF OFFICE EXPIRES,

THE CIRCUIT CLERK WILL BE PAID UPON A FEE BASIS.



#2 - Hon. Birt P. Bryant

At the present time, the circuit clerk is paid a salary under the provisions of Sections 11786 and 11813 R. S. Mo. 1929. The salary provided for now will be paid until the end of the term of office of the present circuit clerks. After the election of circuit clerks this year, they will assume their duties on the first Monday in January, 1935. - Section 11664 R. S. Mo. 1929. The circuit clerks in all counties of this state taking office on the first Monday in January, 1935, will receive compensation for their services as set out in the new section, 11786, Laws 1933, p. 369, and which is as follows:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a population of less than 7,500 persons, the sum of \$1000.00; in counties having a population of 7,500 and less than 10,000 persons, the sum of \$1100.00; in counties having a population of 10,000 and less than 12,500 persons, the sum of \$1300.00; in counties having a population of 12,500 and less than 15,000 persons, the sum of \$1500.00; in counties having a population of 15,000 and less than 17,500 persons, the sum of \$1700.00; in counties having a population of 17,500 and less than 20,000 persons, the sum of \$1900.00; in counties having a population of 20,000 and less than 25,000 persons, the sum of \$2100.00; in counties having a population of 25,000 and less than 30,000 persons, the sum of \$2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of \$2500.00; in counties having

#3 - Hon. Birt P. Bryant

a population of 70,000 and less than 80,000 persons, the sum of \$3000.00; provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

You will note that the above section provides a maximum of fees that any circuit clerk may retain for one year's services. This means that the circuit clerk is entitled to retain fees up to the maximum amount allowed in this section. Fees earned in change of venue cases are not to be accounted for by the circuit clerk.

The language at the very beginning of the new section, 11786, refers to "the aggregate amount of fees" that a circuit clerk may retain for one year's service. The clear meaning of this language is that out of the fees collected by the circuit clerk in his official capacity, he shall be allowed to withhold or retain from the money in his custody and possession all of it up to a certain amount, and none over that amount, as set out in the new section 11786. If his office does not earn the maximum amount allowed him by law, then he has no funds in his hands out of which he can retain the maximum amount allowed him by law. The Legislature clearly intended to pay the circuit clerk upon a fee basis, and by its repeal of Section 11813, and the failure to enact a new section in lieu thereof, the Legislature made it clear that after the present term of office expires the circuit

#4 - Hon. Birt P. Bryant

clerk should receive no compensation from the county treasury for his services.

It is, therefore, the opinion of this office that after the expiration of the present term of office of the circuit clerk, he shall receive fees for his compensation not to exceed the amounts set out in Laws 1933, p. 369; which fees shall be in lieu of the salary heretofore paid the circuit clerk.

## II.

### DEPUTY CIRCUIT CLERKS.

Prior to the passage of the new Section 11812, Laws 1933, p. 371, each clerk of the circuit court was entitled to deputy circuit clerks who were appointed by the circuit clerk with the approval of the Circuit Court. The Circuit Court fixed the compensation of such deputy circuit clerks.- Section 11812 R. S. Mo. 1929. Under this old section, the right of the deputy circuit clerk to compensation was thus fixed by statute and became a county charge. Section 11813 R. S. Mo. 1929, now repealed, added nothing to the liability of the county to pay the deputy circuit clerk's salary except that it specified that it would be paid in monthly installments. The duty rested upon the County Court to pay the deputy circuit clerks without any aid from Section 11813, R. S. Mo. 1929.

The 1933 Legislature repealed Section 11812, supra, and enacted in lieu thereof a new section found in Laws 1933, p. 371. This new section provides:

"Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office.

The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

It will be noted that the principle, which, in the new section, was that it substituted the term "county court" for the term "circuit court" used in the old section, thus transferred to the county court the duties formerly imposed upon the circuit court. No change was made in the law effecting the county's liability for the compensation of deputy circuit clerks. Under the old section, the county was liable for the compensation of deputy circuit clerks, and the amount of that compensation was to be fixed by the circuit court. Under the new law, the county is liable for the compensation of deputy circuit clerks, but the amount of that compensation "is fixed by the county court".

It will be noted from close reading of the entire Act of 1933, pp. 369-372, that the only moneys or fees that the circuit clerk is permitted to retain are the fees for his own personal services. He retains no fees for the pay of deputies and assistants. Therefore, under the provisions of Section 11814, Laws 1933, p. 372

#6 - Hon. Birt P. Bryant

it is made the duty of the circuit clerk to pay into the county treasury quarterly all fees collected in excess of the sums he is permitted to retain.

It is, therefore, the opinion of this office that the county court shall fix the compensation of <sup>deputy</sup> circuit clerks, and that the county court shall pay such circuit clerks from the general revenue fund of the county. Such pay shall be compensation for the services rendered by a deputy circuit clerk and shall be entitled to be classified as such under the County Budget Law.

### III.

#### COUNTIES WHEREIN THE CIRCUIT CLERK WILL BE EX-OFFICIO RECORDER OF DEEDS.

Section 11528, Laws 1933, p. 360, combines the office of the circuit clerk and recorder of deeds in all counties of less than 20,000 inhabitants. This office entertains some doubt as to the constitutionality of that part of the new law, Laws 1933, pp. 369-372, insofar as it may apply to counties of less than 20,000 inhabitants. The constitutionality of this statute is properly for the courts. We merely set forth the history of this Act for whatever it may be worth, and do not attempt in this opinion to pass upon the constitutionality of the Act.

The 1933 statute, Laws 1933, p. 369, in its title, provides:

"AN ACT to repeal Sections 11786, 11808, 11811, 11812, 11813, 11814 and 11815 of Article 2, Chapter 84, of the Revised Statutes of Missouri, 1929, entitled "Fees, Payment, and Disposition of," and to enact five new sections relating and pertaining to the same subject to be known as Sections 11786, 11808, 11811, 11812, and 11814."

#7 - Hon. Birt P. Bryant

We call your attention to the term "same subject", used in the title of the 1933 Act.

Section 11786 R. S. Mo. 1929 originates with Laws 1915, p. 578. The title of the 1915 Act provides:

- "AN ACT changing the method of payment of salaries of clerks of circuit courts, except in any county wherein the clerk of the circuit court is ex officio recorder of deeds of said county; and provided further that the provisions of this act shall not apply to any county which now contains or may hereafter contain a city of 75,000 inhabitants or more, or to any county which now contains or may hereafter contain eighty thousand inhabitants and less than one hundred and fifty thousand inhabitants in which circuit court is held, in two or more places in said county, providing for the appointment and payment of deputies, and requiring clerks to pay into the county treasury all fees collected by them."

SECTION	:	SECTION
1. Salaries of circuit clerks in certain counties.	:	4. Duty of clerk - collection of fees - statement, etc.
2. Deputies and assistants, how appointed-compensation.	:	5. Repealing clause.
3. Salaries, how paid.	:	6. Act to take effect, when."

It will be noted that the 1915 title related to the method of paying circuit clerks EXCEPT in any county wherein the clerk of the circuit court is ex-officio recorder of deeds. Therefore, the Act, by its title, did not cover the salary of circuit clerks in



#8 - Hon. Birt P. Bryant

counties where they were also recorder of deeds.

The Legislators, in 1919, pp. 663-664, attempted to independently amend the 1915 Act by passing two separate and distinct amendments to this Act. Both amendments were approved May 30, 1919. The title of the amendment act, Laws 1919, p. 663, specifically refers to the fact that the 1915 Act did not apply to circuit clerks who were ex-officio recorders of deeds. The amendment further, at page 665 of the 1919 Act, reads:

"AN ACT to amend section one of an act entitled "An act changing the method of salaries of clerks of circuit courts, session acts, 1915, page 378, approved March 22, 1915.

SECTION.	:	SECTION.
1. Amending an act:	:	1. Salaries of
of 1915 relating:	:	circuit clerks
to salaries.	:	in certain
:	:	counties.
:	:	2. Repealing clause."

It will be noted that the 1919 Act, p. 665, is silent in the title as to including circuit clerks who are ex-officio recorders of deeds, but the 1919 revision committee entirely omitted the 1919 law, p. 663, but copied into the revision of 1919 the act as amended at p. 665. This section became 10995 S. S. No. 1919.

The 1919 amendment, supra, did not contain a general title. It adopted the 1915 Act and the 1915 title. Since the 1915 title did not apply to circuit clerks who were ex-officio recorders of deeds, any amendment of the statute contrary to the title as to apply to circuit clerks who were ex-officio recorders of deeds would be invalid, because neither the amended act nor the amendatory act in the title applied to circuit clerks who were ex-officio recorders of deeds. State ex rel. v. Hackman, 267 S. W. 608 (1924).

It is now well settled that where the title refers to a specific class, the Act, and all amendments thereto which adopt the

original title of the act are limited to the classes therein covered. In *State v. Sloan*, 258 Mo. 305 (1914), the title of an act referred to "herding cattle by non-residents", while the amendatory act applied to residents as well as non-residents. No part of the original title was changed in the title to the amendatory act. The court, l. c. 513, said:

"The purpose of a title is to serve as a clear and comprehensive indicator of the purport of the act. While it may be so general in its terms as to omit reference to or the expression of matters germane to the principal features of the statute, if it sufficiently indicates the substantial purpose of the law, it will not be violative of the Constitution; but where a title descends to particulars and specifies a certain class included within the provisions of the act, to the exclusion of others, it does not sufficiently indicate the purport of the law, and is to that extent violative of the constitutional provision.

We find, therefore, in the case at bar that the body of the act contains provisions applying to residents as well as non-residents of the State, while its title, as definitely as words can convey their meaning limits its application to non-residents; under this state of facts, much as the court may be disinclined to declare the act invalid, it cannot in the face of the plain provisions of the Constitution (Sec. 23, art. 4) do otherwise in so far as it is attempted to apply the act to residents of this State."

It would therefore appear that as one section contained the provisions and regulations for fees of all circuit clerks in

#10 - Hon. Birt P. Bryant

the state who were not ex-officio recorders of deeds, then the attempted amendment of the 1915 Act thereafter so as to take in an additional class, or to add an additional subject without setting it out in the title, might contravene Section 28, Article 4 of the Missouri Constitution.

The 1915 statute has heretofore been construed as not violating Section 28, Article 4, of the Missouri Constitution, but the question of class was not raised. The objection at that time was made on the question of salaries and fees. *State ex rel. v. Farmer*, 271 Mo. 306 (1917).

The 1915 Act, p. 378, contained four principle sections, Section 1, now Section 11786; Section 2, now 11812; Section 3, now 11813; Section 4, now 11814. These four sections were referred to in the title as "An Act", and in Section 1, provided,

"provided, that the provisions of this act shall not apply to any county wherein the clerk of the circuit court is ex-officio recorder of deeds of said county,"

The above quotation was a part of the act containing the four sections above enumerated.

It would therefore appear that Section 11786, Laws 1933, p. 369, would only provide for the compensation of circuit clerks who were not ex-officio recorders of deeds.

An attempt was made to amend this section, Laws 1921, p. 607, but the amendment was held unconstitutional. - *State ex rel. v. Hamilton*, 303 Mo. 302; 260 S. W. 466.

Section 11528, Laws 1933, p. 360, combines the office of the circuit clerk and recorder in all counties with a population of less than 20,000.

When considering the two sections together, it would therefore appear that the circuit clerks of Missouri, beginning in 1935, in counties of less than 20,000 population, would be ex-officio recorders of deeds, and that they will receive compensation from fees.

#11 - Hon. Birt P. Bryant

While it is not the duty of this office to determine close questions of the constitutionality of Legislative Acts, we have set out the above and foregoing history of the Act for the consideration of those who might wish to present the matter to a court of record for final determination.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

BANKS AND BANKING : National Banks in Missouri have authority to pledge their assets to secure deposits of public funds to Secretary of State under Section 7784 R.S.1929.

3-2  
March 19, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

This department acknowledges receipt of your letter of February 12, requesting an opinion upon the questions set forth therein, which reads as follows:

"Some days ago, our Mr. Buschmann, who is in charge of bank relations, was in an interview with General Hewitt, of your office, at which time the decision in the case of Ray C. Carroll, Treasurer of Marion, Illinois vs. City National Bank of Herrin, Illinois, was discussed. The court in this case required the surrender of collateral and made the claim of the Treasurer an ordinary or common claim. The question arose as to the right of this department, when dealing with National Banks, to demand collateral security for deposits.

Section 5153 of the National Bank Act, as amended June 25, 1930, sets out the authority of National Banks to pledge their assets in states where the State Banks have such authority, placing the National Bank in identical status with the State Bank, the state law being made the governing rule in these matters. Section 7784 of the Revised Statutes of Missouri, 1929, deals with this subject matter and authorizes Missouri banks to pledge security to this department.

Justice Brandeis in the Treasury vs. the National Bank case held, that law with regard to National Banks, was determined by state law provisions as to State Banks. The National Banks' authority, under the National Bank Act, depends upon privileges extended to State Banks. The decision came down Feb. 5, 1934.

In view of the United States Supreme Court decision, we believe we are safe in proceeding as in the past. If you hold to a contrary view, please advise at once."

The part of Section 7784, R. S. Mo. 1929, pertinent to the question submitted in your letter is as follows:

"Sec. 7784. Fees collected to be deposited in bank where branch office making collection is located.

All fees for the registration of motor vehicles, trailers, chauffeurs, operators, certificates of title and motorcycles provided for herein shall be collected by the secretary of state and deposited in a bank where the branch office collecting same is located. Such depositories shall be required by the secretary of state to give a good and sufficient bond or other legal security in an amount equaling or exceeding any sum that may be deposited therein. Such bond or securities shall be payable to the secretary of state and state of Missouri and shall be deposited in the office of the secretary of state."

The question is whether or not national banks, located in Missouri, have the authority to pledge their assets or securities to the Secretary of State to guarantee moneys deposited in the national banks which may be designated by the Secretary of State as a depository of moneys collected under Section 7784 R. S. 1929.



On March 6, 1934, this office rendered an opinion to Honorable Richard R. Nacy, State Treasurer, in which we discussed the question as to whether national banks in Missouri had the authority to pledge their assets to secure deposits of state funds, in which the case of City of Marion, Illinois v. Sneedam, et al., decided February 5, 1934, by the Supreme Court of the United States - Sup. Ct. Reports, Vol. 54 at page 421, was discussed.

The amendment of June 25, 1930, Section 5153 of The National Banking Act, as shown at 12 U. S. C. A. Section 90, page 30, and referred to in your letter, provides as follows:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (As amended June 25, 1930, c. 604, 46 Stat. 809.) "

In the State of Missouri, the power of banks to pledge their assets to secure public deposits has had legislative approval and sanction for a great many years, since 1879, and it is the policy adopted in this State for the safeguarding of public funds, and we cite as evidence of this, Section 12187, R. S. Mo. 1929, wherein County Depositories are permitted to pledge their assets to secure county funds deposited in said banks and Section 11469, R. S. Mo. 1929, as amended by the Acts of 1931, at page 378, wherein banks are permitted to pledge their assets and securities to secure deposits made by the State Treasurer in said banks,

In the case of Huntsville Trust Company v. Noel, 12 S. W. (2d) 751, 1. c. 754, in construing the statute, Section 9585, R. S. Mo. 1919 (now Section 12187 R. S. 1929), the Supreme Court said that a trust company seeking to qualify under the above section had authority to pledge United States bonds constituting part of its assets to secure the performance of its obligations as a depository.

Honorable Dwight H. Brown

-4-

March 19, 1934

It is our opinion that national banks in Missouri have authority to pledge their assets to secure deposits made by the Secretary of State of automobile registration licenses and fees as provided for in Section 7784, R. S. Mo. 1929, to secure said deposits under the amendment of June 25, 1930, Section 5153 supra, the same as state banks have under the Statutes of Missouri.

We are herewith enclosing to you a copy of our opinion rendered to the Honorable R. R. Nacy, State Treasurer, delivered March 6, 1934, which discusses the subject more fully.

Yours very truly,

COVELL R. HEWITT  
Assistant Attorney General,

APPROVED:

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ROY MCKITTRICK  
Attorney General.

CRH:LC

Inclosure

COUNTY SURVEYORS - Vacancy in office for failure to give bond within 60 days.

3-22

March 19, 1934.



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

We have your request of March 15, 1934, for an opinion based upon the following facts in a letter addressed to you by Mr. Tipton, County Clerk, Lancaster, Missouri:

"I am writing you at the request of George Grist who was duly elected to the office of County Surveyor in November 1932. His Commission was sent to this office along with the others at that time, but he never qualified or gave bond at the time. Later on April 4th, 1933 he filed his bond and the County Court would not approve it on account of the lapse of more than 60 days from the time his commission was received. Now he wants the Governor to send a commission and he wants to re-file his bond, which I think is contrary to law, and qualify for the office at this late date. I would appreciate it if you would give me your opinion on this, and if in your opinion he could qualify at all now."

The County Surveyor is elected for a term of four years, and under the provisions of Section 11571 R. S. Mo. 1929 this election falls in the presidential year.

Section 5, Article 14 of the Missouri Constitution provides:

#2 - Honorable Dwight H. Brown

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Section 11573, R. S. Mo. 1929 provides:

"Every county surveyor shall, within sixty days after receiving his commission, and before entering upon the duties of his office, \* enter into bond to the state of Missouri."

Section 11574, R. S. Mo. 1929 provides:

"If any county surveyor fail to give such bond in the time prescribed in the preceding section, his office shall be vacant."

It therefore appears from the above sections that the Legislature has provided a different tenure of office for the surveyor, and creates a vacancy in the office automatically upon the failure of the newly elected surveyor to give a bond within 60 days after receiving his commission.

It is, therefore, the opinion of this office that a vacancy exists in the office of surveyor of Schuyler County, Missouri. This vacancy is to be filled by appointment by the Governor under the provisions of Section 10216, R. S. Mo. 1929 which provides:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any \* county office originally filled by election by the

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people, other than \* representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person appointed shall, \* continue in such office until the first Monday in January next following the first ensuing general election - at which said general election a person shall be elected to fill the unexpired portion of such term,"

The Governor now has authority to appoint a surveyor of Schuyler County to hold office until January 1935, and in the meantime it becomes the duty of the voters in Schuyler County to elect a County surveyor at the coming 1934 general election.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McRITCHIE  
Attorney General

FER:FE

CITIES OF THIRD CLASS: Officers failing to comply with Sec. 6738, R.S. Mo. 1929 subject to an action in nature of mandamus.

3-26

March 22, 1934.



Senator Frank P. Briggs,  
Macon, Missouri.

Dear Senator:

This department acknowledges receipt of your letter of February 10, 1934 in which you inquire as follows:

"What is the penalty for violation of Section 6738, R.S. Mo. 1929?"

Section 6738, R.S. Mo. 1929 concerning which you inquire, is as follows:

"The council shall semi-annually, in January and July of each year, publish a full and detailed statement of the receipts and expenditures and indebtedness of the city for the half year ending on December 31 and June 30 preceding the date of such report, which statement shall be published in some newspaper published in the city."

We are unable to find any statute setting forth the punishment of officers for violation of this section or for refusing to comply therewith; we, however, mention Sec. 6744, R.S. Mo. 1929, which provides:

"Every officer of the city and his assistants, and every councilman, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation before some court of record in the county, or justice of the peace in the township, or the city clerk or police judge, that he possesses all the qualifications prescribed for his office by law; that he will support the Constitution of the United States, and of the state of Missouri, the provisions of all laws of this state affecting cities of this class, and the ordinances of the city,



March 22, 1934.

and faithfully demean himself in office; which official oath or affirmation shall be filed with the city clerk. Every officer of the corporation, when required by law or ordinance, shall, within fifteen days after his election or appointment, and before entering upon the discharge of the duties of his office, give bond to the city in such sum and with such sureties as shall be designated by ordinance, conditioned for the faithful performance of his duty, and that he will pay over all moneys belonging to the city, as provided by law, that may come into his hands. If any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation, or to give bond as herein required, his office shall be deemed vacant. For any breach of condition of any such bond, suit may be instituted thereon by the city, or by any person in the name of the city for the use of such person."

You will note in the above statute this sentence: "that he will support the Constitution of the United States and of the State of Missouri, the provisions of all laws of this state affecting cities of this class, and the ordinances of the city, and faithfully demean himself in office."

From the above section we are of the opinion that if the officers of the city fail to comply with Sec. 6738, supra, it constitutes a violation of their oath of office; however, we do not believe they would be subject to any action of a criminal nature, but that an action in the nature of a mandamus to compel them to carry out the terms of Sec. 6738, supra, might lie.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

ROY McKITTRICK,  
Attorney General

OWN:AH

COURT COSTS: Neither State nor county liable for expert witness fees.

3-28

March 22, 1934.



Hon. John B. Brooks,  
Presiding Judge County Court,  
Grundy County,  
Trenton, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of February 10, 1934 wherein you make the following inquiry:

"We are in doubt whether we can legally allow and pay the enclosed bills. The defendant is serving a term in the penitentiary. Is this not a case for the State to pay? Please return the bills.

Should an agreement be made between the prosecuting attorney and the county court before the above expense was incurred?"

I.

R.S. Mo. 1929 are the guide in determining whether County or State shall pay costs in a criminal case.

In determining whether or not the costs in a criminal case are legally and rightfully chargeable to the county or state, depending on the gravity of the crime, of course, we must be guided solely by the statutes of our state. We have examined same thoroughly, particularly Secs. 3827, 3828, 3820, 3829, 3850 and 3855, R.S. Mo. 1929 and are unable to find any statute wherein either the State of Missouri or the particular county is liable for expert witness fees in a criminal case.

It is a well established principle of law that costs cannot be recovered except in cases where the statutes specifically

provide for the same. In the case of State ex rel. v. Wilder, 197 Mo., l.c. 32, the Court said:

"The sole question arising from the facts alleged by the relator and admitted by the State Auditor, is whether the State is liable for the costs claimed by the relator. For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. (Shed v. Railroad, 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State ex rel v. Hill, 72 Mo. 512; Williams v. Chariton County, 85 Mo. 646)"

Likewise, the authorities are reviewed in the decision in the case of City of Greenville v. Farmer, 195 Mo. App., l.c. 211-212, as follows:

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; No such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous. It was held in the case of State ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S.W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo. App., l.c. 377, the following language is used: '\*\*\*\*It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation.' (See also: State v. Union Trust Co., 70 Mo. App. l.c. 315). McQuillin on Municipal Corporations Vol. III, Sec. 1070, lays down the rule that costs cannot be awarded unless expressly provided for and that at common law they were not recoverable in either a criminal or civil proceeding, and that it has often been held in the absence of statute providing therefor that costs cannot be taxed against a city in cases for violation

of ordinances regardless of whether there was an acquittal or a conviction. 11 Cyc. 278 states the rule that a city, town or village is never liable for costs for proceedings under its ordinances whether the defendant be acquitted or convicted unless a statute so provides, and that this is true whether the proceeding is considered civil or criminal; and that (p. 289) in the absence of statutes so providing, costs of an appeal to an intermediate court from a judgment for violation of an ordinance or on certiorari to such court are not taxable against a municipality."

#### CONCLUSION

In the absence of any statutory authority, it is the opinion of this department that neither the State nor the County is liable for the expert fees as shown by the attached statement. As per your request, we are herewith returning said statement.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

TRADEMARK - Descriptive words not subject to registration.

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4-20  
April 12, 1934.



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion as to whether or not the Missouri Kansas Coal Company, not a corporation, can register under the trade mark law the following facsimile:

"We are placing fuel in convenient sized paper bags with suggestion to the consumer that they place coal contained therein into the furnace without breaking the bag. This that they may eliminate any dirt or dust, thereby giving them the same cleanliness that they experience in burning competitive fuels." This will be advertised as "Clean Coal in Convenient Paper Bags."

Section 14329, R. S. Mo. 1929 provides that any person who wishes to adopt

"any particular name, term, design or device as his or their trademark to designate, make known or distinguish any article or goods, wares or merchandise by him or them manufactured or prepared,"

shall file an application with the Secretary of State. We call your attention to the words "name", "term", "design", "or device". An examination of the facsimile presented shows that it is not a name, term, design or device within the meaning of the above statute, and at best is merely descriptive of the man-

#2 - Honorable Dwight H. Brown

ner in which coal is to be sold. Mere descriptive terms of an article are not subject to registration under the trade mark law. A. J. Reach Company v. Simmons Hardware Company, 155 Mo. App., 412 (1911). It is this fundamental distinction between a trade name and merely descriptive words that prevents monopolies. It is one thing for a vendor to establish a business under a trade name, and an entirely different thing for a vendor to try to monopolize the business by adopting descriptive terms so as to prevent competitors from describing their produce with the same or similar descriptive terms. McGrew Coal Co. v. Menefee, 162 Mo. App. 209, l.c. 216.

It is, therefore, the opinion of this department that the above facsimile cannot be registered under the trade mark law of this state.

Yours very truly,

FRANKLINE E. REAGAN  
Assistant Attorney General

APPROVED:

ROY MCKITTRICK  
Attorney General

PER:FE



NEPOTISM: - A teacher whose grandmother is a half-sister to a director's wife's mother is not related within the fourth degree.

April 17, 1934



Mr. George D. Brownfield,  
Prosecuting Attorney,  
Boonville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"A question has arisen in this county whether the teacher's grandmother, being a half-sister to the director's wife's mother, may be legally employed.

If you can give us any information in regard to this, same will be greatly appreciated and thank you for a prompt reply."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by ~~consanguinity~~ or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision a director who participates in the election of a person related to him within the fourth degree shall forfeit his office. The sole question presented by your inquiry is whether the teacher who seeks the appointment is related within the fourth degree to the director.

There are two rules which are used in computing the degrees of relationship. These rules are laid down in 12 C. J. 511 as follows:

"One by the canon law, which has been

April 16, 1934

adopted into the common law of descents in England, and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.' By the civil law the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

We do not find that the Courts of this State have laid down any rule as to how the relationship under Section 13 of Article XIV of the Constitution is to be computed. In other states where anti-nepotism provisions are in force the Courts have generally applied the civil rule. We believe that the Courts of this State, when the matter is presented for consideration, will adopt the civil rule in computing the degrees of relationship, under our constitution. As there is no decision by our Courts on this matter this Department has applied the civil rule in figuring relationship. Under the civil rule persons who are related as first cousins or closer would be within the fourth degree, as prohibited by the Constitution. Persons who are related as second cousins and by less relationship than second cousins would not come within the prohibition of the Constitution.

Of course, the relationship prohibited by the Constitution applies to the relationship created by marriage as well as by blood. However, in applying the civil rule to the facts stated in your inquiry, we are of the opinion that the teacher about which you inquire is not related within the fourth degree, as prohibited by the Constitution, and that even though the director should vote for her employment such director would not be liable to forfeiture of office.

Very truly yours,

APPROVED:

FRANK W. HAYES  
Assistant Attorney General

\_\_\_\_\_  
Attorney General

FWH:S

SECRETARY OF STATE  
PRINTING CONTRACT  
STATE PURCHASING AGENT -

State Purchasing Agent has no control over printing for Missouri Commission for the Blind but such printing is entitled to be done by the State Printing Commission.

5-21  
May 17, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City  
Missouri

Dear Mr. Brown:

Receipt of your letter addressed to this Department dated May 9, 1934 is acknowledged. Your letter follows:

"The question has been raised in the Printing Commission as to the present classification of the Blind activities in the State. The question arises in connection with the duty and right of the Printing Commission to furnish paper and printing for these activities. As you know, the Educational Institutions and Eleemosynary Institutions are not under the Printing Commission. The action of the General Assembly in changing the method of administration of the blind activities, may have or may not have taken them from under the control of the Printing Commission in the matter of paper and printing.

Will you kindly advise us on this matter.  
Thanks."

A. State Printing Commission.

By Section 13782 Revised Statutes Missouri 1929 the Secretary of State, State Auditor and State Treasurer are designated as ex-officio commissioners of the public printing for the State of Missouri.

May 17, 1934

Section 13783 divides the printing for the State into three classes for the purpose of letting state printing contracts. The second classification includes all reports and all communications ordered by the executive departments to be printed in pamphlet form. The section further provides:

"The printing of all blanks, circulars and other work necessary for the use of the executive departments, other than such as shall be printed in pamphlet form, shall constitute the third class \* \* \* \*."

Section 13790 prescribes the character of printing to be done for the executive departments of the State and is sufficient to include every kind and character of printed supplies that might be necessary for the use of any branch of the executive department of the state.

Section 13799 in part provides:

"All work to be executed for the executive departments shall be ordered through the Commissioners of Public Printing, and a requisition shall be obtained in advance signed by the head of the department ordering such work and said requisition shall be approved by the Commissioners of Public Printing\* \* \* \*."

In the last mentioned section it is provided further:

"Executive departments shall in this and other sections of this chapter be construed to mean both the heads of said departments and the subordinate branches thereof, the boards, commissions, bureaus and officers appointed by the heads of said departments, except the boards of educational and eleemosynary institutions of the state."

Accordingly, printing for the State educational and eleemosynary institutions is not required to be done through the State Printing Commission nor furnished under the State printing contract.

B.

Missouri Commission for the Blind.

Section 8888 Revised Statutes Missouri 1929, provided for the appointment by the Governor, with the consent of the Senate, of five persons who would constitute the Missouri Commission for the Blind to carry out the applicable part of Section 47 of Article IV of the Constitution of the State of Missouri. In succeeding sections, as well as in Article I of Chapter 51, the purposes of the Act, as well as the duties and powers of the members of the Commission, are set out. By Laws of Missouri 1933, page 190, Sections 8888 and 8892 Revised Statutes of Missouri 1929, were repealed and two sections enacted in lieu thereof. The sections as re-enacted, Laws 1933, page 191, are as follows:

"Sec.8888.Defining Commission.- The Missouri Commission for the Blind shall hereafter consist of the Members of the Board of Managers of the State Eleemosynary Institutions as now or hereafter provided for and constituted by Article 1, Chapter 46, Revised Statutes of 1929, and wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of this act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind. The officers of the Board of Managers of the State Eleemosynary Institutions shall be the officers of the Commission for the Blind as herein constituted.

Sec.8892. Compensation of members. - The officers and members of the Commission hereby created shall receive no salary or other compensation for their services as officers or members of the Commission for the Blind, but their traveling expenses and other necessary expense in the performance of their duties as officers and members of the Commission for the Blind may be allowed and paid them out of any funds that may be appropriated by the State for the use of said Commission."

It will be observed that the duties and powers of the Commission were in nowise changed by the enactment of 1933. By Section 8888, as re-enacted, the name 'Missouri Commission for the Blind' is retained. Instead of the members of the Commission being appointed by the Governor, with the consent of the Senate, the appointments are made by the Legislature so that so long as there are members of the Board of Managers of the State Eleemosynary Institutions there will also be members serving as the Missouri Commission for the Blind. The same persons occupying two entirely different and unrelated offices with separate and distinct duties to be performed as to each office.

The situation here is very similar to Section 18 of Article X of the Constitution of the State of Missouri, which provides that there shall be a State Board of Equalization in this state consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney General. As to whether or not such state officers were ex-officio members of the State Board of Equalization the Supreme Court of this State, in State ex rel McGrath v. Walker 97 Mo. 162, 163, said:

"It will thus be seen from the provisions of the constitution just noted, that the state officers mentioned in section 24, supra, are not ex-officio members of the state board of equalization, that is, their membership of that board is not the result of their holding certain state offices; but is the result of their appointment to such board, by an independent and distinct provision of the constitution. 1 Burrill Law Dict., title ex-officio. But for such independent provision they would not have been members of such board."

C.

State Eleemosynary Institutions.

Section 8560 Revised Statutes Missouri 1929 reads:

"The state hospital No. 1, at Fulton, the state hospital No. 2, at St. Joseph, the state hospital No. 3, at Nevada, the state hospital No. 4, at Farmington, the Missouri state sanatorium, at Mount Vernon, and the Missouri state school at Marshall, are hereby declared to be state



eleemosynary institutions of the state of Missouri within the meaning of the provisions of this article."

By specifically defining certain state institutions to be Eleemosynary Institutions it necessarily follows that there are no other institutions in this state that may be classed or recognized as State Eleemosynary Institutions. An eleemosynary institution is generally defined as an institution, either public or private, devoted or dedicated to extending charity or giving alms.

Words and Phrases Vol. 3, page 2343,  
Words and Phrases 3rd Vol. (3rd series) page 164.

It is common knowledge that the blind in this state receiving pensions on account thereof are not segregated, but generally live in the same home or place where such person lived prior to the receiving of such pension. Section 8893, in fact, provides that:

"Blind persons who are maintained in either public, private, or endowed institutions, or by private persons who would otherwise be entitled to a pension under this article, shall not be entitled to the benefits of this article\* \* \* \*".

Section 8889, setting forth the purposes of the blind pension act, as well as the duties of the Missouri Commission for the Blind, closes with this proviso,

"Provided, however, that no part of the funds appropriated by the State shall be used for solely charitable purposes; the object and purpose of this article being to encourage capable blind persons in the pursuit of useful labor and to provide for the prevention and cure of blindness."

While the constitutional provision above referred to authorizes the raising of funds as a pension to the deserving blind, yet it does not appear that in order to receive such

Honorable Dwight H. Brown

-6-

May 17, 1934

pension a blind person must be reduced to such a financial condition that they would be required to be committed to public charity because upon that being done, as above stated, the right to such pension ceases and the purposes of the law would wholly fail. The property disqualification as to a person receiving a blind pension is stated in Section 8893.

Conclusion.

It is the opinion of this Department that the person, firm or corporation holding the contract to do the printing designated as the third class, under Section 13783, Revised Statutes Missouri 1929, is entitled to do all the printing for the Missouri Commission for the Blind, except that pamphlets printed under the second class designated in such section as that class, is entitled to be done by the person, firm or corporation holding the state contract to do such printing of the second class; that the fact that the members of the State Board of Managers for the eleemosynary institutions also constitute the membership of the Missouri Commission for the Blind, in nowise constitutes such Missouri Commission for the Blind nor any of its activities a state eleemosynary institution, but that the Missouri Commission for the Blind is a branch of the executive department of the state and over whose purchases for printing the State Purchasing Agent has no control.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General,

GL:LC

RELATING TO THE METHOD BY WHICH ABSENTEE ELECTORS  
MAY CAST THEIR BALLOT IN A GENERAL ELECTION OR  
A PRIMARY.

6-5  
May 31, 1934



General H. W. Brown  
Jefferson City, Missouri

Dear General:

This department acknowledges your letter of date  
May 12th, 1934, in which you state and inquire as  
follows:

"We will have in the neighborhood of two  
thousand (2,000) troops in camp from August  
5 to 19, 1934, who are voters in the State  
of Missouri.

Will you kindly render an opinion as to the  
proper method to pursue in voting these men  
in the August primary?

Thanking you in advance, I remain,"

Section 9 Article VIII of the Constitution of  
Missouri reads as follows:

"Qualified electors absent from the state on  
military or naval service shall, and qualified  
electors absent from their counties but within  
the state, may be enabled by law to vote at  
general or special elections."

Section 10181 Laws 1933, page 219 provides as follows:

"Any person being a duly qualified elector of the  
State of Missouri, who expects in the course of  
his business or duties to be absent from the  
county in which he is a qualified elector on the  
day of holding any special, general or primary  
election at which any presidential preference  
is indicated or any candidates are chosen or  
elected, for any congressional, state, district,  
county, town, city, village, precinct or judicial  
offices or at which questions of public policy  
are submitted, may vote at such election as  
hereinafter provided."

It will be observed from the above section that in  
order for one to vote an absentee ballot that the following  
must appear:

General H. W. Brown

May 31, 1934

- (1) He must be a qualified elector of the State of Missouri.
- (2) He must be absent from the county in which he resides and holds his citizenship on the day of the election or primary.
- (3) That it must be a special, general or primary election.

Section 10182 Laws of 1933, page 219, provides as follows:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, to the county clerk or, where existing, to the board or election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

The following section 19183 Laws of 1933, page 219, provides a form of affidavit to be signed by the applicant. It will be noted that the voter makes oath that he is entitled to vote, and that he will be absent from his county on the day of the election of the primary. And that the official charged with the duty of furnishing such ballots shall send them by registered mail, postage prepaid or deliver in person an official ballot or ballots if more than one are to be used at the election.

It will be observed from the above sections that the following proceedings shall be observed.

- (1) That not more than thirty nor less than five days prior to the date of such election or primary the voter must, in person, apply to the county clerk or the officer whose duty it is to furnish ballots for such election, and make his application for an official ballot.
- (2) That the voter must make an affidavit that he will among other things, be absent from the county of his citizenship on the day the election or primary is held.
- (3) The county clerk or the official whose duty it is to furnish ballots, after the ballots have been printed must send a proper official ballot by registered mail or deliver in person to those applying and not possessing them.

May 31, 1934

Section 19184 of the same Act provides that the voter must take his absentee ballot before some person authorized to administer oaths in the State of Missouri and there swear to be true the facts stated therein, among other things that he is entitled to vote, that he will be absent from the county of his citizenship on the date of said election or primary, and that he mark the enclose ballot in secret, and that he had not voted and would not vote elsewhere or otherwise and by that ballot at that election or primary.

The officer that administers the oath likewise certifies to the above facts, namely, that the votes exhibited the ballot unmarked and then in his presence, but not in such manner that he could see how such person voted, and that the ballot was marked and sealed in the envelop.

Section 10185 of the same Act provides in part as follows:

"....and the envelope shall be by such voter sent by mail, postage prepaid, to the officer issuing the ballot, or, if more convenient, it may be delivered in person and such official issue his written receipt therefor, but in any event it must be returned into the hands of the issuing official not later than 6 o'clock p.m. of the next succeeding the day of such election."

Section 10186 provides in part as follows:

"Provided, however, that no ballot shall be counted by said judges which has not been received and filed by the issuing official or officials within the time by this act required."

Section 10188b provides in part as follows:

"Whenever it shall be made to appear by due proof that any absent voter, who has returned his vote as provided in this act, has died prior to the opening of the polls on the date of the election, then the ballot of such deceased person shall be rejected by the judges appointed to open, count and determine the votes of absent voters, but the casting of the ballot of a deceased voter shall not operate of itself to invalidate the election."

May 31, 1934

From the above sections it will be seen that in order for one to vote his absentee ballot that he must have obtained the ballot; that he must have appeared before some officer authorized to administer oaths in the State of Missouri; that one might have his ballot marked before the day of election or primary; however, if one marks his ballot before the day of election or primary, he must make an additional affidavit that he will not be in the county where he is entitled to vote on the day of the election or primary; thus he would be swearing to a fact he knew would exist.

Section 19183b supra. bears out the construction that one does not as a matter of fact have to mark the ballot on the day of election or primary, but may do so before hand; also that the ballot must be in the hands of the officer issuing the same not later than 6 o'clock on the day next succeeding the election or primary.

We have attempted to outline as definitely as possible the procedure to be followed that an absentee elector may be entitled to vote at the August Primary, 1934, and trust that it will be of some service to you.

Yours very truly,

---

W. W. Barnes

W. W. Barnes  
Assistant Attorney-General

APPROVED:

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Ray McKittrick  
Attorney General



CORPORATIONS: A person cannot act as director and vote in a corporation if he has executed his note for capital stock. If the note is executed for treasury stock such person can vote or act as a director.

6-5

May 31, 1934



Honorable George D. Brownfield  
Prosecuting Attorney  
Cooper County  
Boonville, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of April 23, requesting an opinion. Judging by the facts contained in your letter it does not appear to come within the purview of your duties as prosecuting attorney. Regardless of the same we shall attempt to render you our opinion. Your letter is as follows:

"The questions have arisen here first, whether or not a person can act as a director in a corporation when he has his stock apothecated to the corporation to secure a note and cannot vote; second, whether or not a note accepted from a stockholder secured by his stock as collateral is allowed under the corporation law. In other words, what we want to know is whether or not it is legal to accept the stock in a corporation as collateral for the security of the payment of a note of a stockholder in same.

If you can give me any light on this subject same will be greatly appreciated and I will be glad to reciprocate if the opportunity ever presents itself."

Section 4944 of the Revised Statutes of Missouri 1929, with slight amendment, Laws 1931, page 175, is as follows:

"No note or obligation given by any stockholder, whether secured by deed of trust, mortgage or otherwise, shall be considered as payment of any part of the capital stock, and no loan of money shall be made by the corporation to any stockholder therein; and if such loan shall be made to a stockholder, the officers making it, or who shall assent thereto, shall be jointly, and severally liable to the corporation for the amount of such loan and interest: Provided, however, that nothing herein shall be construed to prohibit agricultural credit corporations from making loans to farmers who are stockholders therein, such loans to be agricultural or livestock loans to be rediscounted with federal intermediate credit banks in accordance with the federal agricultural credits act of 1923, and amendments thereto."

An interpretation of this section of the statute is given by the court in the decision of *Bondurant v. Raven Coal Co.* 25 S. W. (2nd) 1. c. 575:

"Our statute provides that no note shall be considered as payment of any part of the corporate stock. Section 10155, R.S. 1919. This has reference to payment for stock issued in the first instance. After the corporation has once issued its stock, and the subscriber has paid therefor, the statute is satisfied. A corporation may sell its treasury stock for cash or credit, for par or for market value, or upon any terms that a stockholder could sell. *Sherman v. Shaughnessy*, 148 Mo. App. 679, 129 S.W. 245; 14 C.J. 407. Nevertheless, we are not willing to say that it affirmatively appears from the pleadings, that plaintiff could not have relied upon the presumption that the purchase price would go into the corporate treasury. We will not trust ourselves to think of every conceivable circumstance which might or might not justify such reliance. The whole circumstances should be developed by the evidence before that question is determined."

By the above decision we find that the statute has been satisfied when cash is paid for the stock in the first instance, and that a corporation may sell its treasury stock for cash or credit. You do not state in your letter the kind of stock hypothecated by the holder of the same, that is, whether or not it is treasury stock or original stock. However, there are recent decisions on the same which we believe by citing to you will enable you to apply the law to the facts in the instant case.

The court said the following in the case of Bankers' Mortgage Co. v. Lessley, 38 S. W. (2d) 1. c. 486:

"The Constitution, as well as the statute, prohibits a corporation from accepting a note in payment for its capital stock. Hunter v. Garanflo, 246 Mo. 131, 151 S.W. 741; Hamilton-Turner Grocery Co. v. Hander (Tex. Civ. App.) 293 S.W. 341.

If plaintiff could lawfully sell one hundred shares of its stock and accept the defendant's notes, then it could have sold all of its unissued stock and accepted a note or notes therefor.

It is claimed that defendant was liable upon the subscription contract, and that the surrender thereof was a consideration for the notes in suit. We do not think so. The subscription contract was not introduced in evidence, nor is there any showing as to its terms. Even if there was, it would not alter the situation. That contract and the original notes were executed at the same time. The subscription contract was not for stock in a corporation to be formed, but, at most, could be nothing more than a subscription for stock in a corporation then existing. The notes were the principal contract, were illegal, and the whole transaction was therefore illegal.

If defendant's conduct in executing the notes in suit amounts to a recognition of validity of the original notes, such act amounted to nothing. Parke, Davis & Co. v. Mullett, 245 Mo. 168, 175, 149 S. W. 461.

'And if the contract in fact be only connected with the illegal or immoral transaction and growing out of it,\*\*\* it is equally tainted.' Woolfolk v. Duncan, 80 Mo. App. 421, 427."

The principle of law that a corporation can not accept a note for its capital stock is reiterated in the case of Shafer v. Home Trading Co. 52 S. W. (2nd) 1. c. 463:

"The fourth charge relates to the fact that the corporation sold four shares of stock to Martin Blickensderfer for the sum of \$200 when the par value of the stock was \$400 and took in payment therefor his personal note. While the evidence sustains this charge, plaintiff's own evidence indicates the stock was worth much less than 50 per cent. of its par value at the time it was acquired. The same is true as to charge five relative to stock purchased by Wills Blickensderfer, for which he gave his personal note. The evidence further shows, however, that the corporation illegally acquired the stock sold to Martin and Wills by trading property of the corporation for the stock. A corporation has no authority to trade its property in purchase of its outstanding stock, the effect of which is to illegally reduce its capital. Potts-Turnbull Advertising Company v. Gatchell (Mo. Sup.) 257 S. W. 134, loc. cit. 139, St. Louis Carriage Manufacturing Co. v. Hilbert, 24 Mo. App. 338. Moreover, granting that it had legally acquired the stock, it is prohibited from accepting a note in payment of its capital stock. Bankers' Mortgage Co. v. Lessley, 225 Mo. App. 643, 38 S. W. (2d) 485, loc. cit. 486. The fourth and fifth charges in plaintiff's petition must therefore be sustained. The sixth charge, relative to illegal purchase of stock by the corporation, is also sustained under the above ruling."

#### CONCLUSION

We are of the opinion that if the director in question gave his note and hypothecated his stock for the capital stock of the corporation he can not act as a director nor vote.

Honorable George D. Brownfield

-5-

May 31, 1934

If, however, it is treasury stock for which he has collateralized his note with the stock, it will appear from the decisions that he would not be precluded from voting or acting as a director.

Yours very truly,

OLLIVER W. NOLEN  
Assistant Attorney General,

APPROVED:

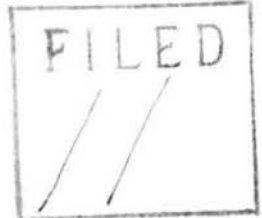
ROY MCKITTRICK  
Attorney General.

OWN:LC

ELECTIONS: Primary. County Clerk should publish election notices under provisions of Section 10262 independently of Sec. 10267A.

June 18th, 1934

6-19



Hon. Dwight H. Brown,  
Secretary of State,  
Jefferson City, Mo.

Dear Sir:

This Department acknowledges receipt of your letter of June 18th, requesting an opinion on questions as contained in your letter, which is as follows:

"I have sent to the County Clerks and Board of Election Commissioners, as required by Section 10261, Revised Statutes of Missouri, 1929, a list of all persons filing Declarations of Candidacy for office.

Chapter 61 of Article V was amended by the 87th General Assembly (Regular Session) by and Act approved May 8, 1933, see Session Laws, 1933, pages 237-238, which provides that ballots be not printed for minor political parties casting less than five per cent of the votes of the State.

Now the Clerks of the County Courts are writing me to know if they shall include these minor parties in the publication required by Section 10262. I would be glad to have your official opinion on this question at an early date, as this publication must start soon, and oblige."

You state in your letter that you have complied with Section 10261, R.S. 1929, which we are quoting in this opinion in order that we may have all the Statutes before us in determining the conclusion.

"SEC. 10261. SECRETARY OF STATE TO NOTIFY COUNTY CLERKS OF CANDIDATES, ETC.--At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."



June 18th, 1934

Section 10262 was referred to, which is as follows:

"COUNTY CLERK SHALL PUBLISH NAMES OF CANDIDATES, ETC.--WHEN AND HOW LONG.--Such clerks shall, upon receipt thereof, publish under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the hours during which the polls will be opened, and that the primary will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

By the two Sections quoted above, it is your duty in the first instance to transmit to the county clerk, certificated lists of the declarations which have been filed in your office fifty-five days before the primary. The next Section makes it the duty of the county clerk to publish the names which you have forwarded him, likewise all the names filing declarations in his county. Publications to be made three weeks next prior to the primary.

Section 10267 contains the procedure for preparing and voting the tickets, which Section is as follows:

"TICKETS, HOW PREPARED -- HOW VOTED.-- At all primaries there shall be as many separate tickets as there are parties entitled to participate in said primary election. There shall also be a nonpartisan ticket, upon which, under appropriate title of each office, shall be printed the names of all persons by whom declaration papers shall have been filed, as required by this article, who do not announce by such declaration papers as candidates for any political party, as defined by this article. The names of all candidates shall be arranged under the appropriate title of the respective offices, and under the proper party designation upon the party ticket, and upon the nonpartisan ticket, as the case may be; and the names of the candidates for each office shall be so alternated on the ballots used in the several election districts or precincts, that each name shall appear thereon substantially an equal number of times at the top, at the bottom, and in each intermediate place, if any, of the lists or group of names in which such candidate's name belongs, and all officers charged with the preparation and distribution of such ballots shall cause

the printer's forms to be so transposed and the ballots so made up as to carry out the intent of this provision. If any elector write upon his ticket the name of any person who is a candidate for the same office upon some other ticket than that upon which his name is so written, this ballot shall not be counted for such person. On any day of nomination of public officers in any primary election precinct, each qualified elector shall be entitled to receive from the judges of the election one ballot of the political party participating in such election for which he desires to vote. It shall be the duty of such judges of election to deliver such ballot to the electors. Before delivering any ballot to the electors, the two judges of election having charge of the ballot shall write their names or initials upon the back of the ballot with indelible pencil, and no other writing shall be on the back of the ballot except the number of the ballot voted."

In 1933, the Legislature enacted another Section, 10267A. In fact it is a new or an addition to Section 10267, modifying or restricting Section 10267, said Section being as follows:

"PREPARATION OF BALLOTS UNDER CERTAIN CONDITIONS.--Whenever any person shall have filed as a candidate for nomination upon a party ticket, which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the state."

June 18th, 1934

Conclusion

The Legislature, when it passed Section 10267, evidently had in mind that it would be economy not to print any ballots when the minor parties have less than five per cent of the total votes cast for Governor. However, the Legislature does not prohibit the printing of a ballot for the minor parties by giving such parties an opportunity to have ballots printed when ten per cent of the voters petition for the same. The Section makes no reference to any change as provided under Section 10262, quoted supra. We are unable to discern any conflict in the Statutes. The new Section deals solely with the printing of the tickets and ballots, while the Section in question viz; 10262, refers solely to the question of publishing the notice. We think it reasonable to assume that the Legislature still intended that the publication should contain all of the proper party designations, the title of each office, the names and addresses of all persons who filed for such offices and the provisions of Section 10262 should be and can be carried out wholly independent of Section 10267A.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

OWN/mh

July 12, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Brown:

This department acknowledges receipt of your letter of June 28, 1934 with enclosures. Your letter is as follows:

"We are enclosing application for registration of trade mark from George J. Heath, Long Island, N. Y., on which we are in doubt. Will you please give us your opinion regarding this application."

It appears that the applicant is seeking to have registered as a trade mark the words "Rosary Meditation Medal". Turning to the figures one and two, which appear to be facsimiles of the object or article which will bear the trade mark above mentioned, we find that the words "Rosary Meditation Medal" are not included as a part of the figures or facsimiles. We have disregarded, as you may, the printed matter following the facsimiles above referred to.

Section 14329, Revised Statutes of Missouri, 1929, under the title of "Trade-Marks, Names and Emblems", provides:

"If any mechanic, manufacturer, association or union of workmen, or other persons shall wish to adopt any particular name, term, design or device as his or their trade-mark to designate, make known or distinguish any article or goods, wares or merchandise by him or them manufactured or prepared, or any union of workmen desire to designate or make known the place in which union labor is employed, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file same, together with a facsimile of the same, term, design or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this article, be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workmen or (other) persons to adopt the same. No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the com-

Honorable Dwight H. Brown

3

~~-2-~~

July 12, 1934

missioner of patents of the United States shall be registered under this section by (any) person other than the owner thereof."

The case of Oakes v. Candy Company, 146 Mo. 391, was a suit by injunction and for damages for the alleged misuse of an alleged trade mark which involved the name given by a manufacturer to certain candy. The so-called trade mark was not anywhere stamped on the candy. At page 398 of the opinion, the court said:

"An article can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to or stamped, printed, carved or engraved upon the article as it is offered for sale."

We see no reason why the foregoing statement of the law does not apply to the application and facsimile under consideration. Assuming that the article to which is sought to have a trade mark attached is a proper object for that purpose, then the registering of the words "Rosary Meditation Medal" will not be any protection to the manufacturer or owner thereof and should not be registered unless it appears that the name used as a trade mark will appear on the article or design itself.

We are returning your enclosures herewith.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

GL:FE



PENAL INSTITUTIONS:

Sentences imposed at different terms  
of court run concurrently unless  
otherwise directed by the court.

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7-16  
July 12, 1934.

FILED  
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Honorable George D. Bryant, Chairman  
Pardon and Parole Board  
Jefferson City, Missouri

Dear Mr. Bryant:

Receipt of your letter dated June 30,  
1934 is acknowledged. Your letter is as follows:

"An inmate of this Penitentiary  
has two sentences against him.  
He was first tried and convicted  
in the Circuit Court of Boone County,  
Missouri, for the crime of Trans-  
porting Intoxicating Liquor and his  
sentence was fixed by the jury at  
three years. The case was appealed  
to the Supreme Court and the sentence  
was approved by the Court on January  
22, 1934.

After the trial in Boone County,  
Missouri, the defendant was charged  
with the crime of perjury in Pettis  
County, Missouri. He pleaded guilty  
and his sentence was fixed by the  
Court for a period of three years in  
the State Penitentiary beginning on  
January 15, 1934.

In neither sentence was any reference  
made to the other sentence. The question  
now is, whether the sentence of the  
Boone County Court and the sentence  
of the Pettis County Court are to run  
concurrently or consecutively."

July 12, 1934

In an opinion dated July 14, 1933 and addressed to you and discussing the question of concurrent and consecutive sentences, we said:

"It seems to us to be impliedly recognized in all of the Missouri cases dealing with this subject, except the Meininger case which holds directly, that unless there is some order, direction or judgment making the sentences cumulative or unless the facts and record come within the statute above quoted, then where two sentences are imposed by a court on the same defendant at different times and where the defendant is incarcerated in the penitentiary under two commitments, the sentences would be served concurrently and this would seem to be necessarily true because if the defendant is in the penitentiary serving under two commitments it could not logically be said that he was serving under one commitment as distinctive from service under the other commitment without some authoritative direction to that effect."

And further, on the same page of the opinion:

"We are further of the opinion that the case presented by you is not controlled by Section 4456 Revised Statutes of Missouri 1929, because the record presented does not show that pleas of guilty were entered in each of the cases, prior to the sentence in either case. If the record did show such pleas of guilty to have been entered before sentence was passed in either case, then the sentences would run consecutively by virtue of Sec-

Honorable George D. Bryant

-3-

July 12, 1934

tion 4456 and the court would have  
no authority to direct otherwise."

In the case submitted by you, the inmate was sentenced by courts in different circuits in this state and, of course, at different terms. There being nothing to the contrary in the sentences imposed upon this inmate, we are of the opinion that the sentences would run concurrently and not consecutively.

We are returning herewith brief attached to your letter.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

GL:FE

2-20-8  
ELECTIONS - Primary. - Whether or not candidates actually signed declaration a question of fact upon which the Secretary of State has no power to pass.

7-19

July 18, 1934



Hon. Dwight H. Brown,  
Secretary of State  
Jefferson City, Mo.

Dear Sir:

This Department is in receipt of your letter of July 14th requesting an opinion as to the following state of facts:

"Enclosed find protest of Hon. Waldo P. Johnson to the certification by this office of the name of Arthur N. Lindsay as a candidate for State Senator in the 16th Senatorial District.

We certified out the list of candidates who filed in this office on June 12, 1934, I am enclosing a copy of this list with a copy of Mr. Johnson's protest, and I ask for your opinion as a guide to my action in this matter."

In this case certain evidence has been filed consisting of affidavits and other papers to the effect that Arthur N. Lindsay did not personally sign his written declaration for the Democratic nomination for State Senator for the 16th Senatorial District. On June 12th, 1934, the Secretary of State certified out a list of candidates and on July 9th a protest was filed requesting the Secretary of State to correct this certification.

Section 10261, Revised Statutes of Missouri 1929, provides:

"At least fifty-five days before any primary preceding a general election, the secretary of state shall transmit to each county clerk a certified list containing the name and postoffice address of each person who shall have filed declaration papers in his office, and entitled to be voted for at such primary, together with a designation of the office for which he is a candidate, and the party or principle he represents."

July 18th, 1934

The determination of the question before us necessarily involves the powers and duties of the Secretary of State. The general rule thereon is well stated in 59 Corpus Juris 116:

"The secretary of state is an executive or ministerial officer and possesses no judicial powers."

This general power was discussed in the case of State ex rel. v. O'Malley v. Lesueur, 103 Mo. 1.c. 262:

"But it is strenuously urged for the relator that the duties of the respondent secretary are strictly ministerial; that he is not clothed with any judicial powers. This is granted, and has already been sufficiently answered in the preceding paragraph in reference to the incompleteness of the O'Malley certificate.

But it may be further said in answer to the contention made, that, though the secretary of state is a ministerial officer, yet he does not for that reason occupy the attitude of a mere figure-head or automaton, moved about at the whim or touch of every eager applicant who desires the performance of duties which pertain to his office.

When applied to for the discharge of such duties, although his discretion may not reach the height known as judicial, and, therefore, uncontrollable by writ of mandamus, yet it cannot be doubted that some portion of the qualities and attributes of discretion necessarily inhere in the discharge of his official duties, requiring him to consider before acting and to search and inquire before reaching or announcing a conclusion. Any other theory would be wholly inconsistent with the proper and orderly discharge of his official duties. His course in this respect in the case at bar, in filing the O'Neill certificate, and in certifying his nomination to the recorder of voters, etc., as the result of a subsequent primary election and convention held in obedience to the order of the Democratic state committee, is free from fault, as will presently be more fully shown."

On the same general question, Judge Ferriss, in the case of State ex rel v. Roach, 246 Mo. 1.c. 64 said:

"Section 5849 provides that all certificates of nomination which are in apparent conformity with the provisions of law shall be deemed to be valid, unless objections are filed thereto within three days. In the absence of such objections, the validity of such nomination stands unquestioned, and the duty of the Secretary of State to certify same is purely ministerial. (State ex rel. v. Falley, 8 N. D. 90; State ex rel. v. Falley, 83 N. W. 860; State ex rel. v. Miller, 39 N. E. 24; People ex rel. v. District Court, 31 Pac. 339)"

This Department has held in a former opinion that all candidates for office who run at the August Primary as a prerequisite to having his or her name printed on the official primary ballot must file a written declaration with the proper officials and must personally sign this declaration.

In the case here under consideration, it is contended that the candidate did not personally sign the declaration. However, this is a question of fact as the declaration on its face purports to have been signed by the candidate. Once the formality of the statute has been complied with, it is the duty of the Secretary of State to certify that person's name to the county clerk. If, as a matter of fact, the candidate did not sign the declaration, then the certification to the county clerk by the Secretary of State was illegal; but this is a question for the courts to pass on.

A somewhat similar question was before the Supreme Court in the case of State ex rel v. Shannon, 133 Mo. 165, in which the Court said:

"But we are of the opinion that the right of relator to the office can not be inquired into in this proceeding. No authority of power is conferred on the comptroller of the city to pass upon or decide the validity of relator's claim to the office. His duty with respect to the approval of the bond of the superintendent of waterworks, is purely ministerial.

\* \* \* \* \*

When relator's appointment was approved by the board of public works, it became the duty of the comptroller to approve his bond when tendered to him for that purpose unless some



July 18th, 1934

valid legal objection existed to the bond itself. It was not for him to decide upon the legality of relator's appointment, or whether he was in fact entitled to hold the office. Upon that question we do not undertake to pass, as it is not involved in this proceeding.

Beck v. Jackson, 43 Mo. 117, was a proceeding by mandamus to compel the respondent judge of the circuit court of that circuit which included the county of Cape Girardeau to approve the bonds of the relator as clerk of the circuit court and recorder of that county, to which positions he had been appointed and commissioned by the Governor. And it was held, that the commission issued by the governor was at least prima facie evidence of title to the office, and a peremptory mandamus would issue to compel the judge of the court to approve the bonds; and that the validity or legality of the commission would only be determined by a proceeding in the nature of a quo warranto. A similar ruling was made in State ex rel. v. Wear, 37 Mo. App. 325."

In view of the foregoing, it is the opinion of this Department that the duty of the Secretary of State with respect to declarations filed in his office, is purely ministerial and when a declaration is once filed and purports to bear the signature of the candidate it becomes the Secretary of State's duty to certify that name to the county clerk. Whether or not the candidate actually and in fact did personally sign said declaration is purely a question of fact upon which question of fact the Secretary of State has no power to pass; the authority to pass thereon being clearly vested in the Courts of the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney-General

AP PROVED:

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ROY MCKITTRICK  
Attorney-General

JWH/mh

ELECTIONS: Necessity for Candidates of Minor Political Parties to File in  
Primaries.

8-2  
July 30, 1934.



Honorable Dwight H. Brown, Secretary of State,  
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you dated July  
5, 1934, such request being in the following terms:

"For a number of years the minor political parties, although  
neither of them polled the required number of votes to keep  
on the ballot, the secretary's of state of this State have  
allowed them to make nomination by committees.

The only reason I know for them so doing was the fact that  
the Socialist-Labor and Prohibition parties were in existence  
before our Primary Law was passed.

Now the legislature has passed an Act allowing the minor  
parties, casting less than 5% of the total vote to file can-  
didates in the Primary and where they have no opposition, no  
ballots will be printed and the parties so filed will be  
certified as regular candidates of the party. This has raised  
the question as to whether or not these minor parties through  
their committees can legally file a candidate for office where  
they have not nominated or attempted to nominate a ticket in  
the Primary.

Will you kindly advise, as to whether or not such filing can  
be made, as soon as possible."

Revised Statutes Missouri 1929, Section 10253, provides in part as  
follows:

"Hereafter all candidates for elective offices shall be  
nominated by a primary election held in accordance with this  
article."

The Article referred to is Article 5 of Chapter 61 of Revised Statutes of  
Missouri 1929, which proceeds in the subsequent sections to cover the various  
steps necessary for the selection of candidates in the general elections.

In 1933 an amendment to such Article was enacted by the General  
Assembly (Laws of 1933, page 238) in which a new section was added to such  
Article, as follows:

"Sec. 10267a. Preparation of ballots under certain conditions.--

2. Honorable Dwight H. Brown

July 30, 1934.

Whenever any person shall have filed as a candidate for nomination upon a party ticket which, at the last preceding election for Governor, shall have cast less than 5 per cent of the total vote cast for Governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least 10 per cent of the voters voting in the county at said preceding election for Governor. When no ballots are printed as hereinbefore provided, the candidates filing declarations and who are unopposed shall be certified, as by this chapter provided, as the nominees of such party casting less than 5 per cent of the vote of the state."

From these statutes it is apparent that the law of Missouri requires persons seeking public office to qualify themselves by being selected at primary elections as the candidates of their parties, with the formality of an election by ballot being dispensed with in certain specific cases. To come within this exception the 1933 amendment requires the person claiming the exemption to "have filed as a candidate for nomination" and where a person seeking a place on the ticket in the general elections has not filed as a candidate for nomination in the primary elections such person has not brought himself within the exception to the general laws governing primary elections (R. S. Mo. 1929, Section 10253 et seq.) and consequently Section 10253 above quoted requiring all candidate for office to have been nominated by primary elections could not be complied with by such candidate.

In conclusion, it is our opinion that you are under no duty to place on the ballot the name of any person who has not filed as a candidate for nomination in the primary election for such election.

Yours very truly,  
EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

SOLDIERS' BONUS:      Right of veteran to receive bonus with  
what exemption.

8-13  
August 3, 1934

Honorable H. W. Brown  
Adjutant General  
Jefferson City, Missouri



Dear Mr. Brown:

Your request for an opinion dated July 28,  
1934 is as follows:

"Your opinion is requested as to whether a veteran would be entitled to receive a Bonus from Missouri if he claimed exemption on the grounds of 'agriculture and maintenance of a dependent sister.' He served in the army four months and was discharged because he was engaged in agriculture."

Article IV Section 44b Missouri Constitution  
provides:

"The General Assembly shall have power, for purposes of paying to each bona fide resident of the State of Missouri who served honorably in the military or naval forces of the United States of America at any time between the sixth day of April, nineteen hundred and seventeen, and the eleventh day of November, nineteen hundred and eighteen\* \* \* \* provided no person shall be entitled to receive the bonus herein provided who was not a bona fide resident of the State of Missouri at least during the twelve months prior to the sixth day of April, nineteen hundred seventeen, or who has received a state bonus from any other state in the Union."

August 3, 1934

The Legislature, pursuant thereto, did pass a law and Section 9 of said law as amended by laws of 1931, page 140, provides:

"It shall be the duty of the adjutant-general to determine as expeditiously as possible the persons who are entitled to the payments under this act and to make such payments in the manner herein prescribed. Applications for such payment shall be filed with the adjutant-general on or before December 31, 1932, and at such place or places as the adjutant-general may designate and upon blanks furnished by the adjutant-general: Provided further, the adjutant-general shall have the power to adopt all proper rules and regulations not inconsistent herewith to carry into effect the provisions of this act; and provided further, that all officers of the state or any county and any city or town herein are hereby directed to furnish free of charge, in writing, any information that the records in his office may disclose relative to the identity, place and period of residence and the war service of any soldier claiming a payment under this act, whenever such information is required by the adjutant-general of any person making an application for such bonus or any part thereof; and any application for bonus heretofore filed and rejected may be filed before the adjutant-general and by him again heard; and if it appears that the rejection of the claim was erroneous, the rejection may be set aside, and the claim allowed and paid; and provided further that no department of the state government shall employ any clerks for the purpose of carrying out the provisions of this act, except the adjutant-general shall employ an examiner of soldier bonus claims and one stenographer for the handling of claims."

We find nothing in the Constitution or Act pursuant thereto that specifically excludes those who claimed and were allowed exemption from service after having served a portion

August 3, 1934

of time honorably as soldiers.

It is our opinion such a retirement from the service could not be said to be in law dishonorable so long as the applicant is possessed with an honorable discharge which shows upon its face that said veteran served between April 6, 1917 and November 11, 1918. All veterans who served honorably within the purview of the Constitution and statutes pursuant thereto, were discharged with an honorable discharge. No veterans should claim without evidence of an honorable discharge paper, which is readily recognizable. Proof of honorable service without proof of an honorable discharge is not within the contemplation of the Constitution and statutes pursuant thereto, and such claims should be disallowed.

Respectfully submitted,

Wm. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H



Sheriff:

Sheriff is entitled to ten cents a mile for execution ~~and~~ commitment where conviction had out in county in Justice Court, where the distance is more than five miles.

5-17  
August 13, 1934.



Mr. George D. Brownfield,  
Prosecuting Attorney,  
Boonville, Missouri.

Dear Sir:-

We have your letter of June 20, 1934, in which is contained a request for an opinion as follows:

"A question has been presented to me by the Circuit Clerk of this County whether or not a Sheriff, where a conviction has been had out in the county in the Justice Court, is entitled to a fee for execution and for mileage on said execution; in other words, where a commitment is issued out in some Justice of the Peace Court I take it he is entitled to \$1.00 for the commitment. Now the question is whether he is entitled to any mileage on the execution and commitment in a criminal case?

"Thanking you for handing down an opinion on this as promptly as possible as our Circuit Clerk is holding up some fee bills, as he does not know just what to do in cases of this kind, I am."

Section 11792, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 11792. Mileage of sheriffs, county marshals and other officers in certain cases.--Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases and in all proceedings for contempt or attachment as follows: Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court when served more than five miles from the place where the court is held: Provided, that such mileage shall not be charged for more than one witness subpoenaed or venire summons or other writ served in the same cause on the same trip."

To the same effect, part of Section 11789, R. S. Missouri, 1929.

Under authority of the above quoted section we are of the opinion that the sheriff is entitled to the mileage fee of ten cents a mile in the situation referred to in your letter, provided the distance of the justice court in question from the jail exceeds five miles. The

August 13, 1934.

mileage fee is therein allowed the sheriff for his "services in criminal cases" in serving any order of court where the distance one way exceeds five miles. Very clearly, we think, where the "services" of serving an order of court necessarily include not only the mere serving of the order but also the execution thereof, the sheriff should be and is entitled to his mileage fees for same. As a matter of fact, the distance traveled would be no greater whether the sheriff traveled the distance merely to serve the order or in addition to bring the prisoner back to the jail with him, as the distance both ways would in any event be counted in computing mileage.

Nor do we think that that part of the statute which provides that the order must be served more than five miles from where the court is held changes the matter. Of course, in our present situation the nominal or technical service would take place at the place where the court was held, but actually there is more to the service of an order of commitment than that. The prisoner must be taken to jail as part of the process and if the jail is more than five miles away mileage fees should be allowed for the entire procedure. The wording of the statute can, therefore, be taken to be only the setting up of five miles as the distance between points where the services by the sheriff between such points will entitle him to fees for mileage.

In this connection it may be wise to advert to Section 11791, Revised Statutes of Missouri, 1929, which provides in part as follows:

"Sec. 11791. Fees of Sheriffs, marshals and other officers.--\* \* \* \* \*. No compensation shall be allowed under this section for taking the prisoner or prisoners from one place to another in the same county, excepting in counties which have two or more courts with general criminal jurisdiction."

The above quoted provision does not, in our opinion, apply to our present situation. In the first place, when read with the rest of the section, it refers only to compensation in certain cases and not to mileage at all. In the second place, it could not refer to commitments since a fee of one dollar is provided for such in the earlier part of the same section. We, therefore, believe that Section 11792 controls and adhere, therefore, to our construction of such section as set out earlier in this opinion.

Very truly yours,

CMEJr:LC

CHARLES M. HOWELL, Jr.  
Assistant Attorney General

Approved:

TRADE-MARK: Articles need not be classified in application for registration.

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8-23

August 31, 1934.



Hon. Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge your letter as follows:

"Referring to conversation with you and Mr. HornBostel today regarding trade-mark applications which we received from the firm of Ryland, Stinson, Mag & Thomson of Kansas City for the Katz Drug Company, will you please render us an opinion on the question brought up by Judge Seddon regarding statutory classifications of merchandise as prescribed in federal trade-mark law, which we have been using as a basis of trade-mark classifications in Missouri."

The answer to your question depends upon the interpretation to be given Section 14329, R. S. 1929, which reads as follows:

"If any mechanic, manufacturer, association or union of workmen, or other persons shall wish to adopt any particular name, term, design or device as his or their trade-mark to designate, make known or distinguish any article or goods, wares, wares or merchandise by him or them manufactured or prepared, or any union

of workmen desire to designate or make known the place in which union labor is employed, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknowledgment of deeds, and file same, together with a facsimile of the same, term, design or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this article, be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workmen or (other) persons to adopt the same. No label, trade-mark or form of advertisement shall be registered that in any way resembles or would probably be mistaken for a label or trade-mark already registered; and no trade-mark duly registered in the office of the commissioner of patents of the United States shall be registered under this section by (any) person other than the owner thereof."

## I.

The facts before us show that the Katz Drug Company, a corporation, presented to your office four separate applications for registration under the above section. Each of the applications are similar as to the articles or classes of merchandise sought to be registered, the design or trade-mark being the only difference between the four applications. Each of the applications recite that each of the designs is "to be applied to articles or classes of merchandise manufactured, prepared and sold", namely "chemicals,

medicines, pharmaceutical preparations and compounds, drugs, druggists' sundries and supplies, paper, stationery, paints, painters' materials, food products, ingredients of food, oils, greases, cutlery and machinery, tools, hardware, sporting goods, wearing apparel, toys, fountain drinks and products, tobacco, tobacco products, beverages, liquors, rubber goods, household and electrical appliances, cosmetics, and all other goods, wares or merchandise manufactured, prepared or sold in connection with a retail business."

One of the questions presented herewith is "whether an application should be made for a trade-mark on each article or whether one application is sufficient on all articles as listed by Katz Drug Company." In other words, should the applicant classify the articles mentioned in its application. The answer to this question depends upon the interpretation to be given to the word "or" found in Section 14329, supra, between the words "any article" and "goods, wares," etc. The statute reads in part as follows:

"\*\*\*\*\* make known or distinguish  
any article or goods, wares, or  
merchandise by him or them manu-  
factured or prepared, \*\*\*\*\*"

Thus, if we interpret the word "or" as separating "article" from "goods, wares or merchandise", then the application must be refused. However, if we interpret the word "or" as meaning a continuation of articles, goods, wares or merchandise, then the application must be accepted. In other words, if we construe "or" to mean "and" then the applications as far as the classifying of the articles, goods, wares or merchandise in separate application is not necessary. We hold that the application cannot be limited to one article or goods, wares or merchandise but that such may contain as many articles, goods, wares or merchandise that the applicant seeks to have registered.

Cornus Juris, Volume 46, page 1124, has this to say about the word "or":

"The monosyllable 'or' is a dis-  
junctive particle that marks an  
alternative generally correspond-  
ing to 'either' as 'either this  
or that.' The term is difficult  
to define. It is not a technical  
one and it has no technical mean-  
ing. In law it is said it re-

ceives the same meaning as it carries in common parlance. \*\*\*\*\* While in its strict signification the term expresses a disjunctive meaning and marks an alternative, it may be used or construed in a conjunctive sense and it may also be used in an explanatory sense. \*\*\*\*\*-

And further at page 1125,

"While in its primary signification the term 'or' marks an alternative, and in its ordinary disjunctive sense it imports 'one or the other,' but not 'both,' it is said that it is often used in the sense of 'both' in common parlance and written instruments."

And further at page 1126,

"\*\*\*\*\* However, 'or' being a disjunctive conjunction, should ordinarily be given its disjunctive meaning; it should be construed as 'and' only when necessary to give effect to the intention, as gathered from the context and the surrounding circumstances. The substitution should not be made where such construction would be inconsistent with the intent as shown by the whole context and the circumstances, nor unless its literal meaning renders the sense dubious."

And further at page 1127,

"When used to connect a series of words in the permission or the prohibition of a given act, 'or' may be construed to mean 'and' when necessary to make the statute express the true legislative intent, but only when so necessary; and



similarly 'or' may be construed as meaning 'and' in constitutional provisions and ordinances."

Dodd v. Independence Stove & Furnace  
Co., 51 S. W. (2d) 114.

If the Legislature intended to have applicants classify articles sought to be registered, it would have provided for such, and, absent action on the part of the Legislature, your department may not promulgate something not found in the statutes. The interpretation heretofore given to the word "or" bears out, in our opinion, that the Legislature never intended an applicant to classify the articles, goods, wares or merchandise manufactured or prepared when registration was sought for trade-mark.

However, in this connection we might add that your Department would have a right to require proof if it so desired that the articles, goods, wares or merchandise mentioned in the application were actually manufactured or prepared by the applicant.

In this case, an affidavit is made as to the facts contained in the application which would be about all the proof necessary as far as your department is concerned that the applicant actually manufactured or prepared the articles, goods, wares or merchandise sought to be trade-marked.

## II.

Your office, however, should refuse to give your attested certificate for the reason that said applications recite more than is prescribed by the statute for registration. The statute specifically pertains to articles, goods, wares or merchandise manufactured or prepared. The application says:

" Goods \*\*\*\*\* by it manufactured,  
prepared or sold."

2/21/34

The word "gold" is not used in the statute. We appreciate that this is no fault of the applicant for the reason that it followed your printed form which had the word "gold" therein. The word "gold" found in your form should be deleted therefrom.

In conclusion, it is our opinion that if the word "gold" is deleted from the four applications presented then your certificate should issue. We are returning herewith your files that accompanied your letter.

Yours very truly,

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OLLIVER W. MOLEN  
Assistant Attorney-General.

OWN/afj  
Encls.

Approved:

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ROY MCKITTRICK  
Attorney-General.

*ELECTION: TITLE TO CONSTITUTIONAL AMENDMENT.*

*9-17*

September 18, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City  
Missouri

Dear Sir:

Your letter dated September 12, 1934 in reference to titles for three proposed Constitutional Amendments to be submitted at the November, 1934, election was received by this Department September 13, 1934.

We are inclosing you herewith title for Senate joint and concurrent resolution No. 5 as found in Laws Missouri 1933, at page 473. Also title for proposed amendment as found in resolution in House joint and concurrent resolution No. 1, Laws Missouri 1933. Also title for amendment proposed by initiative petition to be submitted at the November, 1934, election, all referred to in your letter of the above date.

Yours very truly,

Roy McKittrick  
Attorney General.

RM:LC

Inclosures

September 27, 1934

9-29



Honorable L. D. Brummitt  
County Treasurer  
Grundy County  
Trenton, Missouri

Dear Sir:

We have your request for an opinion as follows:

"I am sighting you to sections 10880 and 10881, Revised Statutes of 1929. As Ex-Officio Collector, I collect drainage after it has become delinquent, receiving the consolidated drainage books as of March 1. For this service of collecting the delinquent drainage, I receive two percent from the drainage company.

"Quoting Section 10881, Revised Statutes of 1929. County Treasurers Fees. -- County Treasurers for receiving, receipting for, preserving and paying out, funds of drainage and levees districts, shall receive one per cent. of sums paid out. (R. S. 1919, 4576.)

"I would like to have your opinion as to whether I am entitled to this additional one percent. I am con-

#2 - Honorable L. D. Brummitt

tending that as County Treasurer and Ex-Officio Collector that I am entitled to a total of three percent. As I collect the money, as collector, that I receive receipt for preserve and pay out as Treasurer."

The statutes cited in your request (10880 and 10881 R. S. Mo. 1929) for an opinion are a part of Article IV, Chapter 64, R. S. Mo. 1929. Article IV refers to "fees for services rendered in organizing drainage and levee districts".

A few of the applicable statutes relating to organization taxes, the duties of the county collector and county treasurer are briefly set out as follows:

Sec. 10752: "The board of supervisors \* shall \* levy a uniform tax of not more than fifty cents per acre \* \* to be used for the purpose of paying expenses incurred or to be incurred in organizing said district, \* \* \* Such tax shall be due and payable as soon as assessed and if not paid by December 31 of the year in which it has been levied, the same shall become delinquent. \* \* \* "

Sec. 10761: "It shall be the duty of the collector of revenue of each county \* \* to promptly and faithfully collect the tax \* . He is further directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other properties. \* \* \* "

#3 - Honorable L. D. Brummitt

In counties under township organization the taxes are collected by township collectors who shall, (Section 10796, R. S. Mo. 1929)

" \* receive the same compensation therefor and pay over such taxes to the Secretary of the Board of Supervisors, as provided for county collectors under this Article, and shall be subject to the same penalties and liabilities. \* "

Section 10802 provides that after the organization of the Board of Supervisors, the qualification of the secretary, the filing and approval of the secretary's bond, the secretary,

" \* shall call upon the county clerk or other person who may be in charge of the records of the district for all records, contracts, files, books, plats, maps and every article of record belonging to said district, and the county clerk or other person in charge of such records shall immediately deliver to said secretary of the district all such records and take the receipt of the secretary therefor. Said secretary shall also call upon the county treasurer or other person who has control of the funds of the district, for the transfer of all funds of the district to him and said treasurer or other person shall immediately transfer such funds, taking the receipt of the secretary for such funds."



#4 - Honorable L. D. Brummitt

Section 10880, R. S. Mo. 1929, which allows a fee of one per cent. to the collector on all taxes collected for drainage districts and a fee of two per cent. on all such delinquent taxes, and Section 10881, R. S. Mo. 1929, which allows the county treasurers for receiving, receipting for, preserving and paying out funds of drainage and levee districts, a fee of one per cent. apply only to the organization fees collected or disbursed by them. A county treasurer who is also ex-officio Collector under township organization is entitled to the fees set out in these statutes (Sections 10880, 10881) only when collecting and disbursing the organization taxes. These sections do not apply to either annual or maintenance drainage taxes.

It is, therefore, the opinion of this office that since these two sections are a part of Article IV, the fees therein provided for must be limited to the collection and disbursement of organization taxes.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General

FER:FE

CORPORATIONS - Loan and investment companies - Right of incorporators of loan and investment company to include in original charter specific powers authorized for business and manufacturing companies by R. S. Mo. 1929, Sec. 4940.

10-13

October 1, 1934.



Hon. Dwight H. Brown,  
Secretary of State,  
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of September 13, 1934, such request being in the following terms:

"We are requested to ask for an opinion on the question of whether or not a new corporation may be organized under more than one Article of Chapter 32 R.S. Mo. 1929.

Formerly you ruled that it would be necessary to incorporate under one specific Article and that if the corporation desired powers that are granted by another Article, either to incorporate two companies embodying such powers or to pay an additional \$50.00 fee. The question arises more generally with corporations organized under Article 7 and the inclusion of the four specific powers provided in Article 8.

You will note Section 4932 calls all the powers therein granted 'additional powers to those granted by Articles 1 and 7.'

Judge Harry F. Russell has presented Articles of Incorporation drawn as he says under provisions of Article 8, but he includes three specific powers which are derived from the provisions of Article 7. He consulted you in this connection and we would be glad to have your written opinion on the questions involved."

The opinion to which you refer was formerly issued from this office and was signed by Roy McKittrick, Attorney-General, and William Orr Sawyers, Assistant Attorney-General, dated May 13, 1933, and in it the following paragraph states the conclusion reached:

October 1, 1934.

"It follows, then, as the opinion of this office that stock holders cannot incorporate a loan and investment company in conjunction with a manufacturing and business company, but each must be incorporated as separate entities, and each entity must pay its individual incorporation fee as required by law."

Apparently in the opinion of May 13, 1933, the Articles of Incorporation specifically requested a charter under both Articles 7 and 8 of Chapter 32, R. S. No. 1929, whereas it is our understanding that the Articles of Incorporation concerning the issuance of which you are now asking for our ruling do not specifically ask for a charter under both Articles 7 and 8, but on the contrary ask that the charter be issued under Article 8 with three chartered powers enumerated which fall within three of the thirteen categories authorized by Section 4940 which is a part of Article 7. This distinction technically might be regarded as a proper basis for distinguishing these two situations. However, the substance of these two situations seems identical, and to penalize a group of incorporators solely because they expressly refer to both Articles 7 and 8 in their association papers would seem to us to be unsound.

You refer in your letter to Section 4982. This section was enacted in 1933 (Laws of 1933, page 199) and repealed a section of the 1929 statutes having the same number. The new section begins as follows:

"In addition to the general powers conferred upon corporations by articles 1 and 7 of said chapter 32, R. S. 1929, as amended, every loan and investment company organized under the provisions of this article shall have the following powers:"

As a first impression it might seem that this section would grant to loan and investment companies all the powers granted to business and manufacturing corporations under Article 7. Closer scrutiny will demonstrate the error of such a conclusion, for the key of this section is the word "general". Corporations under our laws are artificial persons and strictly the creatures of statute. Consequently their various general powers and limitations are embodied in great detail in the statutory scheme of Chapter 32. Article 8 relating only to loan and investment companies contains only eight sections. The General Assembly, had it intended to make Article 8 self-sufficient and able to stand alone, would have found it necessary to include in Article 8 all of the general provisions governing corporations which are at present found in Articles 1 and 7. Since this method would have been exceedingly cumbersome it would seem that the General Assembly preferred the obvious more simple method of incorporating such general provi-

3. Hon. Dwight H. Brown.

October 1, 1934.

sions into Article 8 by reference.

It might be well to mention some of these general provisions of Articles 1 and 7. Thus, in Article 1, provisions and rules are made for the calling and holding of meetings (Sections 4537-34), the election of directors (4535-6), the amendment of the Articles of Incorporation (4540), the making of by-laws (4553-4), dissolution (4561-6), the sale of the assets (4567-8), and payments to employees (4606). In Article 7 provisions are enacted for the declaring of dividends (4842), the keeping of statements of the affairs of the corporation (4843), increasing or diminishing the capital (4848-53), consolidations (4854), and the jurisdiction of courts over corporations (4859-61). Many other provisions are in Articles 1 and 7 dealing with the internal and external affairs of corporations, which provisions would seem equally applicable to all types of corporations in the absence of express conflicting statutes. Another significant fact is the lack of distinction between Articles 1 and 7 in their inclusion of these general types of provisions. Article 7 is not as is Article 8 confined solely to provisions which are peculiarly applicable to corporations of the type which give Article 7 its title of "Manufacturing and Business Companies".

With so many sections in Articles 1 and 7 which could be applicable equally to all types of corporations and thus must appropriately come within the designation of the word "general", and with the added fact that Article 8 to be effective would need the support of these provisions and that it can only claim such support by that part of Section 4982 above referred to as an incorporation by reference, the true meaning of Section 4982 becomes apparent, i.e. a provision incorporating into Article 8 the provisions of Articles 1 and 7 which are necessary to the vitality of Article 8, the "general" provisions as opposed to the specific provisions of Section 4940 which are peculiarly applicable to business and manufacturing companies and consequently are specific and not general. Indeed it would be necessary to distort the meaning of Section 4982 and the word "general" to incorporate Section 4940 into Article 8. To turn from the meaning of words to the practical considerations involved, it would hardly seem reasonable to contemplate that a loan and investment company should be given powers under Section 4940 to construct toll bridges, to build wharves and docks, to construct and operate horse railroads or to purchase and use fire engines.

In conclusion, it is our opinion that a corporation cannot be incorporated under P. S. No. 1929, Chapter 32, Article 8, as a loan and investment company and contain in its original Articles of Incorporation other specific charter powers authorized by Section 4940 of Article 7 of Chapter 32 for business and manufacturing companies.

Very truly yours,

THROVER:

EDWARD H. MILLER

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

ELECTIONS: State Socialist Committee may not fill county vacancy.

10-8  
October 6, 1934.



Hon. Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge your letter dated September 27, 1934, as follows:

"I have been asked by the Socialist Party Committee, if a State Committee could place a candidate on a county ticket in counties where they have no organization."

In State ex rel. Kimbrell v. Becker, 237 S. W. 117, 1. c. 122, the Supreme Court of Missouri, in Banc, said:

"By virtue of section 4823, R. S. 1919 (Section 10253, R. S. 1929) all nominations for elective office must be made by primary election, except that this provision does not apply to special elections to fill vacancies, nor to county superintendents of schools, nor to city officers not elected at a general state election, nor to town, village, or school district officers. Neither is it applied to the nomination of candidates for presidential elector."

And further,

"While these sections relate to nominations by primary elections, they are the sections

which, prior to 1919, also contained provisions relating to nominations by conventions. They are the only sections which define certificates of nominations in a way which could reasonably be applicable to convention nominations unless section 4811 (Section 10241 R. S. 1929) is applicable by force of its terms. It provides that certificates of nomination of candidates selected otherwise than by a primary shall be signed by electors resident within the district to a number equal to one per cent. of the vote cast in the last preceding election in such district. \* \* \* \* Whether or not these sections are intended to apply to convention nominations, they are the only provisions defining certificates of nomination which have been called to the attention of the court in this case."

Section 10232, R. S. Mo. 1929, reads:

"Any primary election as hereinafter defined, held for the purpose of making nominations to public office, and also electors to the number hereinafter specified, may nominate candidates for public offices to be filled by election within the state. Such nomination shall be made by filing a certificate of nomination, executed with the formalities prescribed for the execution of an instrument affecting real estate."

Section 10233, R. S. Mo. 1929, reads:

"The certificate of nomination, which may consist of one or more writings, shall contain the name of the person nominated, his residence, occupation, and the office for which he is nominated, and also the name and residence of each signer. The certificate may also designate by a name the party or principal which such nominee shall represent."



Section 10253, R. S. Mo. 1929, reads:

"Hereafter all candidates for elective offices shall be nominated by a primary election held in accordance with this article. This article shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers."

From the above, then, it is seen that a person is nominated by primary election to represent the party at the general election. However, two methods are provided in the event there is a vacancy on the party ticket.

Section 10268, R. S. Mo. 1929, provides:

"Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."

Article 5, Chapter 61, R. S. Mo. 1929, provides for various committees, that is, county committee, state committee, legislative, senatorial, congressional and judicial committees, such to fill vacancies occurring after a primary in each respective district. The question arises -- May one committee exercise the function of another committee, especially so when no committee exists to exercise that function? It is our opinion that the power to fill vacancies is lodged in the specific committee and if there is no committee then the vacancy may not be filled by another committee. Such are the facts presented by your inquiry, that is, the Socialist Party Committee, same being a state committee, desires to substitute its judgment on a matter wherein a county committee has the power.



October 6, 1934.

If a situation arises such as you have outlined, then, in our opinion, Section 10241, R. S. Mo. 1929, governs; said section being as follows:

"The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent. of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made; provided that said signers shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

From the above we have shown that persons should be nominated at a primary and if such persons are not nominated at a primary and a vacancy exists, then by virtue of Section 10268, supra, such vacancy is filled by the party committee of the district, county or state, as the case may be. And absent a proper committee to fill such vacancy, then such vacancy may be filled by virtue of Section 10241, supra, that is, by petition signed by electors resident within the district or political subdivision for which the candidate is presented, to a number equal to two per cent. of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made.

State ex inf. Barrett, Attorney-General, v. McClure,  
253 S. W. 743;  
State ex rel. Preiss v. Seibel, 246 S. W. 288.

#### CONCLUSION.

It is our opinion that the State Committee of the Socialist Party cannot place a candidate on a county ticket in counties where such has no organization and the only manner that same may fill

Hon. Dwight H. Brown

-5-

October 6, 1934.

any vacancy would be by petition as outlined in Section 10241,  
supra.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

JLH:EG

✓ SECRETARY OF STATE: BLUE SKY LAW: SECURITIES ACT: Certificate  
of interest in profit-sharing agreement  
defined.

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11-9

November 1, 1934

Honorable Dwight H. Brown  
Secretary of State  
Securities Division  
Jefferson City  
Missouri



Dear Mr. Brown:

In Re Universal Service Association (Ill.)- your file No. J.

Receipt of your letter dated October 3, 1934,  
with inclosures, in reference to the above association is  
acknowledged.

Your letter is as follows:

"Universal Service Association was incorporated not-for-profit in Illinois Aug. 21, 1933. The association has appointed agents at various locations in Missouri to enlist members. A copy of one of their enrollment forms is attached hereto. Universal Service Association claims to be a national university 'demonstrating plenocracy in daily life for American citizens,' and speaks of itself as U.S.A. University. It claims that the enrollment form attached is not a contract, but merely a method of securing 'contributions.' You will note the form includes definite money-back clauses, and table of expected profits on back.

Hon. Edward J. Hughes, Secretary of State of Illinois, wrote me July 26, 1934 as follows:

'I have had a report on the above matter and received various forms of contracts which this company is making. Their

November 1, 1934

contracts apparently pertain to the development of agriculture, and being a corporation organized "not for profit" are probably exempt under our Securities Law.

'However, they also appear to be beyond the scope of authority of a corporation "not for profit" to make, and the Corporation Department has issued a rule against the Association to show cause why it should not be certified to the Attorney General for proceedings to dissolve because of its acts in excess of its charter powers.'

On Sept. 17, 1934 Mr. Hughes advised me that the matter was certified to their Attorney General, but he thinks the Attorney General has not yet taken action to oust the corporation. One of their booklets, 'Legal Status of Plenocracy' is also transmitted to you for what it is worth.

Sec. 7726 (e) R. S. 1929 exempts from the scope of the Missouri Securities Act a security issued by a corporation organized and OPERATED exclusively for educational, benevolent, etc. purposes. Sec. 7724 (c) includes within the scope of the Act 'certificate of interest in a profit-sharing agreement.' It is the opinion of the Securities Division that the sale of these contracts in Missouri is in violation of the Missouri Securities Act, and that the 'membership' is a contract offering some kind of participation in a profit-sharing scheme. As a measure of protection to Missouri residents we want to issue an order that they cease and desist from the sale of these contracts in Missouri. Will you please favor me with ruling whether we may do so? "

Honorable Dwight H. Brown

-3-

November 1, 1934

L.

Attached to your letter is a so-called application for enrollment in Universal Service Association. The caption and body of the application in full follows:

"This Application enables the UNIVERSAL SERVICE ASSOCIATION to demonstrate PLENOCRACY in American life. PLENOCRACY means the power of plenty- the science of creating abundance for all. Every person enrolled with the USA is a PLENOCRAT. A PLENOCRAT is a person who demands plenty for self and for everybody else.

Enrollment Form Number Two

APPLICATION FOR ENROLLMENT  
in the  
UNIVERSAL SERVICE ASSOCIATION, Inc.

Of the People By the People For the People  
Non-Sectarian -Non-Political -Purely Economic

A National University Demonstrating  
Plenocracy in daily life for American Citizens

The Emblem of (U S A) Economic Security

Date.....

DUPLICATE

That I may be able to live a life of PEACE, PROSPERITY and HAPPINESS and obtain Economic Security, and with the aid, instructions and labor of the UNIVERSAL SERVICE ASSOCIATION provide myself a city, suburban or little farm home, or cash annuity for life and thereby provide the means of life for myself and dependents, I enroll with the UNIVERSAL SERVICE ASSOCIATION.

I am interested in the work now being carried on by the UNIVERSAL SERVICE ASSOCIATION and desire to aid it in its work by contributing \$..... per month hereafter for a period of sixty months on or before the 20th day of each month, to its general office at 6 North Michigan Avenue, Chicago, Illinois, for use by it during this five year period.

First: Two of the monthly contributions made by me during the five years and \$5.00 in addition each year for the period of five years are for use by the UNIVERSAL SERVICE ASSOCIATION for extension work.

Second: The remaining monthly contributions made by me are for use by the UNIVERSAL SERVICE ASSOCIATION in coordinating MONEY, LABOR and LAND to produce an increase from the natural resources of the earth, the increase to be distributed according to the 'Little Farms Ownership Table' or the 'Natural Increase Table' of the UNIVERSAL SERVICE ASSOCIATION, as shown on the reverse side hereof, and specifically stated in paragraphs three and four hereunder.

Third: Out of the products received from the natural resources of the earth, the UNIVERSAL SERVICE ASSOCIATION is to credit me at the expiration of five years, with the total amount of my monthly contributions and 150% of the natural increase thereon for the period of five years, and such five year period is always understood to be the time in which my sixty monthly contributions have been made regardless of the date of my application.

Fourth: If occasion demands and I notify the UNIVERSAL SERVICE ASSOCIATION in writing at any time that I desire cash at the expiration of any year, I understand that sufficient products, resulting from the use of my monthly contributions will be converted into cash to return to me an amount equal to the natural increase thereon of 30% annually.

Fifth: In case I should not make the full sixty monthly contributions as contemplated and have contributed an amount of \$40.00 or more, I understand that the UNIVERSAL SERVICE

ASSOCIATION desires to deliver to me at the expiration of five years the amount contributed plus the natural increase obtained from the use thereof, not exceeding 30% annually for the period of five years. This action will be satisfactory to me, with the further understanding that contributions aggregating less than \$40.00 are hereby donated to the UNIVERSAL SERVICE ASSOCIATION for the good of the cause.

In the event of my death, I designate

---

Name of beneficiary

to take my place and be entitled to the same service and natural increase that I would be if living.

Whatever surplus is produced after I have received the total amount of my monthly contributions and the natural increase of 30% annually or 150% in five years, shall belong to the UNIVERSAL SERVICE ASSOCIATION for its expenses and future University extension work."

On the back thereof is the following:

"LITTLE FARMS OWNERSHIP TABLE

Showing the Average of Results to Be Obtained by the UNIVERSAL SERVICE Plan in Five Years Operation and Applicable on Land Ranging in Price from \$50.00 to \$300.00 Per Acre.

Example-

Contribute \$1.00 per month for five years and receive deed to 'Little Farm' of not less than  $\frac{1}{2}$  acre, nor more than 3 acres, worth \$150.00, or take your share of the increase in cash from special crops grown by Intensive Farming Methods.



You Contribute Each Month	For 60 Months	Natural Increase Added in 5 years	Total Available in Cash in 5 Yrs.	Number of Acres of Land	Number of acres of Land
				\$300.00	\$50.00
\$1.00	\$60.00	\$90.00	\$150.00	$\frac{1}{2}$ acre	3 Acres
2.00	120.00	180.00	300.00	1 acre	6 Acres.

Then follows a table of results when from two to twenty-five dollars, both inclusive, may be contributed.

Then follows a table showing tables exemplifying the manner in which the Universal Creative Principle works. The Plan when the payment of \$1.00 per month is exemplified, is as follows:

#### NATURAL INCREASE TABLE

Based on the way the Universal Creative Principle works  
Prepared from Agricultural Statistics  
for the  
UNIVERSAL SERVICE ASSOCIATION, Inc.

Accumulated Monthly )  
Contributions (Cash )  
Plus Total (Annuity )  
Gain in five (each year )  
years- (after the )  
(five )  
-if you)-if you)years if )  
take )allow (no with- )  
your )your (drawals )  
Annual )Annual(are made. )  
gain @ )Gain @ )  
(30% at )to com( )  
the end)pound ( )  
of each)for ( )  
yearly )you ( )  
period.)over ( )  
) the ( )  
) full ( )  
) five ( )  
) years.( )

Month-ly Con-tribu-tions of )1st Year )2nd Year )3rd Year )4th Year )5th Year)  
)12 Months)24 Months)36 Months)48 Months)60 Month)

#### \$1.00 Per Month

Total Accumu-lation.....	\$12.00	\$24.00	\$36.00	\$48.00	\$60.00	\$60.00	\$60.00	Annuity
Annual Gain								
@ 30%.....	3.60	7.20	10.80	14.40	18.00	54.00	90.00	\$45.00
Result of your cooperation after five years-Total						\$114.00	\$150.00	"

Honorable Dwight H. Brown

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November 1, 1934

In the tract apparently issued by the Universal Service Association, and attached to your letter, is a quotation from the great political economist, John Stuart Mill, that:

"All matters relating to thought, opinion, conscience, is without the sphere of legislation."

On page two is the very clear and illuminating statement that,

"A relationship of individual voluntary action by STATUS leaves the result in the 'forum of the conscience' of the individual, in which domain no man-made laws can be applied. The 'forum of the conscience' is a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, nor permit encroachments from any other quarter."

The foregoing presents a fair picture of the philosophy and plan of the so-called Universal Service Association. Acknowledging the right to the utmost freedom of thought and expression, it remains to be seen whether or not the operation of the association is above and beyond the law.

From all that may be gathered in the descriptive matter contained in the application and attached prospectus, the lands to which the members may be entitled on maturity of the contract might lie on the plains of Abraham or in the midst of the Sahara Desert, nor, from all that appears, are the members advised as to the kind and character of the land they may hope to acquire nor as to the exact extent of acreage of same. Furthermore, the statement of the purposes and objects of the association bears not the remotest

November 1, 1934

relation to the work ordinarily engaged in by universities. It does appear that the business address of the association is 6 N. Michigan Avenue, Chicago, Ill. The tempting and alluring provisions that the association is to credit the member at the expiration of five years, with the total amount of his monthly contributions and 150% of the natural increase thereon for the period of five years, and further that if occasion demands, upon notice, the association will pay the member at the expiration of any year 30% of the amount paid in, and if the member should not make the full five year payments and should pay in more than forty dollars, then the association, at the expiration of five years, will pay the member the amount paid in plus the natural increase obtained from the use thereof, not exceeding 30% annually for the period of five years, are all set out in no indefinite and uncertain language.

2.

A certificate of stock in a corporation is described as an evidence of title in the stock of the corporation.

Watson v. Sidney F. Woody Printing Company  
56 Mo. App. 145.

#### CONCLUSION.

We are of the opinion that the application for membership and the receipt attached thereto constitutes a certificate of interest within the meaning of Section 7724(c) Revised Statutes Missouri 1929, and that the plan set forth in such certificate is a profit-sharing agreement within the meaning of the last named section, and that the Securities Division of your office would be justified in issuing a cease and desist order in connection

Honorable Dwight H. Brown

-9-

November 1, 1934

with the same, of course, according to due process of law.

We are returning you your inclosures herewith.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

Inclosures

COUNTY COURT: Must care for the poor of the county - cannot turn over funds to local representatives of Mc. Relief and Reconstruction Commission to be dispensed by them.

11-16 November 12, 1934.



Hon. John B. Brooks,  
Presiding Judge of County Court,  
Grundy County,  
Trenton, Missouri.

Dear Sir:

This department is in receipt of your letter of October 22, 1934, wherein you make the following inquiry:

"Will you please advise if this court turns over the amount spent monthly for local poor to the local representative of the Missouri Relief and Reconstruction Commission, would they then be absolved from claims of other citizens of the county who were destitute?

In other words, can this function of the court be delegated to the above Commission and the court be relieved as against claims of other persons?"

Under Sec. 12953, R.S. Mo. 1929 it is made the duty of the county court to support the poor, said section providing as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

A more pointed section is Section 12950, R.S. Mo. 1929, which is as follows:

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

Section 12961, R.S. Mo. 1929 makes it the duty of the county court to set apart funds; it provides:

"The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

Formerly, Section 9986, R.S. Mo. 1929 made it the duty of the County Treasurer to separate and divide the revenue of a county, including the Pauper's Fund. The new County Budget Law repealed this section and providing for the duties of the County Treasurer and other officials, made Class 1, (Sec. 2, Laws of Mo. 1933, page 341) a first lien upon the county funds.

In the case of Jennings v. City of St. Louis, 332 Mo., 1.c. 179-180, the Court in discussing the rise of paupers and the duty of the county in caring for them, said:

"The good of society demands that when a person 'is without means, and unable, on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood', he is entitled to be supported at the expense of the public. 'It is immaterial how the alleged pauper is brought into need, as it is the fact of the situation and not the method of producing it that is important'. 'So the fact that a person's want is the result of gross intemperance does not prevent him from securing relief as a pauper.' 'An able-bodied man, who can, if he chooses obtain employment which will enable him to maintain himself and family, but refuses to accept employment, is not entitled to public relief, though relief may be properly extended to the wives and children of such men.' (21 R.C.L. 705, 708). It necessarily follows

that an able-bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support is entitled to public relief.

The Supreme Court of Pennsylvania directly passed on this question in the recent case of Commonwealth v. Liveright, 161 Atl. 697, 1.c. 710: 'We again hold that the support of the poor--meaning such persons as have been understood as coming within that class ever since the organization of the Government, persons who were without means of support, the same persons stated in the \*\*\* Bill \*\*\* is and has always been a direct charge on the body politic for its own preservation and protection; and that as such, in the light of an expense, stands exactly in the same position as the preservation of law and order. The expenditure of money by the state for such purposes is in performance of a governmental function or duty, and is not controlled by the constitutional provision, if the purpose is to supply food and shelter to the poor, including those who are destitute because of enforced unemployment, provided only that the money be not administered through forbidden channels. The appropriation in providing for relief of poor comprehended those who had been driven into that situation through enforced unemployment; they having no means to support themselves. From this cause the ranks of the poor had increased so rapidly as to stagger the people of our state. The fact that their numbers are swollen through unemployment does not change the established concept of poor persons. To hold that the state may not under the Constitution now aid such people, even though it had a governmental duty, would be to deny to the state the right to perform, not only an important, but at this time a most pressing, governmental function. To hold that the state cannot or must not aid its poor would strip the state of a means of self-preservation, and might conceive untold hardships and difficulties for the future."



Nov. 12, 1934.

CONCLUSION

In view of the statutes and the decisions herein quoted, it is the opinion of this department that it is the duty of the county court to care for the poor. The statutes have set forth the duties of the court and we know of no method by which the county court could delegate its duties in that respect to any other organization and thereby be relieved of its plain duty as set forth in the statutes; hence, we are of the opinion that you cannot turn over the funds to the local representative of the Missouri Relief and Reconstruction Commission to be disbursed by them--the same must be paid out according to the direction and orders of the County Court.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

ELECTIONS: Beginning of terms of Senator and Congressmen elect.

11-24

November 15, 1934.



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Mr. Brown:

This is to acknowledge receipt of your request for an opinion, dated November 14th, 1934, which letter of request is as follows:

"Referring to recent conversation, will you please furnish us a written opinion regarding the date on which our United States Senator and Congressmen will take office."

Your inquiry necessarily refers to the Twentieth Amendment to the Constitution of the United States, which amendment was proposed to the legislatures of the several states by the seventy-second Congress on the 3d day of March, 1932, and was declared in a Proclamation by the Secretary of State, dated the 6th day of February, 1933, to have been ratified by the legislatures of the requisite number of states, to-wit, three-fourths of the whole number of states in the United States; which Twentieth Amendment, as found in United States Statutes at Large, 72d Congress, 1931-1933, Vol. 47, Part 2, page 2569, is as follows:

"Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

"Sec. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

"Sec. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

"Sec. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

"Sec. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

"Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

Hon. Dwight H. Brown

-3-

Nov. 15, 1934.

It is, therefore, our opinion that the terms of the United States Senator elect and the Representatives elect, will begin at noon on the 3d day of January, A. D. 1935.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

ELECTIONS  
SECRETARY OF STATE | Secretary of State to certify name of  
candidate receiving highest vote to Governor. No authority to pass on residence  
qualifications.

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12-6 November 29, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion as to whether or not you should certify the name of N. Elmer Butler as the newly elected prosecuting attorney of Stone County to the Governor for a commission. The question presented is whether or not he has been a resident of Stone County for twelve months prior to the general election of 1934 at which he was elected.

Section 11309, R. S. Mo. 1929 provides that the prosecuting attorney,

" \*\* shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office \*\* "

It appears from your letter that the county clerk of Stone County has certified to your office, under the mandate of Section 11312, R. S. Mo. 1929, an abstract of the votes given for each candidate for prosecuting attorney in Stone County at the November, 1934 general election.

#2 - Honorable Dwight H. Brown

Section 11313, R. S. Mo. 1929 requires the Secretary of State to compare these votes given for the respective candidates and to certify to the Governor the name of the prosecuting attorney elected; and it is made the duty of the Governor, under Section 11362, R. S. Mo. 1929, to issue a commission to the person so certified by you as elected to the office of prosecuting attorney.

Nowhere do we find in the statutes any authority for you to go back of the certified election returns of the county clerk to you, for the purpose of ascertaining whether or not the prosecuting attorney elected was properly qualified. If he does not have those qualifications, then the present incumbent has ample remedy in the courts to test out the legality of the prosecuting attorney's qualifications.

It is, therefore, the opinion of this office that you should certify to the Governor the name of the prosecuting attorney elected to Stone County, as shown by the abstract of votes certified to you by the county clerk, and that you are without authority to pass upon a question of fact, namely, whether or not Mr. Butler possessed the residence qualification to be elected.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

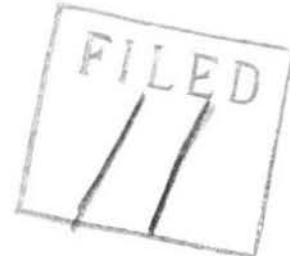
SECRETARY OF STATE:

RECORDER OF DEEDS:

OFFICERS: Commissions should not issue to persons claiming to have been elected to the office of Recorder of Deeds in counties having less than 20,000 population.

12-8

December 8, 1934



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City  
Missouri

Dear Mr. Brown:

This department acknowledges receipt of your letter dated December 6, 1934, as follows:

"This office is now receiving from the Clerks of the County Courts of the several counties of the state, lists of the elected county officers, for the purpose of obtaining Commissions through this office.

Some of the counties with a population of less than 20,000 are requesting Commissions for a Recorder of Deeds. The requests state that such officers were elected on the 6th day of November, 1934. The Fifty-seventh General Assembly at its regular session passed an Act, which is found on page 360 of the Laws of that year, which provided that the Clerks of the Circuit Courts shall be ex-officio Recorders in their respective counties, except in counties containing 20,000 or more. This seems to eliminate the officers known as Recorder of Deeds in the county of less than 20,000.



December 8, 1934

I desire your official opinion as to whether or not we should issue a Commission to Recorder of Deeds in counties less than 20,000. Will you kindly advise at the earliest possible date."

Section 11528 Laws of Missouri 1933, at page 360, reads as follows:

"Sec.11528. Circuit clerks to serve in certain counties. -  
The clerks of the circuit courts shall be ex officio recorders in their respective counties, except in counties containing 20,000 inhabitants or more."

In opinions heretofore issued by this department we have assumed the constitutionality of the section of the law above quoted, without directly passing on the same, and that is the policy of this office at this time.

We therefore advise that you should refuse to issue commissions to persons claiming to have been elected to the office of Recorder of Deeds at the November, 1934, election in counties containing less than 20,000 inhabitants.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

ELECTIONS - - Officer, such as county clerk, must  
SECRETARY OF STATE - pay over and account for all moneys  
received before eligible to office,  
Article II, Sec. 19, Missouri Constitution.

December 12, 1934.



Honorable Dwight H. Brown  
Secretary of State  
Jefferson City, Missouri

Dear Sir:

In answer to your inquiry of December 11, 1934 with reference to issuing a commission to J. A. Hall, claimant to be the county clerk elect of Stone County, the facts submitted to you in the statement of J. B. Norman indicate that he is short in public funds to both the State and County, which facts we have this day verified from the State Auditor's report of the audit made in Stone County by the State Auditor of Missouri.

I call your attention to Section 19 of Article II of the Constitution of Missouri:

"That no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the State of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

The county clerk is a person who receives public money. Section 11666, R. S. Mo. 1929 requires the county clerk to give a bond conditioned that he will "pay over all moneys which may come to his hand by virtue of his office, \* \* \*".

#2 - Honorable Dwight H. Brown

Under Section 11824, the county clerk is required, on the first days of January and July annually, to pay over all fees in his hands belonging to others to the treasurer of the county.

The use of the term "eligible", as used in the above constitutional provision, has reference to the date when the officer is inducted into office. State ex rel. v. Dunn, 277 Mo. 38; 207 S. W. 110.

Ordinarily, under Section 11313, R. S. Mo. 1929, the Secretary of State is required to compare the abstract of votes cast for the respective candidates for county offices and to certify to the Governor the name of the candidate receiving the highest number of votes for each office.

It appears from the wording of the constitutional provision that a person may be elected who has not accounted for and paid over all public money coming into his hands at the time of the election, but in order to be inducted into the office at the beginning of the term for which he is elected, he must have, subsequent to such election and prior to the beginning of the new term of office, paid over all, and accounted for all, such public moneys to the proper authorities. Unless he does so, he is ineligible to take over the office for the new term.

It is, therefore, the opinion of this office that no commission should be issued to J. A. Hall as county clerk of Stone County for the new term beginning on the first Monday in January, 1935 until he shall have complied with the constitutional mandate and paid over and accounted for all fees coming into his hands. Ordinarily, an officer holds his office until his successor is elected and qualified. However, due to the disqualification in this case, Mr. Hall will be ineligible to receive a commission or to enter upon the discharge of his duties as county clerk on the first Monday in January, 1935, in the event he has not accounted for and paid over all public moneys by the first Monday in

#3 - Honorable Dwight H. Brown

January, 1935. If ineligible to take over the office on the first Monday in January, 1935, for the same reason he would be ineligible to continue in office, and there would be a vacancy to be filled by appointment by the Governor.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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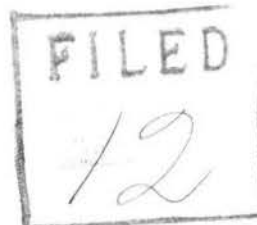
ROY McKITTRICK  
Attorney General

FER:FE

GAME AND FISH DEPARTMENT:

Hunting license not required to kill rabbits on own premises.

1-23  
January 20, 1934.



Hon. Wilbur C. Buford  
Commissioner  
Game and Fish Department  
Jefferson City, Missouri

Dear Mr. Buford:

This Department is in receipt of your letter of December 7th, 1933, with request for an opinion, which letter is as follows:

"This Department is desirous of knowing the following: 'Is a hunting license necessary for the sale of rabbits, alive or dead, when killed or caught on one's own premises, leased or owned, and when a sale is not made on said premises. For example, a man kills or traps rabbits on his own farm, takes them to town, offers them for sale, must he then have a hunting license.'"

Your question may be divisible into two parts: First; whether or not a person has a right to kill or take rabbits under the conditions set forth in your letter without a hunting license. Secondly; whether, after he has killed or taken the rabbits, they may be sold at some place other than the premises where they are taken or killed.

Section 8254 R. S. Mo. 1929, provides as follows:

"Resident licenses shall be issued as county resident licenses and state

resident licenses. A county resident license shall entitle the holder to hunt and fish in the county wherein such license is issued and any adjoining county. A state resident license shall entitle the holder to hunt and fish in all counties in the state of Missouri. Any person who has been a bona fide resident of this state for six months last past may secure a license for himself or herself by filing his or her affidavit with any county clerk or the license collector of the city of St. Louis, stating his or her name, age, place of residence, post office address, the color of his or her hair and eyes, and the fact whether he or she can or cannot sign his or her own name, and paying to said clerk the sum of one dollar for license to hunt and fish in the county where he or she resides and any county adjoining same, or two and fifty one-hundredths dollars (\$2.50) for a state license: Provided, that this section shall not apply to owners and tenants of farm lands, used exclusively for agricultural purposes and members of their families under the age of twenty-one years, who may hunt and fish on their own or leased lands, without obtaining a license: Provided that no female nor minor who are resident citizens of this state shall be required to take out a fishing license; and provided further, that no person shall be required to take out a fishing license to fish in the water within the boundaries of the county in which he resides; but nothing herein shall be so construed as to permit a person to fish in any county other than that in which he resides without first taking out a fishing license as provided in this article."

It will be seen by the above section that a hunting and fishing license is not required of persons coming under this proviso:

"that this section shall not apply to owners and tenants of farm lands, used exclusively for agricultural purposes and members of their

families under the age of twenty-one years, who may hunt and fish on their own or leased lands, without obtaining a license:"

Therefore, replying to the first part of your question, will say that no license is necessary to take or kill the rabbits by the owner of the premises or the tenant occupying same, or members of their families under the age of twenty-one years, where the farm lands are used exclusively for agricultural purposes.

The ordinary rabbit is not protected by any of the fish and game statutes and there is no closed season for same under Section 8238; which section is as follows:

"It shall be unlawful, for any person to kill any fur-bearing wild animals, or take, have in possession, offer for sale, sell, bargain for, transport or ship the same or any part thereof, or their pelts, at any time except during the period between November 15th and December 31st of each year, and January 1st to January 15th of the following year, except as is otherwise provided for in this article: Provided, however, that pelts which have been manufactured for commercial uses, wearing apparel or ornament or for scientific purposes legally permitted, shall not be subject to the restrictions and limitations imposed in this article for wild animals and pelts before they have been legally acquired. Any person violating any of the provisions of this section shall, upon conviction, be guilty of a misdemeanor."

And further, Section 8242 R. S. Mo. 1929, designates by name what are fur-bearing animals, and rabbits are not included therein.

It is, therefore, the opinion of this Department that a hunting license is not required for the sale of rabbits, alive or dead, when killed or caught by the owner or tenant of farm lands, used exclusively for agricultural purposes, and members



January 20, 1934.

of their families under the age of twenty-one years; and they may be sold on or off the premises without first securing a hunting license.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General

CRH:EG

ELECTIONS: Relating to election to fill office of marshal and collector at Ellington, Mo. in April, 1934. City marshal of city of 4th class, when elected at special election, is entitled to fill out unexpired term of his predecessor.

3-17  
March 16, 1934.



Hon. Carter M. Buford,  
Ellington, Missouri.

Dear Senator:

Your letter of March 15 addressed to Attorney General McKittrick has been handed to me for attention. The facts embodied in your letter are as follows:

"I would like to have an opinion from your department as to the following matter:

"At the regular city general election held in the city of Ellington, Mo. on April 4, 1933, a city marshal and collector, H.C. Long, was elected for a term of two years. On Sept. 3, 1933 Mr. Long died. A special election was called to elect a person to fill the vacancy. Copy of election notice is herewith attached.

(newspaper clipping here)

"At the special election B.W. McCormack was elected to the office of marshal and collector and qualified. At the meeting of the City Council, March 5, 1934, notice of the regular general city election was ordered published. Copy of notice is herewith attached.

(newspaper clipping here)

"Mr. McCormack, the present marshal and collector, contends that he was elected to fill the unexpired term of Mr. Long, and was not elected to serve only until the next general city election, and therefore no marshal and collector is to be voted for at the April, 1934 city election.

"The notice for the city election of April 1934

in relation to the election of the City Marshal and collector was based upon a section of the city ordinances which reads as follows:

'Vacancy: Should a vacancy occur in any city office by death, resignation, removal or otherwise; and should said vacancy be not more than six months from the next general election, the Mayor shall appoint some legally qualified citizen of the City of Ellington Missouri to fill said vacancy until the next general election for city officers. If such vacancy occur more than six months prior to any general city election, then, and in that event, a special election shall be called for the purpose of electing some person to fill said office until the next general election.'

In view of this particular provision of the city ordinances, we would appreciate an early opinion on this matter at your earliest convenience, both for the benefit of the city council and Mr. McCormack."

The election of city officers in cities of the fourth class, Ellington being in said class, is controlled by Sec. 6949, R.S. Mo. 1929, which is as follows:

"A general election for the elective officers of each city of the fourth class shall be held on the first Tuesday in April next after the organization of such city under the provisions of this article, and every two years thereafter; and all city elections shall be held under the provisions of Article II, Chapter 61, R.S. 1929, excepting the provisions of section 10208, and except that the judges of election in such city election shall perform all the duties of both the judges of election and clerks of election as prescribed in the state election laws, unless the city council shall provide for such clerks of election by ordinance. All duties specified in the state election laws to be performed by the constable or

sheriff shall be performed by the city marshal in the city elections; and all duties specified in the state election laws to be performed by the county clerk shall be performed by the city clerk in the city elections. The polling places for all elections in cities of the fourth class and the judges therefor shall be selected and specified by the respective boards of aldermen of such cities by resolution, ordinance or otherwise. The manner of making returns of such elections shall be prescribed by ordinance: Provided, that city organizing under the provisions of this article may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until the first Tuesday in April thereafter and until their successors are elected and qualified."

When vacancies occur in any elective office, the vacancy is filled according to Sec. 6973, R.S. Mo. 1929, which is as follows:

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty hand-bills posted up at as many public places within the city; Provided, that when any such vacancy occurs within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the mayor or the person exercising the duties of the mayor by appointment; provided further, that any vacancy in the office of aldermen which may occur within said six months preceding a general municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled."

We note in your letter that Mr. Long, the deceased marshal, was elected at the general election held on April 4, 1933. The Notice of City Election attached to your request states that "the regular municipal election for said city will be held on Tuesday, April 3, 1934", at which time all officers except the marshal and collector are to be regularly elected for full tenure of office. We are at a loss to understand why the marshal and collector were elected in April 1933, while the remainder of the officers are elected in the even years. In other words, why have not the marshal and collector been regularly elected along with the other officers?

In view of the facts as you present them, we must assume that had Mr. Long served his entire term, it would have expired on April 4, 1935. It appears that Mr. McCormack came into office under a special election, because of the fact quoted in Sec. 6973, supra, Mr. Long died more than six months before a general election. The ordinance states that he shall hold office until the next general election. We shall determine whether or not this ordinance is in conflict with the statute, i.e., Sec. 6973, supra, and the decisions of this state.

In the case of *The State ex rel. v. Spitz*, 127 Mo. 248, the court said (l.c. 252):

"The distinction to be found in the multitude of cases to be found on the question of filling vacancies seems to be this: Those cases which hold that one elected to fill an office which has become vacant takes for a full term are based either upon constitutional or statutory provisions which provide only for the length or duration which the incumbent may hold the office, whereas in every instance, so far as our research goes, in which the constitution or statute definitely and certainly prescribes not only the duration of the term but a fixed time for its beginning and ending, the holding has been that the incumbent's right to the office, whether he was elected to serve the whole term or to fill a vacancy therein, terminates with the fixed time prescribed for the ending of said term. As was said by this court both in *State ex rel. v. Ranson*, 73 Mo. 78, and *State ex rel. v. Stonestreet*, 99 Mo. 361, 'the law favors uniformity, but uniformity can not be obtained except by the establishment of an inflexible rule.'\*\*\*\*\*"

Another decision which bears indirectly on the matter but incidentally contains the principle of law applicable in the case under discussion, is that of *Thornsberry v. City of Campbell*, 218 Mo. App., l.c. 362-363, wherein the Court said:

"The term of office of the marshal of a city of the fourth class is definitely fixed at a term of two years by the provisions of section 8402, Revised Statutes 1919. General elections for such cities are required to be held on the first Tuesday in April next after the organization of the city, and every two years thereafter. It may be taken for granted, therefore, that the election of the marshal in April 1921, was for a term ending in April, 1923. As heretofore noted, section 8422 provides that 'the salary of an officer shall not be changed during the time for which he was elected or appointed.' These different statutes, relating to cities of the fourth class, are in pari materia and should be construed together. (*State v. Hostetter*, 137 Mo. 636, 39 S.W. 270).

"The words 'time for which he was elected or appointed' as used in section 8422 must refer to the term of office, for there could be no other time. The term of office, is defined in section 8402, to which section 8422 necessarily alludes. But counsel contends the term of office is divisible and that section 8422 is personal only to the occupant of the office who was elected prior to the passage of the ordinance reducing the marshal's salary; that upon the resignation of the officer, the new ordinance would become effective as to any subsequent officer elected to fill the unexpired term. In other words, the ordinance, held in abeyance while the original officer continues in office, immediately becomes operative upon his resignation. We fail to see the logic of this argument. Such interpretation of section 8422, would destroy its object. Under that theory the city might pass an ordinance increasing the salary of an officer, who could then resign, be re-elected or appointed and thus receive the increased salary during his new or unexpired term. Likewise, under the provisions of section 8424, if the resignation occurs within six months of a general election, the mayor may appoint a successor to fill the unexpired term without calling an election; if such



appointment creates a new term the appointive officer would then be entitled to an increased salary in the event an ordinance had previously been passed so authorizing. While we have considered the proposition from the standpoint of a possible increase in salary, under the statute the same reasoning would apply to a decrease. But the term is fixed and the statute preventing a change in compensation is not, in our opinion, personal to the then occupant in office, but applies to any subsequent holder of the office during the same term. 'Each official term stands by itself. The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term.'

We also quote from the case of *State ex rel. Rosenthal v. Smiley*, 304 Mo. 549, wherein Judge Ragland said (l.c. 558-559):

"It will be observed that the statute prescribes only the length of the term of the office it creates; it contains no provisions as to when the time shall commence or when it shall end; nor does it contain any reference to unexpired terms or to the filling of vacancies. Under the rule of construction applicable to such a statute which has long obtained in this state it must be held that it was the legislative intent that the 'term' of office should consist of consecutive periods of two years, following each other in regular order, the one commencing where the other ends, and that the initial term should commence on the date of the appointment first made by the county court. When the appointing power named the first incumbent it thereby as effectually fixed the dates of the beginning and termination of the initial term of office, and of the subsequent terms as though they had been expressly prescribed by the legislature. (*State ex. inf. v. Williams*, 222 Mo. 268; *State ex rel. v. Stonestreet*, 99 Mo. 361.)

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office



itself, and an appointment to fill such vacancy can only be for the unexpired portion. This rule, which makes for uniformity and is in consonance with the general intent of our Constitution and legislative enactments, has had the repeated sanction of this court. (State ex rel. v. Spitz, 127 Mo. 252; State ex. inf. v. Williams, and State ex rel. v. Wilcox, supra) The only case cited by relator as announcing a different rule is State v. Corcoran, 206 Mo. 1. That case, however, is readily distinguishable from those just cited. The conclusion reached in the Corcoran Case was, as the court was careful to point out, based upon the peculiar and unusual wording of the statute then under review. The statute involved in the case at bar is almost identical in content with that considered in State v. Williams, supra, where the rule of construction just stated was emphasized and followed."

In the decision in the case of City of St. Louis v. Dreisoerner, 243 Mo. 217, this rule is laid down:

"In the exercise of its power, a municipal corporation can enact no statute which violates the Constitution of the State or the United States, or which contravenes the statutes and decisions of this state."

#### CONCLUSION

As stated in the beginning of this opinion, it must be borne in mind that there is an apparent conflict in the time of election of the marshal and collector, assuming that Mr. Long's election was regular and that he was legally elected for two years. In view of the foregoing decisions, we are of the opinion that Mr. McCormack would be entitled to fill out the unexpired term, but if this is the year for regular municipal elections, and the marshal and collector are to be elected this year along with the other officers, which is ordinarily the custom, then Mr. McCormack would, in order to hold the office, be compelled to be a candidate for the full tenure of the office.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General.

APPROVED:

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Attorney General

GAME AND FISH COMMISSIONER:

Fences may be built in  
navigable streams, When.

May 2, 1934

5-14

Honorable W. C. Euford  
Game and Fish Commissioner  
Jefferson City  
Missouri



Dear Sir:

Receipt of your letter dated April 5, 1934 is  
acknowledged. The letter is as follows:

"Enclosed you will find letter which  
I have today received from Tom S.  
Warnack of Protem, Missouri, which is  
self-explanatory.

Will you please let me have an opinion  
in this matter at your convenience?"

The letter referred to in and attached to your  
letter, in part, states and inquires as follows:

"A number of my friends from through-  
out the State who have been down in the  
White river Country fishing have made  
complaints to me and seriously object  
to the fencing below Powersite dam on  
White river near Forsyth a distance of  
one fourth mile below the dam which pro-  
hibits fishing in one of the most popular  
sections of the White river region. The  
dam and power plant is owned and operated  
by the Empire District Electric Company a  
subsidiary of Cities Service and by the  
fencing of this section of the river  
immediately below the dam is greatly dama-  
ging the tourist business and I would like

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to have a ruling from your department or the Attorney General's office if the Company can legally fence this section of the river and prohibit fishing therein.

I will appreciate very much a ruling in this matter and also please advise me if it will be necessary for me to get a ruling from the Federal Government as no doubt you are aware that White river is a navigable stream.

You realize Mr. Buford that sportsmen are not anxious to fish in the run way immediately at the base of the dam but they do desire to fish a hundred or two feet below the dam and there is no way in which they can get near this good fishing spot."

(a) Navigability of White River.

A navigable river is defined in 27 R. C. L. pg.1303, Section 213, as follows:

"The test of navigability of a river, as stated by the supreme court of the United States, is that those rivers are navigable in law when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

It is immaterial if a stream be not used for commercial purposes, the question is whether it can be so used. Nor does it matter that there may be natural obstructions in a river. The test is whether the natural state of the river is such that it may afford a channel for commerce. If so, the river is navigable in fact, although its navigation

may be accomplished with difficulty by reason of natural barriers such as rapids and sandbars.

We assume that White River is a navigable river within the meaning of the definition above set down but we are not expressing any opinion on the fact.

(b) Fishing Rights.

In reference to the rights of the public generally to fish in navigable streams it is stated in 26 C. J. pg.602, Section 17, that:

"Fishing implies a reasonable use of the waters and shore line of navigable streams, and as a general rule all the members of the public have a common and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters, except in so far as he has acquired such right by grant or prescription. This rule applies notwithstanding the title to the bed of such a stream is in the riparian owner, and notwithstanding his ownership of the abutting upland carries with it the right of access to deep water. It has been held that the right of fishing is incident to the right of navigation."

(c) Riparian Rights.

It is the law of Missouri that the owner of land abutting on a navigable river owns to the line fixed by the low water mark of the river.

Randolph v. Moberly Hunting and Fishing Club 15 S. W. (2nd) pg. 834.

Low water mark is the line, on either side of the river banks, to which the water in the river bed reaches at the usual and ordinary low stages of water in the river bed.

The letter of Mr. Warnack does not state who built the fences complained of. If the fences were built by an

May 2, 1934

abutting landowner, and by reason of his rights as such landowner, then such landowner would only have a right to build his fences to the line of the low water mark of the river, if the building of such fences would interfere with the rights of other adjoining landowner or with the rights of the public generally to use the waters of such navigable streams.

(d) Prescription, Grant or other vested right.

There is a rule of law that a right to interfere with the rights of the public generally in the use of a navigable river may be acquired by prescription or use or by grant from the Legislature or other competent authority or by a decree of a court having jurisdiction of the subject matter. We do not know whether Power Site dam was built or any property rights thereabouts acquired by reason of a court proceeding or not and express no opinion thereon.

CONCLUSION

In the absence of rights acquired by prescription, grant or decree of a court of competent jurisdiction and if the fences built are between the lines that mark the low water mark on either side of White River, then, in our opinion, such fences constitute, under the facts stated in your letter, an unlawful obstruction to the use of White River and such obstructions may be caused to be removed by a proper proceeding brought for that purpose.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

RELATING TO NAVIGABLE RIVERS IN THIS STATE:

5-10  
May 4th, 1934



Hon. W. C. Buford  
Game and Fish Commissioner  
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter of April 17th, 1934 in which you state and inquire as follows:

"Since the proprietor of lands on either bank of a navigable streams owns only to the bank, while the property rights on banks of non-navigable streams extend to the stream's center subject to regulation by the State by virtue of the title to all fish being vested in the public at large, information relative to navigability of streams is repeatedly requested of this department. We, therefore, desire your opinion as to the question of navigability.

Would the capacity of a stream at normal water stage to float a tie or fence post for a commercial purpose constitute a sufficient test of navigability?"

I.

A river is navigable in fact when used or capable of being in their ordinary condition of floating boats and vessels for commerce. A river is navigable in law which is capable of transporting rafts of logs, ties, etc. for several months during year without the aid of men on the bank thereof.

Vol. 45 Corpus Juris, Paragraph 6 reads as follows:

"DEPTH AND CAPACITY FOR FLOATAGE--(a) IN GENERAL. What is a navigable water is determined by its capability of use by the public for purposes of transportation and commerce, rather than the particular extent and manner of that use. The ease or difficulty of navigation is not control-



Hon. W. C. Buford

May 4th, 1934

ling; and the general rule is that if the water is adapted for commercial transportation it is immaterial what kind of vessels are or can be employed, although some authorities have taken as the test of legal navigability the capacity of the water to afford a passage for sea vessels or the like. The character of the commerce essential to navigability is that which is useful and has practical utility to the public, but whether the stream is used by boats or by rafts or for floating logs is not the test. It is generally, but not in all jurisdictions, held that the stream must be navigable for some useful purpose, such as trade or agriculture, rather than for mere pleasure, and must be capable of sustaining more than small boats such as rowboats or small skiffs or launches.

CAPABLE OF FLOATING LOGS. Streams which are merely floatable and useful for logging purposes, while not navigable in a technical sense, have been held navigable so far as this public use is concerned, but other authorities hold that such streams are not navigable in a broad sense or that the stream must be capable of floating rafts as distinguished from single logs."

In *Poe v. Economy Light, etc. Co.* 241 Ill. 290, the court said in part as follows:

"The fact that there is water enough in places for row boats or small launches answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose does not render the waters navigable."

In *Grantz v. McKee*, 279 Federal 713, the court said in part as follows:

"A small stream running through a swampy country, used only in times of high water to a small extent for floating of logs or for skiffs and dug outs by people living near, because of the bad conditions of the roads, is not navigable in any sense that would constitute it a part of the public waters of the State."



Hon. W. C. Buford

May 4th, 1934

In *Leerry v U.S.*, 177 U.S. 621, the court said in part as follows:

"The mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable water of the United States, which the federal statute makes it a misdemeanor to obstruct unless the channel is substantially useful to some purpose of interstate commerce."

By the common law no river was considered navigable, which was above the ebb and flow of the tide, but that is not the doctrine of this state.

In *State Ex rel v. Taylor*, 224 Mo. 1. c. 486 Judge Woodson, in ruling the case said in part as follows:

"Here all streams which are actually capable of floating and of permitting the passage of ordinary boats upon the bosom of their waters are considered navigable rivers."

In *Lumber Co. v. Ripley County*, 270 Mo. 1. c. 135, Judge Woodson, in ruling the case said in part:

"Current River is not navigable, and we are not going to let this case go off on the admission that it is, and hereafter be plagued in the future by an opinion of this court holding that it is such, because perhaps, counsel for plaintiff in this cause admitted it to be such."

In *Cambest v. McComas Hydro-Elec. Co.* 212 Mo. 1. c. 332-3, Judge Trimble, said in speaking for the court in part as follows:

"The petition alleged that Platte river is a navigable stream. At the trial defendant, when asked if it was agreed that Platte river had been designated by the United States Government as a navigable stream, replied that "It is admitted that the Government has designated this stream as navigable, but as a matter of fact it never has been navigated."

Hon. W. C. Buford

May 4th, 1934

The decree does not specifically find that it is navigable and makes no finding whatever in that regard unless it be contained within the general finding that "the allegations of plaintiff are true."

Under the Federal decisions only those streams are regarded as "navigable in law which are navigable in fact...And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (The Montello, 20 Wall. 430, 439.) "The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water, does not make it a navigable river." (United States v. Rio Grande, etc., Co., 174 U. S. 690, 698.) By its own terms, the Federal Statute forbidding dams without authority of the Secretary of War (section 9910 supra) relates solely to navigable waters. (Egan v. Hart, 165 U. S. 188, 192.) Under the Federal test, Platte river is not a navigable stream since the most the evidence shows it that at some time in the remote past it was used for floating logs for short distances to saw mills, that once a party of fur traders went down the river to its mouth in a boat. It is only at certain flood times that the stream has a sufficient amount of water to either float logs or carry a boat. Whether the State test of navigability as found in McKinney v. Northcutt, 115 Mo. App. 146, 154, 155, and in Weller v. Missouri Lumber, etc., Co., 176 Mo. App. 243, 256, is different from or less than the Federal test, it is manifest that the Federal Statute, defining rights which depend upon the fact of navigability, would require that the Federal test is the one to be applied in determining that fact. Hence we may readily agree with defendant that, in this sense, Platte river is not a navigable stream."

In McKinney v. Northcutt, 114 M.A. 1. c. 157-8, Judge Norton, speaking for the court, said in part as follows:

May 4th, 1934

"So we find that by concurrence of authorities, a stream capable of transporting rafts of railroad ties, as in this case, for several months during the spring of the year, without the aid of men on the banks thereof, is navigable within the meaning of the law for that purpose and subject to the use of the public therefor, and the rights of the riparian owners to the soil adjacent to and underlying the bed of such stream are subject to this right or easement in the public, which rests upon the necessities of commerce; and where, as in the case at bar, it appears that there was no other practical route by which the ties could be transported to market, the adjacent owners would have no right to interfere with one using the stream for the commercial purposes indicated. Respondent had a right to occupy the stream in floating his ties to market without inflicting injury upon the adjacent property, and the appellants had no right to obstruct said stream as shown in the evidence, or otherwise interfere with respondent in the exercise of his privilege. The views herein expressed are abundantly supported by the courts of this country as will appear by reference to the following cases."

Therefore from the conclusion reached in the foregoing cases, we hold that rivers are said to be navigable, within the meaning of the law, and in fact when they are used, or are susceptible of being, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary mode of trade and travel on water, that a stream is navigable in law which is capable of transporting rafts of railroad ties or logs for several months during the year, without the aid of men on the banks thereof.

Respectfully submitted,

W. W. Barnes  
ASSISTANT ATTORNEY-GENERAL

APPROVED:

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ATTORNEY-GENERAL

FISH AND GAME: WILD GAME (BIRDS) CANNOT BE SOLD OR POSSESSED  
UNDER A SPECIAL LICENSE FROM THE FISH AND GAME  
DEPARTMENT.

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5-21  
May 15, 1934.

Honorable W. C. Buford  
Commissioner, Game and Fish Dept.  
State of Missouri  
Jefferson City, Missouri.



Dear Wilbur:

Your request for an opinion dated April 16,  
1934, reads as follows:

"Enclosed you will find letter from  
Senator Edwin Nolte, which is self-  
explanatory.

"Will you please let me hear from  
you in this matter as soon as con-  
venient?"

Your letter from Senator Nolte reads as fol-  
lows:

"In accordance with our conversation  
in Jefferson City a few days ago re-  
garding a license to sell foreign  
wild game in the State of Missouri  
which have been shipped from the  
European Countries to the United States  
and on which the duty has been paid,  
will you kindly take this up with the  
Attorney General and let me know what  
procedure we would have to go through  
to get this license. This license is  
wanted by Chester Franz & Company a  
large wholesale poultry concern in the  
City of St. Louis."

After reading your letter and also Senator Nolte's communication of April the 13th, and after talking with you on the 'phone, I take it that what you want to know is this: Can one, who is engaged in the poultry business legally receive and have in their possession, in Missouri, dressed game birds which were shipped from foreign countries to the United States and on which the federal duty tax has been paid? If one can legally receive and have in his possession such game birds, then what procedure must be followed in order to procure a state license to sell said birds in Missouri?

Section 8209, R. S. Mo., 1929, provides in part as follows:

"\*\*\*\*Said game and fish commissioner shall at any and all times seize any and all birds, animals and fish which have been caught, taken or killed at a time, in a manner, or for a purpose, or had in possession, or which had been shipped, contrary to the laws of the state."

Section 8225, R. S. Mo. 1929, provides:

"No person shall, within the state of Missouri, kill or catch, or have in his possession, living or dead, any wild bird other than a game bird, or purchase, offer or expose for sale, transport or ship, within or without the state, any such wild bird after it has been killed or caught, except as permitted by this article. No part of the plumage, skin or body of any bird protected by this article shall be sold or had in possession for sale, irrespective of whether said bird was captured or killed within or without the state. For the purpose of this article the following only shall be considered game birds: The anatidae, commonly known as swans, geese, brant, and river and sea ducks; the rallidae, commonly known as rails, coots, mud hens and gallinules; the limicolae, commonly known as shore birds, plovers, surf-birds, snipe, woodcock, sandpipers, tattlers and

curlews; the gallinæ, commonly known as wild turkeys, grouse, prairie chickens, pheasants, partridges and quails; the columbæ, commonly known as doves and pigeons; all other species of birds, either resident, migratory or imported, shall be considered nongame birds. Nothing in this article shall be construed to prevent the possession and sale of live canaries and parrots."

Section 8232, R. S. Mo. 1929, provides:

"No person shall take, capture or kill, by any means whatever, any game bird except the following named game birds between the following dates (both inclusive): Wild turkey, December 1st to December 31st of each year. Quail (bobwhite partridge) and woodcock, November the 10th to December 31st, each year. Ducks, geese, brant, snipe, black breasted and golden plover, greater and lesser yellow legs, rails, coots and gallinules - January 1st to April 30th, and September 5th to December 31st of each year. Doves -- September 1st to December 15th, but not more than ten doves can be killed by any one person in one day, or have in his possession more than 15 doves. Anyone who shall violate any of the provisions of this section shall be guilty of a misdemeanor."

Section 8247, R. S. Mo. 1929, provides:

"Any person who shall have in his possession or under his control any variety of fish, game or birds, during the closed season prescribed by law therefor, and any person who shall have in his possession, or under his control the carcass, pelt, or flesh of any animal, fish or game protected by this article, except when such possession or control is permitted thereunder, shall be guilty of a misdemeanor and the game warden and his deputies are hereby permitted and authorized to take and confiscate any fish, game, birds, or wild animals,



or the carcass, pelt or flesh thereof, from any person who may be holding the same, in violation of this article."

Section 8284, R. S. Mo. 1929, provides:

"Any persons, firm or corporation, to whom is consigned any birds, game or fish, the killing, sale or possession of which is at any time or at all times prohibited, shall, upon receipt of same, immediately notify the state game and fish commissioner, or any of his deputies, and safely keep such game, birds or fish in his possession or under control, subject to the order of said game commissioner. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty-five dollars nor more than fifty dollars."

Section 8285, R. S. Mo. 1929, provides:

"Any person, firm, or corporation, who shall, at any time of the year, barter, sell or offer for sale, or who shall store or serve in any commission house, cold storage house or commercial establishment, in this state, either under the name used in this article, or under any other name, or guise whatever, any animal or birds protected in this article, whether taken within or without this state, or lawfully or unlawfully taken, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100.00), and an additional fine of five dollars (\$5.00) for every bird or animal or part of every bird or animal bartered, sold or offered for sale, stored or served: Provided, that nothing in this section shall be construed to apply to the pelts of furbearing animals lawfully taken, or as otherwise provided for taxidermists, or



scientific specimens in this article; Provided, nothing in this section shall be construed to prohibit the storing, and serving, in any eating establishment, of deer and elk raised in captivity, as provided for in section 8310."

Section 8326, R. S. Mo. 1929, provides:

"It shall be unlawful for any person, firm or corporation, to solicit by correspondence, printed cards, circulars, shipping tags, advertisement or otherwise, any illegal shipments, consignments or delivery of game and fish, contrary to the laws of this state, whether taken within or without this state, or in any other manner to aid or abet in a conspiracy to violate the game and fish laws of this state. Any violation of this section shall be a misdemeanor, and upon conviction of the offender, shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00)."

CONCLUSION.

Thus we see that it is the duty of the Fish and Game Commissioner to seize all foreign wild game held in possession of one contrary to the laws of this state. We see that under the provisions of Section 8325, supra, it is unlawful for one to have in his possession any game bird, alive or dead, except as permitted under the provisions of Section 8332, supra, which section provides for the open season, and then only with a bag limit for one who has in his possession wild birds, dead or alive. Where game birds are consigned to one, out of season - dead or alive, or where consigned, in open season but in excess of the bag limit, then the consignee must notify the Fish and Game Commissioner, whose duty it is to take possession or control over the consignment.

Under the provisions of Section 8285, supra, the Legislature makes it a crime for one to sell, barter for sale or store in any commercial establishment any game birds.

It is our opinion that Chester Franz and Company of St. Louis fall within the restraints of the law prohibiting commercial establishments from selling, bartering for sale or storage game birds. They also are restrained, as any other person, from having in their possession birds out of season or in excess of bag limit. The fact that the birds which they have in their possession are foreign and on which a duty has been paid does not alter their status. There is no provision in the law whereby they can be licensed, as per their desire.

Respectfully submitted,

APPROVED:

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WM. ORR SAWYERS  
Assistant Attorney-General.

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ROY MCKITTRICK  
Attorney-General.

WOS/afj

VOTING: Members of Citizens Conservation Camp are entitled to vote in county and state elections, both as resident voters.

1-25  
July 23, 1934.



Honorable Wilbur C. Buford  
Game and Fish Commissioner  
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated July 23rd, is as follows:

*And frame out large*  
"Please render an opinion as to whether or not the members of the various C.C.C. Camps over the state are entitled to vote in the respective counties in which those camps are located, at the coming primary and general election this summer and fall, and if they are entitled to vote, must they vote absentee ballots when they have been a resident of the state for one year and a resident of the camp for sixty days, and have declared themselves to be residents of the county in which the camp is located?"

A similar question was presented by Honorable George F. Addison, Prosecuting Attorney of Salem, Missouri, and an opinion was given on March 1, 1934, which touched upon all matters in your request, except your last question relating to the necessity of C.C.C. members voting absentee ballots.

Section 2, Article VII of the Missouri Constitution was adopted February 26, 1924, and provides as follows:

"All citizens of the United States, including occupants of soldiers' and sailor's homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person

July 23, 1934.

while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting.

Section 10178 R. S. Mo. 1929, provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the Confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

July 23, 1934.

The Constitution and Statute above set out does not refer to those persons who work in Citizens Conservation Camps, <sup>and Citizens Camp</sup> and the very fact that these camps are composed of citizens, <sup>and Citizens Camp</sup> as the very title to the Federal Act discloses, would indicate that they are to be treated as citizens of the United States, irrespective of their duties relating to the camp to which they belong.

It is the opinion of this office that one who belongs to a Citizens Conservation Camp <sup>or Citizens Camp</sup> is not disfranchised as a voting citizen, and if said elector has resided in this State for one year and in the county, city or town sixty days immediately preceding the election to which he offers to vote, he shall be considered an elector, and as such is entitled to vote as any other elector when presenting himself to the polls for that purpose.

## II. <sup>and Citizens Camp</sup>

Residence is a prerequisite to voting in this State. The Attorney General's office takes notice that the personnel of a Citizens Conservation Camp <sup>or Citizens Camp</sup> is usually made up of citizens, who, before entering the camp, resided in many states in the Union. This question may present itself: Is this personnel made up only of temporary residents in this State and County, at all events, not entitled to vote in Missouri, because of the non-permanency of their camp's location?

The fact that a camp <sup>or Citizens Camp</sup> may be moved at pleasure does not mean that the personnel must follow the camp. One who is a member of a Conservation Camp <sup>or Citizens Camp</sup> is not on the same plane as an inmate in a poorhouse, or a convict in the penitentiary, and hence disqualified as a citizen and a voter. <sup>or Citizens Camp</sup> These citizens are not incarcerated in a Citizens Conservation Camp. They are there by choice. They leave by choice, and they retain all their civil rights while attending camp. To reason otherwise would defeat the very purpose for which these camps were created by our President. They can sever their relations with the camp life on their own volition. Their membership and domicile within a Citizens Conservation Camp, without additional facts, is of minor importance in determining the question of their residence when qualifying them as electors for voting, under the Missouri Constitution and Statutes. <sup>or Citizens Camp</sup>

Webster's dictionary defines the verb "reside" as used in the Constitution and Statutes thus:

July 23, 1934.

- "1. To take up one's abode or station.
2. To dwell permanently or for a considerable time; to have a settled abode for a time; to have one's residence or domicile; specif., to be in residence, as the incumbent of a benefice."

Webster also gives as synonyms for the verb "reside":

"Live; dwell; abide; sojourn; stay and remain."

Section 655 R.S. Mo., 1929, provides in part as follows, and defines residence in this State in its seventeenth point thus:

"\* \* \* ; seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; \* \* \* "

The above statutory definition is not to be interpreted to mean that only persons falling within its provisions are to be considered as legal residents of this State when qualifying as voters. True, those persons which fall within the statutory definition are residents, ipso facto, for the purpose of voting. On the other hand the word "reside" as used in the Constitution and Statutes relating to voting has no fixed meaning applicable alike in all cases, but the intention of the party is a large factor in determining residence.

Our Supreme Court said in *Green v. Beckwith*, 38 Mo. 384, 1. c. 387:

"A man's residence, like his domicile, or usual place of abode, means his home, to and from which he goes and returns, daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on."

In the case of *State ex rel. v. Smith*, 64 App. 343, 1. c. 319, the Court said:

"The term 'residence' has no fixed meaning applicable alike to all cases, It must be understood differently, according



July 23, 1934.

to a number of varied conditions. In some instances it is regarded as synonymous with 'domicile,' but they are not, in all cases, to be treated as convertible terms. It is said that domicile is residence combined with intention. It has been well defined to be residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicile, for one and the same purpose, at any one time, though he may have numerous places of residence. His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence, without the intention of remaining, will constitute domicile."

Judge Cooley in his Constitutional Limitations, volume 8, pages 1365 to 1367 say:

"A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. The words 'inhabitant', 'citizen,' and 'resident', as employed in different constitutions to define the qualifications of electors, means substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home. Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place. One's residence is where he has an established home; the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It has been held that a student in an institution of learning, who has residence there for the purpose of instruction, may vote at such place provided he is emancipated from his father's family and for the time has no home elsewhere. \* \* \* \*\* Temporary absence from



July 23, 1934.

one's home, with continuous intention to return will not deprive one of his residence, even though it extend through a series of years."

CONCLUSION: *transient camp*

It is the opinion of this office that one who belongs to a Citizens Conservation Camp is not disfranchised as a voting citizen. It is our further opinion that as far as residence is considered in the qualifications of voters, those members in a Citizens Conservation Camp, residing in a camp located in this State and your county, may become qualified electors and voters in your State and County elections. The fact that one is a member of a camp is not of itself conclusive evidence as to temporary residence, disqualifying him as a voter. Residence for the purpose of voting, in all cases is largely a matter of intention on the part of the elector. The elector's intention as to residence can be determined by his overt acts and his declarations on the matter. When once an elector has fixed his habitation for the required period of time within your jurisdiction, with no present intention of moving, then he is a qualified voter in your jurisdiction, as far as residence is concerned, even though he be a member and living at a Conservation Camp. *transient camp*

Those electors who have always been a resident of this State but have not shown any intention of being but temporary residents of your county may vote an absentee ballot within this State and your county, the ballot to be voted and transmitted as the absentee ballot of any other qualified voter. On the other hand, where a member of a C.C.C. Camp of proper age, has resided in the State of Missouri for one year and in a county for sixty days, even as a member of a Citizens Conservation Camp during his county residence, and has declared himself to the Judges of election, to be a resident of the camp in the county in which the camp is located is entitled to vote in said County, State and National election as a resident voter, and is a qualified elector for that purpose. He cannot legally be disfranchised or forced to vote an absentee ballot under such circumstances. *transient camp*

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

*W. K. Hoffmann*  
ROY McKITTRICK  
Attorney General.  
WCS:H

3/1  
75  
CONSTITUTIONAL LAW - FEDERAL INSTRUMENTALITIES - Applicability of  
Missouri motor fuel tax to sales to Farm Credit Administration.

10-3  
September 20, 1934



Mr. Gerard N. Byrne, Attorney,  
Farm Credit Administration of St. Louis,  
St. Louis, Missouri.

Dear Sir:

Your letter of July 6, 1934, has been received in which you ask for our views on the application of the Missouri motor vehicle fuel tax to sales of gasoline to the Farm Credit Administration of St. Louis, and we likewise acknowledge receipt of your supplemental letters of July 30, 1934 and September 10, 1934, the latter of which enclosed a memorandum of authorities.

After an extensive investigation we have come to the conclusion that the Constitution of the United States does not prohibit the imposition of a tax with respect to the sale of gasoline to the Farm Credit Administration, and as there is no exemption in the Missouri law covering such sales, it is our opinion that the liability for the tax is imposed with respect thereto.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY-GENERAL

APPROVED:

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ATTORNEY-GENERAL

GAME AND FISH COMMISSIONER:

The word 'householder' as used in Section 8246 defined.

Election under Section 8246 could not be enjoined or prohibited.

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10-15  
October 12, 1934



Honorable Wilbur C. Buford  
Game and Fish Commissioner  
Jefferson City  
Missouri

Dear Sir:

We acknowledge receipt of your letter dated October 10, 1934 as follows:

"This Department is desirous of your opinion of an interpretation of Section 8246 Game and Fish Laws of Missouri, as regards to the filing of a petition signed by one hundred or more householders for the closing of a season on quail in the respective counties; your interpretation of the word 'householders' and just how many in one family would be considered householders.

Also for the following example: A man's married son living under his father's roof, would the father and son each be counted as a householder?"

You also submit the further inquiry:

"Can a taxpayer enjoin an election under Section 8246 when Section 8246 has not been complied with; can a writ of prohibition be procured under the same circumstances."

We will answer your questions in the order in which we have stated them.

1.

Section 8246 Revised Statutes Missouri 1929 provides, among other things, that upon the filing of a petition signed by one hundred or more 'householders' of any county and presented to the county court, at any regular or special term thereof, more than thirty days before any general election to be held in such county, it shall be the duty of the county court to order the question as to whether or not there should be a closed season on quail for the next two years in said county to be submitted to the voters at such election. If a majority of the votes cast at such election be in favor of the closed season on quail, then the taking, capturing or killing of any quail or bob white within such county for a period of such two years is made unlawful.

The section above referred to has been held to be constitutional in the case of State v. Ward 328 Mo. 658.

The word 'householder' is defined in 30 C. J. at page 474, in the following language:

"A master of a family, a person who has charge of, and provides for, a family or household; one who occupies a house with his family; one who keeps house with his family; the occupier of a house; the head of a household; the master or chief of a family. The term implies the idea of a domestic establishment, or the management of a household, and of residence. It has been held to include married women, widows, widowers, and bachelors, provided they constitute the head of a family."

In the case of Fore v. Hoke 48 Mo. App. 254, the circuit court in appointing commissioners in a condemnation case, had described them as 'householders' instead of 'freeholders'. The statute requiring freeholders to be appointed to make the assessment of damages. In a discussion of whether freeholders had been appointed the court discussed the meaning of the word 'householder'. At page 261 of the opinion it is said:

"The word freeholder is generally used to designate the owner of an estate in fee in land. See Anderson's Law Dictionary, verb. 'Freeholder.' But the word householder means merely, according to Webster, 'a master or chief of a family; one who keeps house with his family.' Mr. Anderson in his law dictionary, a recent work of great merit, in like manner defines a householder to be 'head of a household; a person who has charge of and provides for a family or household.' And he adds that the word 'implies the idea of a domestic establishment, or the management of a household.' And Law Dict. verb. 'Householder.' He supports these definitions by the citation of many adjudged cases. It is plain from these definitions that a person may be a householder without being a freeholder, and we must hence conclude that the proceeding is void by reason of the failure of the record to recite that the commissioners appointed were freeholders."

Elliott v. Thomas 161 Mo. App. 441, had under consideration an exemption right under the homestead law and involving the definition of a 'housekeeper.' In that connection the court discussed the meaning of the word 'householder' and at page 447 of the opinion said:

"In this case, while this defendant was a member of a family, though not its head, during the life of her husband, yet, the lot in question was not acquired by her until after her husband's death, so as to this lot, she occupies the same position as if she had never been married, and if she can hold this property as exempt, she must do it because she is a housekeeper for she is not the head of a family. As far as its relation to a homestead is concerned we can see no difference between the meaning of the words 'housekeeper' and 'householder' when applied to the same individual. Webster defines 'housekeeper' as

'one who occupies a house with his family; a householder; the master or mistress of a family; one who does or oversees the work of keeping house.' It is apparent that the last definition could not apply for a person might oversee or do the work of keeping house merely as a servant and it is clear that the statute does not apply to a person acting in that capacity. The same author defines householder as 'The master or head of a family; one who occupies a house with his family.' Bouvier defines housekeeper as 'One who occupies a house,' then refers to the word householder. In defining householder, he quotes Webster's definition as above given. In the legal sense as used in a homestead statute to designate the parties entitled to the exemption the meaning of the two words seems to be synonymous. Some of the homestead statutes use the language, 'Householder or head of a family.' Our statute and that of Vermont use the language 'Housekeeper or head of a family.' As far as we can learn, the question involved in this case has not been passed upon by the Vermont courts nor by the courts of our own state. In those states in which the exemption is allowed to a 'householder or head of a family' it has been uniformly held that a householder within the meaning of the statute is one occupying a house with some one who is dependent upon him and has never been held to apply to one person occupying a house alone except in those cases in which the family became dispersed after the homestead right had attached. (Cadhoun v. Williams (Va.) 34 Am. Rep. 759; Lane v. State (Tex.), 15 S.W. 627; Kaltzenberg v. Lehman (Ala.), 2 Southern 272; Griffin v. Sutherland (N.Y.), 14 Barb. 456.)"

The meaning of the terms as used in the statutes are always dependent upon or to be construed in the sense and in light of the context in which they are used, so that no hard and fast rule can be laid down, but we think by the use of the word 'householder' in Section 8246 supra, was meant that the petition was to be signed by the head of the family and not by



any other member thereof. Of course there might be heads of two families under one roof, all depending on circumstances. We do not feel called upon to enter into a discussion on that controversial, if not hazardous, field of argument as to whether the husband or the wife is the head of the family in the legal sense, because we are of the opinion that what particular person is the head of a family always depends on the peculiar facts surrounding each particular case. In some instances it might be the husband and in another the wife, or in some instances some other member of the family.

2.

On the question of the right of a taxpayer to procure a restraining order or writ of prohibition against holding election above referred to.

What seems to be the general rule is stated in 32 C. J. 255, which reads:

"In the absence of statute conferring jurisdiction, the general rule is that an injunction will not issue to prevent the holding of an election whether the election is illegal or not, and that this is so whether the election relates to the filling of public office or other matters, such as changes in boundaries or political subdivisions and kindred matters."

After the holding of such an election, if the proposition purports to carry and if it is not held in compliance with the provisions of Section 8246, the Game and Fish Commissioner might be compelled by mandamus to issue a hunting license to a person in any particular county otherwise entitled thereto, or if the Game and Fish Department should issue a hunting license, notwithstanding the election, and the person holding same should proceed to hunt quail in a county where such election had been held and should be prosecuted therefor, the defendant in such a case could try out the question of whether or not the provisions of Section 8246 had been complied with, as a defense to the prosecution. If the section had not been



Honorable Wilbur C. Buford

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October 12, 1934

complied with the prosecution could not be maintained.

This defense was made in many cases involving the validity of the adoption of the old local option law and we see no reason why the rule would not apply in this case.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

CN  
CITIES, TOWNS & VILLAGES: Publication of notice to contractors for  
bids must be in accordance with Section  
13745, R. S. Mo. 1929.

11-9  
November 1, 1934.



Hon. Carl E. Calvert  
Representative of Clark County  
Kahoka, Missouri

Dear Mr. Calvert:

Your letter of October 17, 1934, supplemented by your  
letter of October 25th, received, with request for an opinion  
on the questions submitted therein. We are herewith setting  
forth both of said letters, as follows:

(October 17th)

"I am writing you or your office in behalf  
of my constituents; Mayor, Councilmen and  
Citizens of the City of Kahoka, Mo.

"They are about in the act to publish notice  
to bidders in their P. W. A. Work of the  
construction of a Public Sewerage system.  
They having contracted with U. S. Govern-  
ment loan to carry and construct a Public  
Sewerage for within the City of Kahoka,  
Missouri; amounting in the sum of \$35,000.  
00 and a Grant. Section #7074 does not  
state the number of weeks that the Notice  
contractor - bidders should be published,  
to appear in a weekly newspaper.

"A written opinion coming from your office  
would be much appreciated, and requested  
for the reason the City is contracting with  
the Government."

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(October 25th)

"I am sorry to have furnished you inadequate  
information in my letter of October 17,  
1934 relative to length of the period of  
advertising for bids on a municipal project

in a fourth class city.

"As you may know it seems that legal questions pertaining to engineering matters are not within the scope of every day practice of lawyers in small cities, and information which has been gathered on the above matter is somewhat contradictory. Therefore, in order that my City may be correct, I am attempting to be more explicit in my request.

"The situation is as follows:

- "1. Kahoka, Missouri is a City of the fourth class.
2. Direct Obligation bonds have been voted for the construction of a sewer system and disposal plant.
3. Plans and specifications have been prepared.
4. The estimated cost of the project is \$47,000.
5. The P. W. A. has approved the project and made the allotment for it.
6. There are three weekly newspapers in the City of Kahoka.
7. The P. W. A. standard requirements as to advertising for bids is that on all project, 'Notice to Contractors' (advertisement for bids) must be published for two weeks prior to the receiving and opening of bids.
8. What is the State requirement relative to the length of time which such advertisement must be published? In other words, does the advertisement 'Notice to Contractors' have to be published in two, three, four or more, consecutive weekly issues of a local newspaper? Also does it have to be published in a newspaper having a minimum circulation of any stated figure?"

We note that the City of Kahoka, a city of the fourth class, has voted direct obligation bonds for the construction of a sewer system and disposal plant; that the plans and specifications have been prepared and the estimated cost of the project is \$47,000. Your inquiry is: What do the Missouri statutes require as to the length of time advertisements for bids or notices to contractors should be published, the number of weekly insertions, and whether said publications should be published in a newspaper having a minimum circulation or not?

It is our opinion that Section 13745, R. S. Mo., 1929, is applicable to the questions submitted in your letter; which section is as follows:

"No contract shall be made by an officer of this state or any board or organization existing under the laws of this state or under the charter, laws or ordinances of any political subdivision thereof, having the expenditure of public funds or moneys provided by appropriation from this state in whole or in part, or raised in whole or in part by taxation under the laws of this state, or of any political subdivision thereof containing 500,000 inhabitants or over, for the erection or construction of any building, improvement, alteration or repair, the total cost of which shall exceed the sum of ten thousand dollars, until public bids therefor are requested or solicited by advertising for ten days in one paper in the county in which the work is located; and if the cost of the work contemplated shall exceed thirty-five thousand dollars, the same shall be advertised for ten days in the county paper of the county in which the work is located, and in addition thereto shall also be advertised for ten days in two daily papers of the state having not less than fifty thousand daily circulation; and in no case shall any contract be awarded when the amount appropriated for same is not sufficient to entirely complete the work ready for service. The number of such

November 1, 1934.

"public bids shall not be restricted or curtailed, but shall be open to all persons complying with the terms upon which such bids are requested or solicited."

We think that the publication should be in accordance with this section. Of course you should follow the requirements of the ordinance as to the publication of notice to contractors, if such requirement is made in the ordinance, and you should also follow the Public Works Administration standard requirements as to advertising for bids, which, as you stated in your letter, must be published for two consecutive weeks prior to the opening and receiving of the bids. Inasmuch as the work contemplated will exceed thirty-five thousand dollars, the same should be published for ten days in the county paper of the county in which the work is located, and this means at least for two consecutive weeks; and in addition thereto shall also be advertised for ten days in two daily papers of the state, having not less than fifty thousand daily circulation, the first insertion in each instance to be at least ten days prior to the day of letting.

We do not have all of the proceedings or the transcript which you are required to furnish to the State Auditor, yet we think that from the statements outlined in your letters that if you will follow the provisions of Section 13745, supra, no questions can be raised as to the legality of the notices to the contractors.

If there is anything further we shall be glad to comply with your request.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

ERH:EG

TAXATION: Publication for sale must be made in reasonable time before date of sale under Senate Bill 94, Laws of Mo. 1933, page 445.

November 3, 1934. 11-5



Hon. Tom Carlton  
Treasurer & Ex-Officio Collector  
Barton County  
Lamar, Missouri

Dear Mr. Carlton:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

"We only have a very few tracts of land that have delinquent taxes for 1928, and our Prosecuting Attorney has advised us that if we prepare a list of 1928 and 1929 taxes and publish them before the last day of the year for next November 1935 sale, we are within the statutes and I want to know if that is your opinion also."

A portion of Section 9952B, page 430, Laws of Missouri, 1933, referring to the publication of the lists of delinquent lands and lots, provides as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November." \* \* \*

It appears that the object of the delinquent list of lands and lots is to serve two purposes. First, to notify the delinquent taxpayer that delinquent taxes remain unpaid against his land and that unless the taxes are paid the tax certificate will be sold therefor; and second, to advise any party who might be interested in the purchase of the delinquent tax certificate as to the location of the land for which the certificate is to be sold, and the amount of taxes, penalties and costs due thereon. It should be kept in mind that the purpose

of any notice should have some reasonable relation to the transaction or proceeding of which it purports to give notice, and unless such relationship exists the notice will have failed to serve its purpose.

While it is true that the foregoing section provides that the last publication shall be at least fifteen days prior to the First Monday of November, this provision must be given a reasonable construction so as to effect the purpose contemplated by the legislative act. It was undoubtedly intended by the Legislature that the last publication should be made on some day between the 13th and 20th of October. A publication so made would give the delinquent taxpayer a last opportunity in which to raise a fund sufficient to redeem his property, and would also notify prospective bidders of the sale a reasonable time prior to the sale, so that they could make necessary arrangements to appear and bid at the sale. The notice as suggested in your communication would be entitled unconstitutional for either of the objects suggested because too great a time elapses between the date of the publication of the notice and the date of the sale. True, such a construction might be placed upon the bare words of the statute, but as stated in the case of *State ex rel. vs. Trustees of William Jewell College*, 234 Mo. 299-313, quoting from *Sutherland on Statutory Construction*:

" \* \* 'A thing which is within the object, spirit and the meaning of the statute is as much within the statute as if it were within the letter. Conversely, a thing which is not within the intent and spirit of a statute is not within the statute, though within the letter.' "

In our opinion this provision of Senate Bill 94 must be given a reasonable construction, one which will effectuate the purpose of the act. As stated in *Bowers vs. Kansas City Public Service Company*, 41 S. W. (2d) 810-815:

" \* \* 'In construing a statute, the court must, if possible, give effect to the whole and every part thereof, provided the interpretation reached is reasonable, and not in conflict with the legislative intent.' \* \* "



Hon. Tom Carlton

-3-

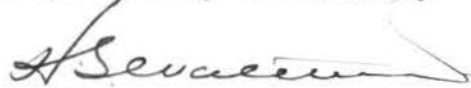
November 3, 1934.

The construction suggested in your communication fails to satisfy either of the requirements of the foregoing rule.

CONCLUSION.

It is therefore the opinion of this office that the publication suggested in your letter would be insufficient and would not be a valid foundation for a lawful sale next November of delinquent taxes under the provisions of Senate Bill 94, page 425 et seq. Laws of Missouri, 1933.

Respectfully submitted,



HARRY G. WALTNER, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKittrick  
Attorney General

HOW:MM

NEPOTISM:-Death of wife of director terminates the relation-  
SCHOOL ship by affinity, unless there are children of  
DISTRICTS: the marriage now living.

12-27  
December 19, 1934.



Hon. Clarence Cannon,  
Member of Congress,  
House Office Building,  
Washington, D. C.

Dear Mr. Cannon:

We are acknowledging receipt of your letter  
in which you inquire as follows:

"One of my constituents who is a  
school director in a country district  
school desires to vote for one of the  
candidates for appointment as teacher  
in the school but write to know if  
under the inhibition prohibiting di-  
rectors from voting for relatives by  
'consanguinity of affinity' he can  
vote for a relative of his first wife  
now deceased. He has married the  
second time and wishes to know if the  
relatives of his deceased wife come  
within the prohibition proposed by  
the law.

Shall appreciate it if you can ad-  
vise me in response to his inquiry."

Section 13 of Article XIV of the Constitution  
of Missouri, provides as follows:

"Any public officer or employe of this  
state or of any political subdivision  
thereof who shall, by virtue of said  
office or employment, have the right  
to name or appoint any person to ren-  
der service to the State or to any  
political subdivision thereof, and who  
shall name or appoint to such service  
any relative within the fourth degree,  
either by consanguinity or affinity,  
shall thereby forfeit his or her office  
or employment."

The foregoing constitutional provision makes  
no provision regarding the death of the spouse as to whether  
or not the relationship by consanguinity or affinity is  
terminated. We find no decisions in this State dealing

with the subject. However, the rule as laid down in 3 C. J. is as follows:

"Death of the spouse terminates the relationship by affinity. If, however, the marriage has resulted in issue who are still living, the relationship by affinity continues."

The decisions are not harmonious regarding this question. Some of the decisions hold that while the relationship by consanguinity is in its nature incapable of dissolution, that the relationship by affinity ceases with the dissolution of the marriage which produced it. Kirby v. State, 89 Ala. 63; Blodget v. Brinsmaid, 9 Vt. 37. On the other hand some decisions are to the effect that the relationship by affinity is not dissolved where there are issue of the marriage who are still living. Dearmond v. Dearmond, 10 Ind. 191; Bigelow v. Sprague, 140 Mass. 425.

Not having any decision on the question in this State and not being able to reconcile all the decisions of other jurisdictions, we have followed the rule, in interpreting Section 13 of Article XIV, that the death of the spouse does terminate the relationship by affinity unless there are children of the marriage still living. The reasonable rule would seem to be that death should terminate the relation by affinity because it terminates the marriage from which the relationship of affinity exists. However, as a matter of public policy, where there are children of the marriage still living, then it would seem that the relationship should continue even though one of the spouses has passed away.

It is our view, therefore, that the death of the wife of the director would terminate the relationship by affinity unless there are children of the marriage now living.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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ROY McKITTRICK,  
Attorney General.

FWH:S

SCHOOLS:-Under Section 9261, R. S. Mo. 1929, the maximum levy for school purposes is sixty-five cents in districts other than town districts.

2-1  
January 30, 1934.



Mr. C. H. Carson, Secretary,  
Grandview Consolidated Schools,  
King City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"The board of the Grandview Consolidated School, Number 1, Gentry County, has requested me to write you in regard to what would be the legal levy for a consolidated school. We have a levy of \$1.10 for school purposes. The Bell Telephone Company states it is illegal and refuses to pay the full amount. They will pay 65 cents for school purposes plus 20 cents for the bond and interest.

Please inform me as to whether or not the board can collect the full amount."

The Attorney General is only authorized to render official opinions to state officials and Prosecuting Attorneys. While we cannot render you an official opinion in this matter, we advise you that Section 9261, R. S. Mo. 1929, provides that:

\*\*\*\*"The levy thus extended shall not exceed in any one year as follows: For building purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for school purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for sinking fund, forty cents on the one hundred dollars' valuation, and a sufficient amount to pay interest on bonded indebtedness; \* \* \*"

You do not state whether this is a town school district and from your letter we assume that it is not. Such being true, for school purposes, the maximum levy for districts other than town districts is sixty-five cents on the one hundred dollars;

for sinking fund the maximum of forty cents and a sufficient amount to pay the interest on bonded indebtedness. If, by your letter, you mean that you have levied \$1.10 for "school purposes," that is in excess of the maximum permitted. However, if the \$1.10 levy includes the levy for school purposes, sinking fund and interest on the bonded indebtedness, it may be legal, depending upon whether or not the levy for "school purposes" and sinking fund exceed the maximum set out in the above section.

Very truly yours,

  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
Attorney General.

FWH:S

AUTOMOBILE DEALERS:

Automobile dealer opening branch offices in other towns must register each place of business maintained under a different dealer's registration number.

131  
January 30th  
1934.



Hon. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol,  
Jefferson City, Missouri.

Dear Mr. Casteel:-

We have your letter of November 27, 1933, in which was contained a request for an opinion as follows:

"This question in regard to the use of dealers registration plates has been raised:

'A dealer as defined in Section 7759 R. S. Mo. 1929, whose home office is in Kansas City, has opened branches in several other towns. Must each place of business maintained by this dealer be registered under a different dealer's registration number?'

"Thanking you in advance for your opinion in this matter, I am,

Yours very truly,

B. M. CASTEEL,  
Superintendent,

By L. B. Howard,  
Captain, Cmdg., HQ Troop."

In construing the statutes on the matter above referred to we are not aided by any decisions of this state. The matter has never been before our courts nor so far as we are able to discern has it been before the courts of other states. A study of the wording of the statutes in question, however, and an application of the rudimentary principles of statutory construction enables us to render what we consider to be an equitable and just opinion in the premises.

Section 7759, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 7759. Definitions.--Wherever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed

and taken to have the meanings ascribed to them as follows: \* \* \* \* \* 'Dealer'. Any person, firm, corporation, association, agent or sub-agent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers."

Section 7764, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 7764. Registration of manufacturers and dealers.--(a) All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the commissioner for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain: (1) a brief description of each type of motor vehicle manufactured, or dealt in, including character of the motive power, amount thereof, stated in figures of horsepower, and (2) the name and business address of such manufacturer or dealer; (3) the weight and rated live load capacity of commercial motor vehicles."

With advertence to the part of Section 7759 above quoted we notice that the definition of the word "dealer" is quite broad. The use of the words "agent or sub-agent" is illuminating. Obviously this could not mean that every salesman working for a motor car company would have to have a separate dealer's registration. The only sensible meaning then is that the words must refer to separate places of business, or branches, of a central dealer.

Proceeding then to the part of Section 7764 above quoted we see the provisions for the registration of "dealers" as defined in the earlier section. Since it was the obvious intent of the legislature to include such branches in the definition of the word "dealer", this provision must apply to such branches. Let it further be noted that subsection (a) (2) of Section 7764 provides that "the name and



Hon. B. M. Casteel

-3-

January 30, 1934.

business address" of the dealer shall be furnished in the application. This information is, of course, required so that each registration number and duplicate numbers may be allocated to cars operating out of a single definite address, thereby providing a check-up for the various agencies of law enforcement. It will also be noted that the words "name and business address" are not pluralized but are singular, evidencing the legislative conception that business could only be done at one address under the same registration number.

The above reasoning proceeds in harmony with the obvious legislative intent and since it is a wellknown rule of law that, where possible, effect must be given to the legislative intent expressed or implied, we feel that our view must be in accordance therewith. In other words, if a dealer opens branches in other places each place of business must be under a different registration number.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General.

Approved:

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Attorney General.

*me - w*  
**MOTOR VEHICLE - REGISTRATION - SHALL TRACTORS AS DEFINED IN THE MISSOURI MOTOR VEHICLE LAW, OPERATED IN CONNECTION WITH ROAD CONSTRUCTION WORK ON HIGHWAY? BE REQUIRED TO CARRY REGISTRATION PLATES?**

*See Op.  
8/24/35  
7/7/36*  
*1-31*  
January 31, 1934.

FILE  
14

Honorable B. M. Gasteel, Superintendent  
Missouri State Highway Patrol  
Jefferson City, Missouri

Attention: Captain L. B. Howard.

Dear Sir:

Your letter of inquiry, January 30, 1934, relative to the arrest of A. W. Mosley while operating a tractor on highway 71 without license plates, received; stating further this operation was not a construction activity since the tractor was merely being moved from a finished road job to a project about to start, and desiring an opinion as to whether or not a tractor, as defined in the Missouri Motor Vehicle law as stated herein is required to carry registration plates.

In reply to your inquiry, I will state first that Section 5264, as amended by Session Acts of 1931 at page 304, gives the following definition:

"(a) The term 'motor vehicle', when used in this act, means any automobile, automobile truck, motor bus, truck, bus, or any other self-propelled vehicle not operated on driven upon fixed rails or tracks."

Section 7761, R. S. Mo. 1929, says:

"(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registra-

tion on a blank to be furnished by the commissioner for that purpose,  
\* \* \* \*.

"(b) Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or a set of plates, bearing such number."

Under Section 7776, R. S. Mo. 1929, the last paragraph of sub-section "b" provides that

"in special cases motor vehicles whose weight, including loads, exceed those herein prescribed may be operated under special permits granted as hereinafter provided."

And paragraph "g" provides:

"Farm tractors when using the highways in traveling from one field or farm to another or to or from places of delivery or repair are exempt from the provisions of this article relating to registration and display of number plates, but shall comply with all the other provisions hereof."

These parties cannot claim, as an excuse that this was a farm tractor under the last above quoted paragraph.

They cannot claim that they were actually working on the highway as they had finished the work they were working on, so that they were not in the employe of the State

Section 7767, R. S. Mo. of 1929, states that the commissioner shall issue certificates for all cars owned by the State of Missouri and shall assign for each of such cars two plates bearing the words "State of Missouri, Official Car \* \* \* ", with the number inserted thereon, which plate shall be displayed on such cars when they are being used on the highway. This section also provides:

"No officer, or employe of the municipality, county or subdivision, or any other person shall operate such a motor vehicle unless same is marked as herein provided, \* \* \* \*".

The general purpose of the law is to require every person operating a "motor vehicle" ( hereinbefore defined) to carry a tag or plate bearing numbers easily identified and checked up on (in case of accidents or other mishaps). The statute should be construed accordingly and its general purpose, when being construed, should not be overlooked.

Ross v. Kansas City St.Jos. Ry.Co., 111 Mo. 19,  
Supply Co. v. Smith, 182 App. 1.c. 238,  
Downing v. La Shot, 202 App. 1.c. 515,  
Keene v. Wyatt, 160 Mo. 1.c. 16.

It is our opinion under the circumstances detailed and from the fact they failed to have a special permit, and that they failed to have regular plates, or failed to have special license plates mentioned and provided for as herein above referred to, as they do not come under any exceptions of the law herein referred, they would be and are required to carry registration plates when on the highway under the facts above enumerated, and are liable under the law for failure to do so.

Yours very truly,

APPROVED:

ROY McKITTRICK  
Attorney-General.

GEORGE B. STROTHER  
Assistant Attorney-General.

GBS/J

TAXATION - Last assessment defined, - Formula for determining  
1934 rate for county purposes.

<sup>3-14</sup>  
February 28, 1934.



Hon. J. R. Cary  
County Clerk  
Carroll County  
Carrollton, Mo.

Dear Sir:

We have your request of February 19th, 1934,  
for an opinion upon the following facts:

."What assessment shall be used in determining the county rate and increase in rate under Section 9873? Apparently the Supreme Court in 300 S. W. 274 attempted to base the computation of the county rate on the "last completed assessment" which for 1934 would be the 1933 assessment.

When the 1934 rate is fixed by the County Court in May, only the real and personal property assessments have been fixed, while the utility and merchants and manufacturers assessments are not fixed until in September or October.

Some contend that the real and personal property assessments for 1934 and the utility and merchants and manufacturers for 1933 shall be used in determining the rate. Some even contend that the 1934 assessment shall be estimated and rate computed on it.

It seems to me that the "last completed assessment" means the complete assessment

#2 - Hon. J. R. Cary

of property for one year and of course in May of 1934 the only complete assessment is that of 1933.

What assessment shall we use in increasing our rate under the ten per cent limit over the previous year's levy as authorized by Section 9873?

For the purpose of this opinion, we are dividing it into two divisions.

1. The meaning of "last assessment".
2. The formula for determining the 1934 rate for county purposes.

I.

THE MEANING OF "LAST ASSESSMENT".

Section 11 of Article 10 of the Missouri Constitution, in part, provides:

"The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes,"

Since Section 9873, R. S. Mo. 1929 is copied from the above constitutional provision, limiting the amount that any County Court may levy annually for county purposes, the valuation referred to in Section 9873 means the last full assessment. The Supreme Court of Missouri en banc (1927), in State ex rel. v. St. Louis S. F. Ry. Co. 300 S. W. 274, 1. c. 276, said:

"There is nothing in article 10, Sec. 11, of the Constitution, which requires the assessment, made in the year the levy is made, and in the year in which the taxes are payable, to be taken as and for the 'last assessment.' The term 'last assessment' means the last completed assessment. The Wabash Case so holds. See also, State ex. rel. Carthage v. Hackmann, 287 Mo. 184, loc. cit. 188, 229 S. W. 1078; Steinbrenner v. St. Joseph, 285 Mo. 318, loc. cit. 325, 226 S. W. 890; State ex rel. Dexter v. Gordon, 251 Mo. 303, loc. cit. 309, 158 S. W. 683. It must therefore be regarded as finally settled in this state that the words 'last assessment,' as used in article 10, Sec. 11, and in article 10, Sec. 12, of the Constitution, mean the last completed assessment."

The term 'last assessment' is merely an arbitrary measuring rod which is not necessarily accurate at the time it is applied. In fixing the limit of indebtedness under article 10, Sec. 12, the 'assessment next before the last assessment' is used as the measuring rod, notwithstanding the actual assessed value in the taxing district may have markedly increased or decreased between the date of such 'assessment next before the last assessment' and the time when the particular bonds are voted. \* \* \* \* \*

"Thus the county court is at least authorized and empowered to make the levy for county purposes at its May term and, in fixing the rate of such levy, the court is governed by the last assessment, which means the last assessment completed at the time such levy is made. It can mean nothing else. If the assessment for the current year is completed at the time the levy is made, well and good. That assessment can be used as the measuring rod to ascertain the rate which can legally be levied. If the assessment for the current year is not complete at that time, then the completed assessment for the previous year must be used."



#4 - Hon. J. R. Cary

It is, therefore, the opinion of this office that the term "last assessment" means the last full assessment, including all forms of property subject to taxation, and for the purpose of the 1934 levy is the 1933 assessment made as of June 1st, 1932 and thereafter.

## II.

### THE FORMULA FOR DETERMINING THE 1934 RATE FOR COUNTY PURPOSES.

Section 9873 R. S. Mo. 1929, in part, provides:

"the county court shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any county court or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year."

It must be borne in mind that any tax levy on real and personal property is subject to the limitations, based upon "last assessments", as set out in Article 10, Section 11, of the Missouri Constitution.

The fair meaning of Section 9873, above set out, is that the taxes levied on real and personal property in a county

#5 - Hon. J. R. Cary

for 1933, limits the right of the county court to collect on real and personal property taxes for 1934 from such property totaling more than ten per cent in excess of the 1933 anticipated revenue.

The maximum rate of levy for 1934 is determined by multiplying the 1934 rate times the last full assessment, divided by the unit of value for assessment purposes, the result of which will equal the previous year's anticipated revenue plus ten per cent. Stated in other terms:

$$\text{Rate} \times \frac{\text{Last full assessment}}{100} = \text{Previous year's anticipated revenue, plus ten per cent.}$$

Assuming the following facts for the purpose of the formula:

R = Rate of levy.

\$4,000,000 = last full year assessment (1933).

\$100.00 = Unit of value for tax purposes.

\$16,000 = Previous year's anticipated revenue.

The formula would then read:

$$R \times \frac{4,000,000}{100} = (16,000 + 10\%) = \$17,600.$$

R = 44¢ rate.

It is, therefore, the opinion of this office that the 1934 maximum rate of levy for county purposes can be fixed by the

#6 - Hon. J. R. Cary

county court, subject to the constitutional limitation, only at such a figure so as to produce no more than 110% of the previous year's anticipated revenue from real and personal property.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

MOTOR VEHICLES - Caterpillar tractor using highways as "motor vehicle" under R. S. Mo. 1929, Chap. 41, and operator thereof as "chauffeur" or "operator" under such chapter.

12-27  
December 18, 1934

Mr. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol,  
Jefferson City, Missouri.



Dear Sir:

Your letter of November 26, 1934, has been received in which you request an opinion on the matters involved in a letter to you from Captain Thomas L. Leigh, "C" Troop, which letter you enclosed. Captain Leigh's letter is as follows:

"1. Request that we be furnished with an opinion of the Attorney-General upon the following state of facts:

2. Certain contractor engaged in building state highway in Jefferson County, is using a number of Caterpillar Tractors pulling dump wagons for the purpose of moving dirt. These vehicles operate over and along portion of the old highway and portion of the new highway on their trips, hauling dirt from the bar pit to the place of making the fill.

3. The question has come up as to whether or not these tractors should have a motor vehicle license and whether or not the operators should have a chauffeur's license. Trucks engaged in this same kind of operation are required to have state license and their operators are required to have chauffeur's license. The truck operators feel that they have been discriminated against, while the tractor operators contend that their vehicles are not motor vehicles within the meaning of the law. We feel that this matter could be clarified by an opinion of the Attorney-General and if one can be secured, we will govern ourselves accordingly."

I

TRACTOR AS MOTOR VEHICLE

A. Chapter 41 of the Revised Statutes of Missouri of

2. Mr. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol.

December 18, 1934.

1929 deals with the registration or licensing of motor vehicles. In Section 7759 of such chapter the term "motor vehicle" is defined as follows:

" 'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors."

The caterpillar tractor is a self-propelled vehicle and it is not operated on tracks. Nor is it within the exception because only farm tractors are excepted. If the statute had said "except tractors" then all tractors would have been excepted, but by excepting farm tractors all other tractors were left within the definition of the term "motor vehicle". A farm tractor under the same section of the statutes is defined as "a tractor used exclusively for agricultural purposes", so that the caterpillar tractor described in your letter could not be regarded as a farm tractor. Therefore, the conclusion is inescapable that the caterpillar tractor described in your letter is a motor vehicle within the meaning of R. S. Missouri 1929, Chapter 41.

This conclusion is strengthened by comparison between the definition above quoted from Section 7759 and the definition of the term "motor vehicle" contained in R. S. Missouri 1919, Section 7551, wherein such term was defined as meaning "all vehicles propelled by any power other than muscular power, except traction engines, road rollers, fire extinguishing apparatus and engines, police patrol wagons and ambulances, owned or operated by municipal corporations of the state, and such vehicles as run only upon rails or tracks." This comparison immediately shows that the 1929 statute has enlarged the definition of "motor vehicle", and especially noteworthy is the omission of the term "traction engines" which appears in the 1919 statute, which might well have applied to a caterpillar tractor.

B. R. S. Missouri, 1929, Section 7761 provides that "every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state \* \* " shall register the same and shall pay registration fees according to a scale fixed in such statute. Such Section 7761 is within Chapter 41 and consequently the definition of Section 7759 above quoted applies, so that the caterpillar tractor described in your letter is a motor vehicle under Section 7761, and according to your letter it is being operated upon the highways of this State, and consequently must be registered and registration fees must be paid on account of it.

## II

### REGISTRATION OR LICENSE FOR CHAUFFEUR OR OPERATOR

R. S. Missouri, 1929, Section 7759, contains the following definitions:

3. Mr. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol.

December 18, 1934.

" 'Chauffeur.' An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire."

" 'Operator.' Any person who operates or drives a motor vehicle."

Section 7765 requires persons desiring to operate motor vehicles as chauffeurs to register, and Section 7766 requires persons desiring to operate motor vehicles as registered operators to register. If the persons operating the caterpillar tractors referred to in your letter are either chauffeurs or operators within the meaning of the definitions just quoted, then they should register under whichever of these two statutes is applicable.

In conclusion it is our opinion that a caterpillar tractor pulling a dump wagon for the purpose of moving dirt and operating on the highways of this State, is a motor vehicle within the meaning of R. S. Missouri, 1929, Chapter 41, and must be registered as a motor vehicle and pay registration fees as such, and that a person driving the same as a chauffeur or operator within the meaning of Section 7759 of such chapter should likewise be registered.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

✓

MOTOR VEHICLES: Who must register where exclusive use granted by legal title holder to another for a period greater than ten days successively.

1-14  
December 31, 1934.

Hon. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol,  
Jefferson City, Missouri.



Dear Sir:

A letter has been received from you dated November 26, 1934, enclosing a letter from Captain Thomas L. Leigh, Commanding Officer of Troop "C", Kirkwood, Missouri, dated November 22, 1934. In your letter you asked us for an opinion on the question raised by Captain Leigh's letter which was by whom must an application for registration and state license plates be made for a truck owned by Hertz-Drivursel Stations, Inc. and leased by it under its form lease for an indefinite period, or from year to year, or in fact for any period in excess of 10 days. We have had the benefit of examining the form of lease involved which is designated Hertz-Drivursel Stations Truck Lease Service Agreement, Form 233 B, and the memorandum furnished by Thompson, Mitchell, Thompson & Young as attorneys for that company.

I

LANGUAGE OF STATUTES

R. S. Missouri, 1929, Section 7761 (repealed and re-enacted Laws of 1933, Extra Session, page 98, irrelevantly) provides in part that "every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this State, shall, except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration", and upon the payment of certain fees for such registration shall receive a certificate of registration and license plates. Also contained in Chapter 41, R. S. Missouri, 1929, entitled "Motor Vehicles" is Section 7759 which contains the following definition:

"Owner'. The term owner shall include any person, firm, corporation or association, owning or running a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively."

Fitting this definition of the word "owner" into Section 7761 where it is used, Section 7761 would read as follows:



Hon. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol.

December 31, 1934

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"Every person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively, of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration \* \* "

Section 7761 in its expanded form would thus require every title holder or lessee or exclusive user for a period greater than 10 days, to apply for registration for a motor vehicle. A person having the exclusive use of a motor vehicle for a period in excess of 10 days for present purposes will be treated as a lessee. Where there is a lease of a motor vehicle, by hypothesis there must be another person who holds the legal title, for by definition the lessee has not legal title.

Only one person would be required to be, or would be allowed to be, the registered owner of one motor vehicle at a given time, as the disjunctive "or" is used. The lessee must be the registrant in the contemplation of the statute in some instances, as there is always an owner of the legal title, and it would make the entire phrase "or renting \* \* or having the exclusive use thereof under lease, or otherwise, \* \* ", meaningless to require and allow the owner of the legal title always to be the registrant and the sole registrant, since only one registrant at a time is required or contemplated.

The 10 day proviso shows that all lessees are not to be considered owners, and consequently are not to apply for registration, but only those whose right to exclusive use has some substantial duration, and the General Assembly fixed 10 days as the line of demarcation.

Therefore, Section 7761, as expanded by the definition provided for it, must mean that registration must be applied for by the legal title holder unless he has leased the vehicle for at least 10 days successively, in which event it is to be registered not by the legal title holder but by the lessee.

## II

### PURPOSE AND FUNCTION OF STATUTES

The word "owner" or "owners" is used 42 times in Article I of Chapter 41 of R. S. Missouri, 1929, for which the definition above quoted is provided. We are unable to discover from these various uses

December 31, 1934.

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any particular instance where the word was used in such a way as to compel the inference that it was for that particular use that the definition was provided, and consequently the definition would seem equally applicable to each such use of the word in this article, including the use in Section 7761.

The lease to be encompassed by the Hertz form is described by the attorneys for that company as a lease from year to year, although as far as the lessee's obligations are concerned, it is more like a contract of purchase by installments, for by its terms the lease provides that it is to continue indefinitely subject to termination at the end of any one year, but if the lessee elects to terminate he is obligated to purchase the vehicle. The lease likewise provides for exclusive use, control and right to possession by the lessee. Thus the lessee, for a period of at least a year, and probably for the life of the vehicle, is, as far as the beneficial use is concerned, in the nature of an owner. Why should the State be interested as much in the disposition of the legal title as between the parties, as it is interested in having a record of the person who is responsible for the operation of the vehicle and has the exclusive use thereof for a long period of time?

R. S. Missouri, 1929, Section 7774, provides that where a motor vehicle is sold the new owner cannot keep or use the license plates for over five days, and that upon transfer of ownership the certificate of registration then in force shall expire, and that the new owner must get new license plates by applying for registration in his own name. Assuming that the transaction provided for in the Hertz-Drivursel<sup>f</sup> form is not a sale, Section 7774 shows that the intent of the statutory scheme of registration for motor vehicles was not an intent to see that every motor vehicle was registered as a chattel, and that the ownership thereof is immaterial, or that only revenue was sought by the registration scheme, but it rather shows that the statute intends that each successive owner must for himself and as a personal obligation register the vehicle of which he is the owner. Further confirming this construction is another part of Section 7774 under paragraph (c) thereof which, in dealing with a certificate of ownership, provides that "the certificate shall be good for the life of the motor vehicle or trailer, so long as the same is owned or held by the original holder of the certificate"

The memorandum furnished by the attorneys for Hertz-Drivursel<sup>f</sup> Stations, Inc. cites as the only authorities which they have been able to discover certain cases decided by the Supreme Judicial Court of Massachusetts as follows:

Downey v. Bay State St. Ry. Co., 225 Mass. 281, 114 N.E. 207;  
Hurnanen v. Nickse, 228 Mass. 346, 117 N.E. 323;  
Temple v. Middlesex & B. St. Ry. Co., 241 Mass. 124, 134 N.E. 641;  
Murray v. Indursky, 165 N. E. 91;  
Liddell v. Standard Accident Ins. Co., 187 N.E. 39.

Hon. B. M. Casteel, Superintendent,  
Missouri State Highway Patrol.

December 31, 1934.

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All of these cases were personal injury suits and all involved the question of whether registration by one having a special property in a motor vehicle, usually under a conditional sale, was sufficient registration to enable the vehicle in question to escape treatment as a trespasser on the highways of Massachusetts. Massachusetts has the rule that a person operating a motor vehicle not properly registered is a trespasser on the highway and liable, irrespective of negligence, to a person who has not been guilty of contributory negligence in an accident. (Balian v. Ogassian, 179 N. E. 232 (Mass. 1931)). This rather harsh rule would seem to furnish a strong incentive to a court to uphold the validity of the registration where to do otherwise would impose liability, irrespective of fault and causation, and consequently these Massachusetts cases are not highly persuasive. The lease in question is not a conditional sale such as was involved in the Massachusetts cases above cited, and the Massachusetts doctrine about registration in cases other than those involving conditional sales is far from liberal. See Fairbanks v. Kemp, 226 Mass. 75, 115 N. E. 240 (1917); Shufelt v. McCartin, 235 Mass. 122, 126 N.E. 362 (1920); Hanley v. American Ry. Express Co., 244 Mass. 248, 138 N.E. 323 (1923); see also Kaufman v. Hegeman Transfer Etc. Co., 100 Conn. 114, 123 Atl. 16 (1923).

In the memorandum furnished to us it was suggested that to require the lessees of Hertz-Drivursel Stations, Inc. to apply for registration on all trucks leased by them, and especially on substitute trucks furnished while other leased trucks were being repaired, might result in the necessity of as many as 25 different licenses in a single year. While this might be a severe burden, still it would seem that very few repairing or renovating operations require over 10 days.

In conclusion it is our opinion that a person having the exclusive use of a motor vehicle, by lease or otherwise, for a period greater than 10 days successively, is required under R. S. Missouri, 1929, Section 7761, as repealed and re-enacted by Laws of 1933, Extra Session, page 98, to apply for registration in his name of such motor vehicle, and that during such period registration in the name of the owner of the legal title thereof is neither sufficient as a registration for such vehicle nor permissible.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney General

APPROVED:

ROY MCKITTRICK  
Attorney General

RELATING TO AUTHORITY OF OTHER STATES TO PROHIBIT SALE OF  
"PRISON MADE" GOODS WITHIN SUCH STATES - DETERMINED IN THE LIGHT  
OF THE COMMERCE CLAUSE AS AFFECTED BY THE POWER CONFERRED UNDER  
THE HAWES-COOPER LAW.

2-17

February 14, 1934



Hon. Robert L. Chapman  
Superintendent of Industries  
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your request as follows:

"Please give us your opinion  
whether the State of New York,  
under the provisions of the fol-  
lowing law, can successfully pro-  
hibit sale of prison made goods  
by the State of Missouri to private  
industry in New York.

"69. SALE OF CONVICT MADE GOODS.

No goods, wares, or merchandise, man-  
ufactured, produced or mined wholly  
or in part by prisoners or convicts,  
except by prisoners or convicts on  
parole or probation, shall be sold in  
this state to any person, firm, as-  
sociation or corporation except that  
nothing in this section shall be con-  
strued to forbid the sale of such  
goods produced in the prison institutions  
of this state to the state, or any po-  
litical division thereof, or to any  
public institution owned or managed  
and controlled by the state, or any  
political division thereof as provided  
in section one hundred eighty four of  
the correction law."

I.

The New York statute, as quoted, if applied to interstate commerce shipments, is not repugnant to the Constitution of the United States with reference to commerce between the states.

The question presented in your request must be determined in the light of the operation of the commerce clause as effected by the power conferred upon the states by what is known as the Hawes-Cooper Law (Act of January 19, 1929), which provides as follows:

"All goods, wares, and merchandise, manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or Territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or Territory be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or Territory, and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."



From the above statute it would appear that Congress, by virtue of its regulating authority, caused a shipment of goods, wares, and merchandise, manufactured, produced, or mined wholly or in part by convicts or prisoners, in interstate commerce, to become subject to state authority after arrival and delivery in such State or Territory of the United States and remaining therein for use, consumption, sale or storage, shall be subject to the operation and effect of the laws of such State or Territory to the same extent and in the same manner as though such goods, etc. had been manufactured, produced, or mined in such State or Territory.

It is also apparent to us that the exertion by the State of New York of its authority to prevent the sale of goods, wares, or merchandise manufactured, produced, or mined wholly or in part by prisoners or convicts is lawful in view of the provisions conferred upon the states by the Hawes-Cooper Law, supra (Act of January 19, 1929). By said act, the transportation into the State of New York, on arrival and delivery in said state, is divested of its interstate character and subject to the operation and effect of the laws of the State of New York, to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in the State of New York, and are not exempt from the operation of the state laws of the State of New York by reason of being introduced into the State of New York in the original package.

No greater restrictions are placed upon "prison made goods" of other states than is placed upon goods of a like character manufactured, produced, or mined in their own state; except that they permit such goods manufactured, produced, or mined in their own state to be sold to the state and all political subdivisions thereof.

New York state, in determining what shall be an offense against the better interest, peace and dignity of its citizens, is exercising its own sovereignty, and not that of any other state.

We have reached the conclusions, as herein expressed, based upon the following authorities:

In the case In Re: Rahrer, 140 U. S. 1. c. 554, the court in part said:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. \*\*\*\*

The Fourteenth Amendment, in forbidding a State to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation. \*\*\*\*

The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress



might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States. \*\*\*\*\*

In *United States v. Lanza*, 262 U. S. 377, the court said in part as follows:

"Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

In *McCormick & Co. v. Brown*, 286 U. S., 1. c. 143, the court said in part as follows:

"If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the state law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the State for the purpose of there consummating their sales without the described permits would fall directly within the terms of that Act."

Hon. Robert L. Chapman

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February 14, 1934

Our construction of the New York statute is of little importance.

We have endeavored herein to answer your question, assuming that said statute is not in conflict with any constitutional provisions of the State of New York.

Very truly yours,

W. W. BARNES  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

WFB:FE

STATE BOARD OF HEALTH: Supervision of School of Cosmetology. Sections 9089 and 9092 R. S. Mo. 1929 not applicable to public schools

May 7, 1934

5-10



State Board of Health of Missouri  
Division of Cosmetology & Hairdressing  
Jefferson City, Missouri.

Attention: Mr. H. G. Cherry, Director.

Gentlemen:

This department acknowledges receipt of your letters and enclosures of March 8, 1934, and April 2, 1934. Your letter of March 8th reads as follows:

"I am writing you to ascertain, whether or not, under our law Section 4, schools known as Vocational schools can operate and teach cosmetology, hairdressing and manicuring without securing a certificate from this Department to do so. In other words, can we require them to pay the \$100.00 that is charged the regular schools who are teaching this profession, and require them to teach the same as is required of other schools under our supervision."

Your letter of April 2nd reads as follows:

"Your letter received and in answer will enclose herewith the letter received by this Department from the Hadley Vocational School which will give you all the information desired."

Your enclosure dated January 24, 1934, and signed by Mr. F. J. Jeffrey, Assistant Superintendent in Charge of Vocational Education, reads in part as follows:

"Application is herewith made for a license permitting a school, or class, of cosmetology in the Hadley Vocational School, which is a part of the St. Louis public school system."

May 7, 1934.

"The rules and regulations governing licensed schools as issued by the State Board of Health of Missouri, effective March 1, 1931, will be at all times complied with, and the school will be, of course, open to the inspection of the officials of your Board.

\* \* \* \* \*

"Pupils who have a four-year high school education before applying for admission to the cosmetology class will be required to complete 1200 hours of practical instruction. The entrance qualifications described in our cosmetology circular will be found to be higher than the minimum given on page 5 of the Board of Health pamphlet. The course of study will be made consistent with that laid down in the pamphlet or modified to meet the conditions of your Board.

"The Board of Education of the City of St. Louis has appropriated \$3000 for equipment, the purchase of which is now under way. The suitability of this equipment has been passed upon by a committee of beauty shop owners of this city. The specifications are at this time open to inspection by your office and the installation must be made in a manner satisfactory to you.

No teacher has as yet been selected. The application of a number are now being considered. The requirements which a teacher must meet in order to be employed in the vocational classes in the public schools is set forth on the attached circular. Sworn proof of a minimum of five years' experience as an operator will be required in order to meet the provisions of the Federal Smith-Hughes Law.

"No tuition will be charged for instruction in this class. Pupils will be required to pay for shop supplies, uniforms, and personal equipment. This charge, for other than equipment, is not to exceed \$5.00 for each term of twenty weeks. The enrollment in this class at the present will be limited to 35 pupils and the maximum for which the equipment is planned is fifty.

"The customer material upon which the pupils of the course will practice will be drawn from the girls matriculating in other courses in the Hadley Vocational School. The services of the class in cosmetology will not be open to the public. Charges for the cost of materials may be made to the pupil customers until such time as it is found that this practice is in conflict with any code which may be established for cosmetology schools or with the rules and regulations of your board.

" \* \* \* \* \*

Section 9089 R. S. Mo. 1929, requires a certificate of registration for the operation of a School of Hairdressing, Cosmetology and Manifuring, and reads as follows:

"It shall be unlawful for any person in this state to \* \* \* conduct a hairdressing or cosmetologist's or manicurist's school, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9092 R. S. Mo. 1929, sets out the requirements and qualifications that must be set before such certificate may be secured and states as follows:

"It shall be competent for any person, firm or corporation to apply to the state board of health for a certificate of registration of a school for any one or more of the classified occupations within this article upon the payment of a reasonable annual registration fee as determined annually by the said board but in no case to exceed the sum of one hundred dollars. No such school for hairdressers or cosmetologists within this article shall be granted a certificate of registration unless it shall attach to its staff a regularly licensed physician and employ and maintain a sufficient number of competent instructors, registered as such, but not less than one instructor to each twenty students, and shall require a course of training not less than one thousand hours over a period of six consecutive months for the classified occupation of hairdresser and cosmetologist and not less than one hundred fifty hours for the classified occupation of manicurist, such training to include practical demon-

strations, written or oral tests, and practical instructions in sanitation, sterilization and the use of antiseptics, cosmetics and electrical appliances, consistent with the practical and theoretical requirements as applicable to the classified occupations as provided in this article.\* \* \* \*

I.

SUPERVISION OF PUBLIC EDUCATION  
VESTED IN BOARD OF EDUCATION.

Article XI., Section 1, of the Missouri Constitution provides for free public schools and reads as follows:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of xix and twenty years."

Article XI., Section 4, of the Missouri Constitution provides for a Board of Education and reads as follows:

"The supervision of instruction in the public schools shall be vested in a 'Board of Education,' whose powers and duties shall be prescribed by law.\* \* \* \*

In accordance with this constitutional mandate, the legislature has laid particular duties upon the Board of Education. Section 9379, R. S. Mo. 1929, provides that the board of education shall establish standards, inspect schools, and that the state superintendent must approve the schools. It reads as follows:

"That such board of education shall establish standards and annually inspect, as a basis for approval, all public prevocational and vocational schools, departments and classes receiving state or federal moneys for giving training in agricultural, industrial, home economics and commercial subjects, and all schools, departments and classes

receiving state or federal moneys for the preparation of teachers and supervisors of such subjects.\* \* \* \*

This Section directly places the inspection and supervision of vocational schools in charge of the Board of Education.

Section 9385 R. S. Mo. 1929, defines the term "vocational" in the following manner:

"The following words and phrases as used in the above section shall, unless a different meaning is clearly required by the context, have the following meanings:

"(a) Vocational education shall mean any education of less than college grade, the controlling purpose of which is to fit for profitable employment."

There can be no doubt but that the instruction contemplated by the City of St. Louis falls within the classification of a "vocational" school.

From the foregoing constitutional and statutory provisions, it appears that the regulation, control, supervision and inspection of the public schools, vocational and otherwise, are placed in the Board of Education. What effect then is to be given the statutes which apparently conflict with the duties and powers conferred upon the Board of Education? It is apparent that Section 9379 was enacted pursuant to Section 4 of Article XI of the Constitution, providing that the powers and duties of the Board of Education should be prescribed by law. On the other hand, we find Sections 9089 and 9092 conferring certain duties upon the Board of Health respecting the inspection and supervision of schools of cosmetology, hairdressing and manicuring.

The situation thus presented is somewhat akin in principle to the situation presented in the case of State ex rel. McDowell vs. Smith, 67 S. W. (2d) 50. In this case the Court considered the apparent conflict between the State Purchasing Agent Act and the Highway Act, which latter act was enacted pursuant to Section 44a of Article IV of the Constitution. The constitutional provision provides that the state highway bonds and the State road fund are to "be administered and expended under the direction and supervision of the State Highway Commission."



May 7, 1934.

In that case as in the instant case the problem was one of harmonizing the various statutes with the constitutional provision. As stated by Judge Hays in the Smith case supra:

"\* \* \* With reference to the purchase, and matters connected therewith and incidental thereto, of road material by the commission for use in the construction of state highways, which law prevails as between the State Purchasing Agent Act and what we shall term the Highway Act, if an so far as they may be found to be in conflict? The duty of the Court to reconcile and harmonize these statutes, as far as may be, is fully recognized; \* \* \* a fundamental rule of statutory interpretation requires that, if any provision of our constitution may be concerned in the premises, we give that interpretation of the statutes which will harmonize the statutory provisions with the Constitution.\*\*\*\*\*"

The constitutional provision of course must prevail and the statutes if possible harmonized with each other and with the constitution. In considering the constitutional provision in the Smith case supra, Judge Hays stated, 1. c. 57:

"\* \* \* The mandatory power conferred by the constitutional amendment is plenary in respect of the commission's power to purchase road construction material for the purposes stated therein. The grant conferring this power contains no delegation to the Legislature, or authority for legislative delegation, of that power or any part of it to any other state officer or agent. \* \* \* It need only be noted that the \* \* \* commission cannot be shorn of any part of its plenary discretion and power in the premises. Said Purchasing Agent Act not only purports to apply to supplies, but defines that term to mean 'supplies, materials, equipment,' etc., and is in seeming conflict, in respect of materials, with said Highway Act, and also, if construed to include materials purchased for highway construction, would impinge on said constitutional amendment. \* \* \*"

In the instant case no power or authority for legislative delegation is found and we feel that to place the supervision of vocational classes under the Board of Health will impinge upon Section 4 of Article XI. Therefore, if possible, some other construction must

be placed upon Sections 9089 and 9092 which will effectuate the purpose for which they were enacted and yet give full force and effect to the constitutional provision. As has often been said, the reason for the law is the life of the law. State ex rel. vs. Becker, 233 S. W. 641, 1. c. 649:

"\* \* \* There is a familiar maxim, uniform in its application, that the reason of the law is the life of the law, or, as the pedants put it, ratio legis est anima legis. By the reason of the law we mean, of course, the occasion or moving cause of its enactment. This is the touchstone of correct interpretation.\* \* \*"

Without question the necessity or moving cause for the enactment of the Cosmetologist Act was to regulate and supervise the occupation and instruction of persons desiring to enter the occupation, which school of instruction was conducted by those seeking a financial profit from such activity. The Cosmetologist Act was designed to insure competent instruction, safe places for instruction, proper, suitable and adequate equipment, and safe and sanitary conditions. Can it be said that there is any necessity for inspection and supervision to insure these things when the activity is conducted by the public school system of the State? We think not, and therefore feel that there was never an intention that this law be applied or construed to regulate or effect vocational instruction conducted by the public school system of the State.

## II.

### "PERSON" DOES NOT INCLUDE PUBLIC SCHOOL SYSTEM.

Our Conclusions heretofore reached are fortified by a further reference to Section 9089 of the 1929 revision. It is to be noted that this section provides:

"It shall be unlawful for any person in this state to conduct a \* \* \* school.\* \* \*"

This Section does not indicate an intention to include the public schools as possible violators of the provisions of the Act. It is recognized that the term "person" is not of itself sufficient to include the public schools. As stated in State ex rel. vs. Gordon, 231 Mo. 547, 1. c. 574:

May 7, 1934.

"\* \* \* a school district is but the arm and instrumentality of the State for one single and noble purpose, viz., to educate the children of the district--a purpose dignified by solemn recognition in our Constitution.\* \* \*"

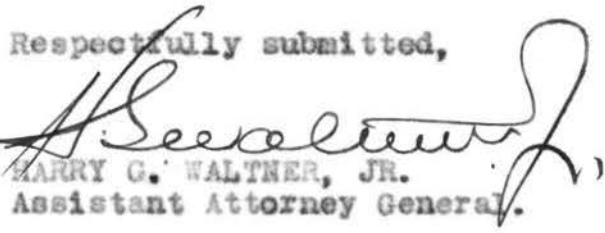
This is clearly stated in the case of Waddell vs. Board of Directors, 175 N. W. 66, L. C. 67, wherein it is stated:

"The defendant is a school corporation. It is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a "person" within the meaning of any bill of rights or constitutional limitation. It has no rights, no function, no capacity except such as are conferred upon it by the Legislature.\* \* \*"

CONCLUSION.

It is therefore the opinion of this office that the State Board of Health cannot require the payment by the Board of Education of the City of St. Louis of the registration fee provided for in Section 9092 R. S. Mo. 1929, and that the Board of Health is without power to require the same instruction as is required of other schools under its supervision.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK,  
Attorney General.

HGW:MM

MOTOR VEHICLE FUEL TAX: Consular agents and employees of a consulate are not exempt from the provisions of the Motor Vehicle fuel tax of Mo.

December 14, 1934



Hon. Roy H. Cherry  
State Inspector of Oils  
Jefferson City, Missouri.

Dear Mr. Cherry:

This department is in receipt of your letter of July 31 requesting an opinion as to the following state of facts:

"Attached herewith please find correspondence had with the State Department of Washington, the Shell Petroleum Company and the Mexican Consul at Kansas City, concerning the right of exemption from the motor fuel tax of consular agents and employees of the Consul by reason of a treaty signed at Havana, Cuba, between the American Government and the Government of Mexico on February 20, 1928, I also enclose a copy of this treaty.

I shall be pleased to have you advise me whether, in your opinion, the Mexican Consul and his agents are exempt from the Missouri Motor Fuel Tax by reason of this treaty."

Article 20 of the Convention signed at Havana on February 20, 1928 exempts consular agents from all tax, state, provincial or municipal, except such taxes as may apply to the possession or ownership of real estate.

Section 7794, R. S. Mo. 1929 provides:

"For the purpose of providing funds to complete the construction of and for the maintenance of the state

highway system of this state as designated by law, there is hereby provided a license tax equal to two cents per gallon of motor vehicle fuels as defined in this article used in motor vehicles of the public highways of the state, which license tax shall apply and become effective January 1, 1925."

Section 7795, R. S. Mo. 1929 provides:

"Every distributor shall for the year 1925, and each year thereafter, when engaged in such business in this state, pay to the state treasurer an amount equal to two cents (2¢) for each gallon of motor vehicle fuels refined, manufactured, produced or compounded by such distributor and sold by him in this state, or shipped, transported or imported by such distributor into and distributed or sold by him within this state during each year."

It is clear from a consideration of these two sections of the Motor Vehicle Fuel Tax Law of Missouri that the tax is a license tax imposed upon the distributor and not a property tax paid by the consumer. While the distributor is permitted to charge the purchaser of motor fuel with the amount of this license tax, the distributor alone is made responsible for the payment and collection of this tax to the State of Missouri.

It is therefore the opinion of this department that Consular Agents, as well as the employees of a consulate who are nationals of the state appointing them, are not exempt from the provisions of the Motor Vehicle Fuel Tax Law of the State of Missouri and that no deduction of this tax should be allowed by reason of their official position.

Respectfully submitted

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

COUNTY COURT; CONTRACTS AND APPROPRIATIONS.

1. No statutory authority for county court to contract for two years county printing.
2. Can appropriate funds and employ county nurse on certain conditions.
3. Can appropriate for County Farm Bureau on certain conditions.

December 15, 1934.



Mr. Homer G. Chaffin,  
Prosecuting Attorney Webster County,  
Marshfield, Missouri.

Dear Sir:-

We have your letter of November 21, 1934, requesting an opinion as follows:

"I am herewith submitting three questions on which I would like to have a legal opinion:

(1) Can the present County Court of my county, before January 1, 1935, contract for the next two years' county printing?

(2) Can they appropriate funds and employ a county nurse?

(3) Can they make the usual statutory appropriation for two years or more for the County Farm Bureau.

I am making these inquiries at the request of my county court and would appreciate receiving this opinion on or before December 1, 1934."

We regret that due to the pressure of work in this office we have been unable to answer your inquiry before this date.

Article VI, Section 36, of the Constitution of Missouri provides that county courts shall transact all county and such other business as shall be prescribed by law, that is, by act of the legislature. A careful examination of the statutes of Missouri discloses to us no authority granted to the county court to make a contract for county printing for two years.

Homer G. Chaffin--#2

Dec. 15th, 1934.

The County Budget Law, Laws 1933, page 340, which embraces generally the provisions for expenditures and appropriations by counties, at page 350 and 351, seems to provide for the contracting for supplies and services not of a personal nature (among which printing should be included) only as such things are needed.

With reference to the appropriating of funds for the employment of a county nurse and for the County Farm Bureau, such appropriations can be made under certain conditions by the present county court unless the terms of any of the judges are due to expire at the end of this year.

In this connection, we refer you to Section 14 of the County Budget Law, Laws 1933, page 348-9, which provides in part as follows:

"In any year in which the terms of any of the judges of the county court expire, the budget shall be approved and the appropriation order made by the new court within thirty days after the beginning of the fiscal year."

If the terms of none of your county judges are expiring, the county nurse may be employed and paid under sections 9036, 9038 or 9039, Revised Statutes of Missouri, 1929. With reference to the County Farm Bureau appropriation, subject to the same condition, the enabling sections are sections 12616 to 12623, inc., Revised Statutes of Missouri, 1929.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

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Attorney-General



Relating:--To fee for registration of hairdressing cosmetologists's  
or manicurists Establishment or school.

2-17

February 16, 1934.



Hon. Roscoe Claycomb  
Representative Third District  
Jasper County  
2021 Wall St.  
Joplin, Missouri

Dear Sir:

We acknowledge receipt of your letter of February 8, 1934, in which you state and inquire as follows:

"I would like to have your opinion as to the interpretation of Section 9092 of the R. S. of 1929 in regard to the fee for a school under this section. The statute states that there is to be an annual registration determined annually by the Board of Health, but in no case to exceed \$100.00.

If a school opens for business on April 1st or July 1st or October 1st, what fee should the school be forced to pay that opens on April 1st, or the school that opens on July 1st what fee, and the school that opens October 1st what fee?

In other words this statute states that the fee shall not exceed \$100.00 annually, does that mean that regardless of the time of the year the school opens for business, even though in the month of December that the school has to pay \$100.00 for its license for the balance of the year, or does the statute mean that the time is divisible and that the school should only pay that part of a \$100.00 according to the proportionate time of the year left at the time the school opens.

I think this should be divisible and I am interested in what your opinion is so that I can act accordingly."

Section 9089 R. S. Mo. 1929, provides as follows:

"It shall be unlawful for any person in this state to engage in the occupation of hairdresser or cosmetologist or manicurist, or to conduct a hairdressing or cosmetologist's or manicurist's establishment or school, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9092 R. S. Mo. 1929, provides in part as follows:

"It shall be competent for any person, firm or corporation to apply to the state board of health for a certificate of registration of a school for any one or more of the classified occupations within this article upon the payment of a reasonable annual registration fee as determined annually by the said board but in no case to exceed the sum of one hundred dollars.\* \* \* \*"

It will be observed that the statutory provision as appears in Section 9092 supra, empowers the State Board of Health to determine the registration fee which may be charged annually to any person, firm or corporation for certificate of registration, to engage in the occupation of hairdressing, cosmetologist's or manicurist's to conduct an establishment or school within this state. Said fee not to exceed the sum of \$100.00 annually. 3 C. J. p. 197, defines the word "annually" thus; "year by year, by the year, yearly, each year, every year, once a year, once in every year."

Where a statute provided that every trust company shall pay annually for the privilege of exercising its corporation franchise a certain annual tax, it was held that the word "annually" did not show that the Legislature did not intend that a trust company should pay for any period of existence less than a year, and hence a trust company was liable for a tax although it had only been in business six days when the tax was assessed.

Poe vs. Miller, 85 A. pp. Div. 211-214.  
83 N.Y.S 185.

The word "annually" as used in the city charter of San Francisco, provided that the first general election for city officers shall be held in April, 1851, and thereafter "annually" at the general election for state officers does not mean a measure of time, but a succession of calendar years, and as the general elections are held in September the first officers elected in April only hold to such time; as the word annually has no relation to the first election held in April so as to make the one of the annual elections contemplated.

People vs. Brenham, 3 Cal. 477-488.

CONCLUSION.

Therefore, we conclude from the foregoing statutory provisions and the constructions herein set forth, that the annual registration fee as provided in Section 9092 supra shall be paid for the privilege of conducting a hairdressing or cosmetologist's or Manicurist's establishment or school as provided in Section 9089 supra, for a year or any fractional part thereof; as in our opinion the word "annually" does not mean a measure of time and has no relation to the time when paid, so as to make the one to be paid each year on the date first paid, and that said fee is not divisible.

Respectfully submitted,

W. W. BARNES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

WVB:MM

SENATE BILL 94; Taxation and collection of delinquent taxes in cities of the second class; unaffected by Senate Bill 94, Laws of Missouri, 1933.

L-5

June 4, 1934.



Hon. Roscoe Claycomb  
Representative Jasper County  
2010 Wall Street  
Joplin, Missouri

Dear Mr. Claycomb:

Sometime ago you requested an opinion of this office on the following matter:

"I am writing to request an opinion on the Jones-Munger Law of the Regular Session.

The City Attorney and the Commissioner of Revenue of the city of Joplin, a city of the second class having a special charter, are proceeding to collect delinquent taxes in the same manner and with the same penalties as were imposed under the old law. Prior to the passage of the Jones Munger Law, the City of Joplin imposed a penalty on Jan. 1 on taxes for the preceding year of 5% and interest 1% per month for each month of delinquency. The Commissioner of Revenue is continuing to do the same now.

Does the Jones-Munger Law apply to Joplin?

Another question regarding this bill is whether under it the interest is added at the rate of 1% per month but not to exceed 10% per year, or is 10% to be added in January and no more interest added until the following year? \* \* \* \*

June 4, 1934.

I wish to advise that sometime ago this office prepared a lengthy opinion to the State Tax Commission as to the operation and affect of Senate Bill 94 found at page 425 et seq. Laws of Missouri, 1933. It was held in that opinion that the effect if any this law has upon the procedure of the collection of delinquent city taxes is determined by the classification into which the city falls. We have held that cities of the first and second classes are not affected by this act, the reason for this being that specific provision has been made in Articles 2 and 3 of Chapter 38 for the enforcement of the payment of delinquent city taxes. No effort was made to repeal any of these provisions and there was no intention of the Legislature to do so as evidenced by the enactment.

Your Commissioner of Revenue in the City of Joplin is requiring a payment of penalty interest in the sum of one per cent per month on taxes not paid before January 1st by virtue of the provision of Section 6600 R. S. Mo. 1929. He is collecting a five per cent penalty by virtue of an ordinance passed pursuant to Section 6614 R.S. Mo. 1929. Neither of these Sections were repealed by the Jones-Munger Law. They stand as special enactments determining the penalties to be assessed upon delinquent city taxes in cities of the second class.

In view of our ruling on this matter your second question need not be considered as the provisions of Section 9952 Laws of Missouri, 1933, page 429, has no affect upon the collection of penalty interest upon your city taxes.

I herewith enclose to you an excerpt of the opinion of this office to the State Tax Commission dealing particularly with the affect of the Jones-Munger law upon proceedings to enforce delinquent taxes in cities. This will set out more fully the original basis for an opinion.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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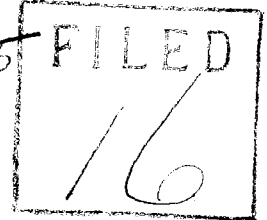
ROY McKITTRICK,  
Attorney General.

HGW:MM

SCHOOL DISTRICTS:-District organized under Sections 9325 and 9326, R. S. Mo. 1929, may, by vote, increase tax levy not to exceed \$1.00 on the \$100 valuation, and where district contains incorporated village the requirements of Section 9194, R. S. Mo. 1929, are fully met, even if it be held that said Section applies in respect to the amount of levy.

June 12, 1934.

Mr. David R. Clevenger,  
Prosecuting Attorney,  
Platte City, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I have before me a letter of yours dated May 19th, addressed to Mrs. Alice Scrivner of District Number 74, located in this county near Parkville, Missouri. The district has asked that I write for an official opinion of your office relative to the matter which you discussed in this letter of the 19th.

"Undoubtedly some of the facts were not given to you and I thought best to advise you of these before you wrote your opinion on this. I wish to call your attention first to Sections 9325 and 9326. You will note that at first set out of Section 9325 the wording is as follows: - 'Any Common School District containing within its boundaries a city, town or village, the plat of which has been filed in the Recorder's office of the county in which the same situate.' Now, District Number 74 was undoubtedly organized under this section and also Section 9326, and it is true there are two villages incorporated within the boundaries of this district now and also at the time of its organization, the plats being filed and of record at the time of organizing. Although, it is true that they were not organized under the town and village act and are not organized at this time under that act.

"That being true, I do not see how the case of Brown vs. Woods could possibly apply or any other decision as far as

that is concerned which I am able to find. If this is true, that is, is that all that is necessary to have a village within confines of the district irrespective of corporation (and it must be admitted that the statute does not state that it must be an incorporated town or village). Then undoubtedly under Sections 9325 and 9326, this district does not offend the constitutional provisions relative to levys and, therefore, can legally levy a one hundred cent on the One Hundred Dollars valuation.

"If I am correct, kindly advise me. I would appreciate your earliest possible reply to this as this matter is vital at this time in making up the tax returns and the clerk is holding this matter up until a decision can be had. For your information District Number 74 was organized under Sections 9325 and 9326 as a six-director school in the month of June, 1931."

Previously Mrs. Alice Scrivner of near Parkville, Missouri made an inquiry about this same proposition. While we could not render her an official opinion we did answer her letter. However, she did not state sufficient facts for us to be in a position to definitely decide the matter for her. The facts stated in your letter are as follows: That this school district was organized under Sections 9325 and 9326, R. S. Mo. 1929; that there were two incorporated villages within the boundaries of the district at the time of the organization; that the plats of the villages were on file and of record at the time of the organization and that the district was organized as a six-director district. You inquire whether, under the facts stated, it is legal for your district to levy a tax of \$1.00 on the \$100 valuation. Section 11 of Article X of the Constitution of Missouri, among other things, provides as follows:

\*\*\*\*\*For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters



who are tax-payers, voting at an election held to decide the question, vote for said increase.\*\*\*\*"

Section 9325, R. S. Mo. 1929, among other things, provides:

"Any common school district containing within its boundaries a city, town or village, the plat of which has been filed in the Recorder's office of the county in which the same is situated, or any district having two hundred or more children of school age by the last enumeration, may be organized into a town or city school district, and, when so organized, shall be a body corporate, and known as the school district of \_\_\_\_\_, and in that name may sue and be sued and possess the same corporate powers and be governed the same as other school districts except as herein provided;\*\*\*\*."

In State ex rel. Reynolds, v. Rickenbrode, 4 S. W. (2d) 436, which was decided by the Supreme Court en banc, a suit was brought by the collector to enforce the State's lien for taxes against land situated in consolidated school district No. 4 of Livingston County. The school district had voted a levy of 100 cents on the \$100 valuation for school taxes. The defendants contended that Section 11 of Article X of the Constitution the limit which could be voted for taxes was 65 cents on the \$100 valuation. The district was organized under Sections 11236 and 11237, R. S. Mo. 1919, which are the same sections as 9325 and 9326, R. S. Mo. 1929. The court held that the district was organized as a town district and that it could levy a tax by vote up to \$1.00 per \$100 valuation. The court says at page 437:

"The town of Avalon is situated in the district, but is not incorporated. The district has six directors and appellant claims that it comes, therefore, within the second class, a consolidated school district; that this is a legislative interpretation of the Constitution which makes school districts formed of cities or towns apply only to towns which are incorporated."

"At that time sections 11236 and 11237, R. S. 1919, were in force. They were enacted in 1895, and appeared in the Revised Statutes of 1909, in almost the same form as they appear in the Revised Statutes of 1929. Section 11236 provides that any common school district containing within its boundaries a

city, town or village, a plat of which has been filed in the recorder's office of the county in which the same is situated, or any district having 200 or more children of school age, by the last enumeration, may be organized into a city or town school district."

"In State ex rel. Buck v. Railroad, 263 Mo. 689, 174 S. W. 64, a suit to collect taxes voted beyond the 65-cent limit, the court construed the expression, 'Formed of cities and towns.' It was held that the expression did not mean that the district should be formed exclusively of cities or towns, but it might include contiguous territory outside the city limits. The opinion quotes what is now section 11236, providing that any city, town or village, the plat of which has been previously filed, etc., may be organized \* \* \* nothing is said in the opinion about the necessity of the town being incorporated; and a judgment for taxes in excess of the 65-cent limit was affirmed."

"In State ex rel. v. Gill, 190 Mo. 79, 88 S. W. 628, a proceeding to oust directors of a certain school district which had been organized under a statute which was the same as section 11236, R. S. 1919, it was held that the statute applied to an unincorporated as well as to an incorporated village. The district in the village, together with the territory which was attached to the district, was organized as provided in the act. It was held that the organization was legal. The opinion points out that the act had previously contained the word 'incorporated' preceding the word 'city' but it was amended in 1870, eliminating the word 'incorporated.'"

"We have here the Avalon district organized as a town district, and the only requirements regarding the town was that the plat of the town should be filed with the recorder of deeds. It was not necessary that the town should be incorporated. The subsequent statute (section 11123) could not annul an organization which had

already been made, even if it applied to such a case. The Avalon district, as a town district, was therefore properly incorporated under the Constitution and under the statute then in force. It provided for six directors, and it was brought within the proviso of section 11, art. 10, of the Constitution, which authorized the school tax to be increased by vote of the people to 100 cents on the \$100 assessed valuation."

In view of the foregoing decisions and citations contained therein we believe that it is immaterial whether or not the villages are incorporated so far as the right to organization under Sections 9325 and 9326 is concerned. It appears that this district was organized under the foregoing sections as a town district. Under Section 11 of Article 10 of the Constitution districts formed of cities and towns may, by vote, increase the tax levy, not to exceed 100 cents on the \$100.00 valuation. Under the case of State ex rel. Buck v. Railroad, quoted above, it is not necessary that the district consist exclusively of cities and towns, but districts may still be town districts even though they include contiguous territory outside of the city limits. We do not believe that Section 9194, R. S. Mo. 1929, which was formerly Section 11123, R. S. Mo. 1919, changes the situation so far as the validity of this tax levy is concerned. It was inferentially so held in the case of State ex rel. Reynolds v. Rickenbrode, above quoted.

Section 9194, R. S. Mo. 1929, classifies schools and section 3 of the Section provides as follows:

"All districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts."

Since there were incorporated towns within the boundaries of your district at the time of its organization, even under Section 9194 the district would be a town district within the provisions of the above constitutional provision. This district was organized under Sections 9325 and 9326, R. S. Mo. 1929 which provide for the organization of town school districts. While those sections do not make any requirement as to the district containing an incorporated city, such as Section 9194 requires, yet, as a matter of fact, the district did and does now contain incorporated villages within its boundaries and we believe that the constitutional and statutory requirements were met to the extent that by proper vote the district may increase its tax levy not to exceed 100 cents on the \$100.00 valuation.

It is therefore the opinion of this Department that under the facts as set forth in your letter the district in question could legally vote a levy of not to exceed \$1.00 on the \$100.00 valuation.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

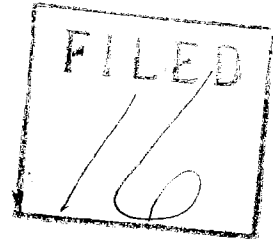
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ROY McKITTRICK,  
Attorney General.

FWH:MS.

SCHOOL DISTRICTS:-District organized under Sections 9325 and 9326, R. S. Mo. 1929, whether containing incorporated or unincorporated villag may increase tax levy by vote not to exceed \$1.00 on \$100.00 valuation.

June 20, 1934. 6-28



Mr. David R. Clevenger,  
Prosecuting Attorney,  
Platte City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you state as follows:

"This is to acknowledge receipt of your letter of June 12th relative to the tax question in District Number 74 located in this county. Unfortunately, I believe there is one confusion, which, from reading the copy of my letter, might not have been entirely clear to you, It is this: -

"There are no incorporated towns within the bounds of this district nor has there ever been, not even at the time of organization or since that time, however, there has been two plats filed of town and are of record in the Recorder's office here in Platte City.

"I note that you state on page five of your letter in the first paragraph thereof that it is not necessary to have an incorporated town within the district, and so this being true, I assume from the cases cited and from your opinion that this district undoubtedly could, without offending the Constitution, make a levy of one hundred cents on a one hundred dollar valuation, however, I thought best to call your attention to the fact that there are no incorporated towns to make certain that I was correct in assuming that even though that fact be true it would still make no difference as long as they were corporated under Sections 9325 and 9326.

"I am sorry for this confusion as I believe it is entirely my fault as my letter to you was not entirely clear on the question of incorporated towns."

June 20, 1934.

It is true that in your previous inquiry you stated there were incorporated towns in District Number 74. On June 12, 1934, we wrote you an opinion in which we held that the district which was organized under Sections 9325 and 9326, R. S. Mo. 1929, could, by a proper vote, increase the tax levy not to exceed \$1.00 on the \$100.00 valuation. You now state in the above letter that you were in error and that there are no incorporated towns in the district.

As we understand the decisions quoted to you in our opinion of June 12th it is not necessary, in order for a district to be incorporated as a town district under Sections 9325 and 9326, that there be an incorporated town within the district so as to come within the provisions of the Constitution which permits town districts, by vote, to increase the tax levy to \$1.00 on the \$100.00 valuation. We do not see that any useful purpose would be served to again quote to you the decisions quoted in that opinion. We believe that under the authority of State ex rel. Reynolds v. Rickenbrode, 4 S. W. (2d) 436; State ex rel. Buck v. Railroad Company, 263 Mo. 689 and State ex rel. v. Gill, 190 Mo. 79, it makes no difference, where a district is organized under Sections 9325 and 9326, whether the towns within the district be incorporated or not.

We would be of the opinion therefore that under the foregoing cases, as fully set out in our former opinion, even though there were no incorporated towns within this district, that the district organized under the foregoing sections, where the plat was duly filed, etc., would be a town district and that by a proper vote might increase the tax levy.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

FWH:MS

**TAXATION:** County Board of Equalization must equalize assessments to reflect true values.

April 12, 1934.



Hon. James V. Conran  
Prosecuting Attorney  
New Madrid County  
Portageville, Missouri

Dear Mr. Conran:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

"The County Court advises me that they have received instructions from you to increase the valuation of New Madrid County real estate approximately \$900,000.

The Court is of the opinion that this increase should be placed upon the lands in the various drainage districts which secured the benefit of the new tax law exempting unpaid benefits. In some instances the compliance with said law reduced the assessed valuation of certain tracts out of all comparison with the valuation of other lands. The Court feels that the placing of the increase upon such benefited lands should be far more equitable than to make a blanket increase on all lands, including those not benefited by said law."

I.

COUNTY BOARD OF EQUALIZATION  
MAY EQUALIZE VALUATION OF IN-  
DIVIDUAL TRACTS.

The powers and duties of the County Board of Equalization are found in Article II of Chapter 59 R. S. Mo. 1929. Portions of Section 9812 read as follows:



"Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and, having each taken an oath, to be administered by the clerk, fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation and assessment of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value:

\* \* \* \* \*

So as to assist the County Board of Equalization in their deliberations the Legislature has laid down rules to be observed by the Board as are found in Section 2813:

"\* \* \* First, they shall raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value,\* \* \* second, they shall reduce the valuation of such tract or parcels of land\* \* \* which, in their opinion has been returned above its true value as compared with the average valuation of all the real \* \* \* property of the county."

The foregoing sections clearly indicate that it is the duty of the county board of equalization to examine the assessment of the various tracts and parcels of land and to equably adjust their valuation of each tract so that each taxpayer makes his fair contribution.

Judge Ragland in the case of State ex rel. Thompson vs. Dirckx, 11 S. W. (2d) 38, stated as follows, 1. c. 41:

"\* \* \* The county board's authority is limited to equalizing valuations of property within a class. If it finds one piece of property within a class overvalued, it follows as a necessary implication that the remaining property in the class, or at least some of it, is undervalued. This for the reason that the valuation of the whole as a class, is fixed by the state board and that cannot be changed. A reduction of the valuation of one or more pieces of property

therefore requires a corresponding increase of the valuation of some or all of the remaining property in the class.\* \* \* \*

As indicated by the foregoing quotation, your County Board of Equalization, when it meets on the first Monday of April is further required to conform the assessed valuation of the real property in the County with the orders of the State Board of Equalization duly made. Section 9865 provides in part as follows:

"When the state board of equalization shall have completed its labors, the state auditor shall immediately transmit to each county clerk the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the personal property respectively, and also the value of the real and personal property of his county as equalized by said board; and the said clerk shall furnish one copy thereof to the assessor, and one copy to be laid before the annual county board of equalization.\* \* \* \*

Upon receipt of the information above referred to, the valuation as fixed by the county assessor or as equalized by the Board must be conformed to the requirements of the state board. See State vs. Bethards, 9 S. W. (2d) 603, 1. c. 605:

"The county board of equalization, under article 3, c. 119, sec. 12821, is authorized to hear complaints and equalize valuations made by the assessor. It is nowhere authorized to increase or reduce the aggregate valuation fixed by the state board of equalization. It has no power to assess. State ex rel. v. Baker, 170 Mo. 16c. cit. 391, 70 S. W. 872. Its duty is to equalize among the separate tracts the valuations fixed by the assessor. If the county board of equalization refuses to perform its duty, as it did in this case, then the statutes clearly contemplate that the county clerk shall adjust the valuation in accordance with the orders of the state board.\* \* \* \*

From these and other sections (Sec. 9792--providing for the assessment of all property at its true value in money at the time of the assessment) it is evident that the intent of the law is to insure an assessment of all property at its true value. Checks and balances have been provided-- the County Board of Equalization, The County Board of Appeals, The State Board of Equalization--to insure that the final assessed valuation on each piece of property shall be fairly and equably assessed.

## II.

### LOCATION IN DRAINAGE DISTRICT CANNOT BE SOLE BASIS OF INCREASE OF ASSESSMENT.

It is well established in this State that the Board acts judicially in equalizing the valuations. Railroad vs. McGuire, 49 Mo. 483. It has jurisdiction over all lands in the County and is required to make such adjustments of the valuations as may be necessary to effect the purpose of the law. Whether lands be located in drainage districts or not cannot be considered as the sole criterion for the raising or lowering of the assessment. However, if conditions exist by reason of which the valuations placed upon the land in a drainage district are below the true values, such assessments, should be equalized so that each tract will bear its fair burden of taxation. The same is true of land located elsewhere in the county. What we desire to emphasize is that each tract must be considered separately and upon its own merits, and if the valuation is high it should be reduced; if low, it should be increased.

If after equalizing the real estate in the County the total assessed valuation does not reach the figure set by the State Board of Equalization, the valuation of all tracts should be increased a uniform percentage so as to make the valuation conform to the order of the State Board of Equalization. See Black vs. McGonigle, 103 Mo. 192, 1. c. 198:

"\* \* \* The board has jurisdiction over all the lands in the county, and generally in practice its actions will be confined to raising and decreasing the assessed value of particular parcels, so as to bring all the lands in the county to a uniform value. The law, however,

clearly contemplates that all property shall be assessed at its true value (Sec. 6711), and if, in the opinion of the board, this has not been done, then the assessment may be increased so as to comply with the spirit and intention of the law. \* \* \* \* "

A similar question to the one now presented has been determined by the Supreme Court in the case of Columbia Terminals Co. v. Koeln, 3 S.W. (2d) 1021. In this case the State Board of Equalization ordered an increase of 20% in the assessed value of all personal property in the City of St. Louis. The City Board of Equalization raised the assessed valuation of all personal property, the 20% required, except the property belonging to the estates of deceased persons and minors. The plaintiff instituted this action in equity to restrain the defendant from collecting the increase and alleged (l.c. 1024):

"\* \* \* the action of the board of equalization of the City of St. Louis, and of the city assessor, in increasing plaintiff's assessment, was 'illegal, unconstitutional, and void', because, 'in not increasing the assessed value of the personal property, included in classes 3, 4 and 10 of the assessment list of St. Louis, belonging to the estates of deceased persons and minors, the principle of uniformity in taxation was disregarded \* \* \* "

The court overruled other contentions of the plaintiff, but recognized the inequality of omitting the property of the estates of deceased persons and of minors, and stated (l.c. 1025):

"Upon the record before us, we must indulge the presumption of right action on the part of the city board of equalization, and assume that, at the time it recommended that the assessor comply with the order of the state board of equalization, it had completed its work of equalization and had equalized all individual assessments, including the assessments of the estates of deceased persons and minors, as by law it was required to do. If such was done, it is

April 12, 1934

evident that any method except a blanket increase in all assessments sufficient in the aggregate to meet the aggregate increase ordered by the state board of equalization would produce discrimination. Lack of uniformity appears in the case stated by appellant because the assessor, whose duty it was to adjust the assessments in conformity with the order of the state board of equalization, in applying the increase to all assessments except the assessments of estates of deceased persons and minors, adopted a rule or system which was designed to operate and did operate unequally in violation of this section of the state Constitution, as well as section 1 of the Fourteenth Amendment of the Constitution of the United States."

As it was discriminatory in the above case for the assessor to arbitrarily omit the property of the estates of deceased persons and minors from the increase, so, in the instant case, it would be arbitrary and discriminatory to place the entire increase in valuation upon land in drainage or levee districts when the sole basis for such action is the fact that the land happened to be situated in a drainage or levee district.

From your request we assume that your County Board of Equalization is still in session and has not passed finally upon the assessment as made by the County Assessor. Of course, if the Board has met and adjourned Section 9817 R. S. Mo. 1929, would be applicable:

"In case the report from the state board of equalization be not received at or during the session of said county board, then it shall be the duty of the county clerk to adjust the tax books according to such report when received."

It would go without saying that in this instance the County Clerk could only adjust the books by increasing all property a uniform percentage necessary to bring the total assessed valuation of real estate to the figure established by the order of the State Board of Equalization.

April 12, 1934

CONCLUSION.

It is therefore the opinion of this office that there would be no authority to place the entire increased valuation upon lands in the various drainage districts merely because such lands were entitled to advantageous assessments by reason of the new tax law, but that the duty rests on the County Board of Equalization to see that each tract of land is assessed at its true value. After the true valuation of all tracts be established the valuation of all tracts must be proportionally increased so that the total assessed valuation of real estate conforms to the requirements of the State Board of Equalization.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

HGW:MM



ELECTIONS: Party living in county for number of years, leaving for purpose of teaching school, but who has always voted in said county and claimed same as his residence, is eligible to become candidate for County Sup't. of Schools.

11-5  
October 25, 1934.



Mr. A. Loyd Collins,  
Sup't. of Schools,  
McFall, Missouri.

Dear Sir:

This department is in receipt of your letter of September 13, 1934 wherein you make the following inquiry:

"I claim Henry County, Clinton, Missouri as my legal residence; but as I am engaged in the school profession, my family and I, of course, live where I am teaching for the nine months school term each year. In state and county election, when I am away, I send in my absentee vote.

I am superintendent of schools at McFall, Missouri, in Gentry County for the school term of 1934-35. In the spring I am contemplating making announcement as a candidate for the office of county superintendent of schools of Henry County, Missouri. I am writing you to ascertain if I am eligible to announce for the office. I shall appreciate an opinion from you relative to the matter at your earliest convenience."

Section 9454, R.S. Mo. 1929 relates to the election and qualification of a county school superintendent and is in part as follows:

"There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school



meeting held on the first Tuesday in April, 1923, and every four years thereafter; said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; \* \* \* \* "

Whether or not you are a citizen of Henry County is largely a matter of intention on your part, corroborated by your past actions relative to voting and claiming the same as your legal residence.

In the case of Hall v. Schoenecke, 128 Mo., l.c. 666, the court in discussing the status of a student, said:

"The evidence discloses the facts that two of the young men whose votes were rejected had formerly lived in the state of Kansas and came to Tarkio for the purpose of attending college. They were still students in college at the date of the election. Their parents, by whom they were supported and their tuition was paid, continued to reside in Kansas. One of them testified that he regarded Tarkio as his home, and expected to reside there after his education was finished. The facts in the case of the other voter were substantially the same, except that his parents resided in Missouri, though not in the City of Tarkio.

The constitution of the state provides that 'no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence \*\*\*\* while a student in any institution of learning'. This provision is but a declaration of the law as generally recognized. McCrary on Elections (3 Ed.), secs. 66-68; 6 Am. & Eng. Enc. of Law, 278.

Each case must, then, depend upon the facts. There is no doubt that a student may become a resident of the place where the college is located, though he only went there for the purpose of attending school. Whether he has done so or not,

depends upon all the facts and circumstances. The fact that he is supported and maintained by his parents, and spends his vacation with them, are strong, but not necessarily conclusive, circumstances to prove that he has not changed his residence. See cases cited in note 6 Am. & Eng. Encyclopedia of Law, p. 278. The question is, as in other cases, largely one of intention, though as to this, the evidence of the party himself is not necessarily conclusive.

The question in this case was one of fact for the court. There were no declarations of law asked or given, and we can not review the finding of the court, in law cases, upon questions of fact, when there is substantial evidence to support such finding."

It was also said by the court in the above decision that

"A temporary removal by a person, for the sole purpose of educating his children, without an intention of abandoning his usual residence, and with the intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as would, under the law, entitle him to vote at his temporary abode."

Likewise, in the case of Hope v. Flentge, 140 Mo., 1.c. 398-399, the court said:

"The challenges of E.W. Nelson and A.N. Payne were based upon the want of legal residence in the county. These parties testified to a residence of more than twelve months in the State and more than sixty days in the county and that they had their home in the county. It was a question of fact in which the intention of the parties largely entered and the circuit court found they were residents within the meaning of the law and that finding we will not disturb. Lankford v. Gebhart, 130 Mo. 621; Hall v. Schoenecke, 128 Mo. 661."

CONCLUSION

It is the opinion of this department that if Henry County was your legal residence for a number of years but that you left the county for the purpose of engaging in your profession of teaching school, have always voted in Henry County and have claimed the same as your residence, you would be eligible to become a candidate for the office of County Superintendent of Schools of Henry County.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

BANKS & BANKING: National Bank not permitted to pledge its assets to secure deposits of Northeast Missouri State Teachers College.

5-10  
May 9, 1934.



Mr. Byron Cosby,  
Business Administrator,  
Northeast Missouri State  
Teachers College,  
Kirksville, Missouri.

Dear Mr. Cosby:

This Department is in receipt of your letter of recent date in which you enclosed a letter from Mr. J. P. T. O'Connor, Comptroller of the Currency, and also in receipt of your supplementary letter of April 28th; which three letters are as follows, respectively:

"I am enclosing a copy of a letter sent out from the office of Comptroller of the Currency of the United States.

The Treasurer of the Northeast Missouri State Teachers College is cashier of the Citizens National Bank, Kirksville, Missouri, and his bank, the Citizens National Bank deposited \$30,000.00 in United States Government securities to protect the college funds while they are being collected, and waiting transmission to the State Treasurer. The Comptroller has ordered that we release these securities now held in escrow.

In order to comply with Sec. 9611 of Missouri Revised Statutes 1929 just what shall we do? The treasurer is willing to give personal bond as security that he will discharge his duties, but how can we protect ourselves in the depository?"

"COMPTROLLER OF THE CURRENCY

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To the Cashier:

The Supreme Court of the United States on February 5, 1934, rendered two decisions of the utmost importance to national banking associations.

In Texas & Pacific Railway Company vs. S. O. Pottorff, Receiver, it was held that 'national banks lack power to pledge their assets to secure a PRIVATE deposit.'

In City of Marion vs. Ben Sneed, Receiver, it was held that a 'national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; (Act June 25, 1930) and since then it can do so legally ONLY IF IT IS LOCATED IN A STATE IN WHICH STATE BANKS ARE SO AUTHORIZED.

You are accordingly expected to ascertain immediately whether or not state banks in your state could lawfully pledge assets to secure such deposits of public funds of the state or a political subdivision thereof which you may have and for which you have pledged assets as security. It will be advisable to obtain the opinion of your bank attorney in this connection and retain same on file for inspection by the bank examiner.

Any existing pledges of assets to secure private deposits must be immediately terminated.

Any pledges of assets to secure deposits of the state or political subdivision thereof, which pledges are determined to be beyond the power of the state banks must likewise be promptly terminated.

Respectfully,

J. F. T. O'CONNOR,  
Comptroller."

"Mr. Ethel Conner, Cashier of the Citizens National Bank of Kirksville, Missouri, is Treasurer of the Board of Regents of the Northeast Missouri State Teachers College, Kirksville, Missouri. As treasurer, he gives a surety bond of \$10,000. He deposits the college money as it is received and holds same in the Citizens National Bank until such a time as this money is remitted to the State Treasurer. In the past and at the present time the Citizens National Bank deposits with one of the St. Louis banks \$30,000 of government bonds as a surety to protect the deposits of the treasurer. Mr. Ethel Conner believes that the letter of Mr. J. P. T. O'Connor, Comptroller of Currency, demands that the bank recall these securities. If that is done, then we have no security against a depository. We would like to ask if it is possible under existing laws for the bank to make the deposit of these securities in order to protect our deposits. "

\*\*\*\*\*

The question asked in your letter is whether or not the Citizens National Bank of Kirksville, Missouri, has the power and authority to pledge its assets and securities to the treasurer of the Board of Regents of the Northeast Missouri State Teachers' College, Kirksville, Missouri, to secure funds deposited in said bank for said college.

Your request for an opinion calls for a construction of the amendment of June 25, 1930, Section 5153, of The National Banking Act, as shown at 12 USCA, Section 90, page 30, which is as follows:

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such

association is located in the case of other banking institutions in the State. (As amended June 25, 1930, c.604, 46 Stat. 809.)",

and the application of same that may be made to the Laws of Missouri. Prior to the Federal Act of June 25, 1930, National Banking Associations could not pledge their assets to secure funds deposited in their bank, except public deposits made under Section 45 by the Secretary of the Treasurer of the United States.

Justice Brandeis stated the rule in the case of City of Marion, Illinois vs. Sneed, 54 Sup. Ct. Rep. 421:

"For the reasons stated in Texas & Pacific Railway Co. v. Pottorff, 290 U. S. \_\_\_\_\_, 54 S. Ct. 416, 78 L. Ed. \_\_\_\_\_, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under section 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds. A national bank could not legally pledge assets to secure funds of a state, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a state in which state banks are so authorized. In some states national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the state or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do.; But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

Since the rendering of the decisions of the United States Supreme Court in the above case, and the case of Texas & Pacific Railway Co. v. Pottorff, 54 Sup. Ct. Rep. 416, National Banking Associations have been restricted in their powers to pledge their assets to secure deposits although it had been done with the knowledge and consent of the Comptrollers of Currency; which such



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pledging of assets was unauthorized. The Federal Act of 1930, supra, gives power to National Banking Associations to pledge their assets to secure deposits of public money of a state or political subdivision thereof of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

Now, the question is: Is the money deposited with the Citizens National Bank of Kirksville, Kirksville, Missouri, public money of a state, or a political subdivision thereof, within the meaning of the Federal statutes? We think not. This question in the last analysis would be determined, in our opinion, by the Federal courts as to whether National Banks have such powers.

The State of Missouri is divided into five districts for the purpose of establishing five Teachers Colleges, and the Northeast Missouri State Teachers College, located at Kirksville is the college for one of these districts and said college is under the control of "the Board of Regents for the Northeast Missouri State Teachers College." It is one of the duties of the Board of Regents to appoint a treasurer for such college, and to determine the amount of his bond, which shall be in amount not less than \$10,000.00. The statutes governing the money in the hands of the treasurer of said college do not provide for a depository bond to be given by the bank to secure the funds deposited by said treasurer, nor is provision made for the depositing of assets or securities of said bank to secure said deposits.

The statutes of Missouri have provided in many instances for the giving of depository bonds by banks to secure public funds deposited therein, also the pledging of assets is provided for by law in a great many cases to secure said funds so deposited, and we note a few of said provisions of the statute as follows:

The state funds - under Section 11469, R. S. Mo. 1929, as amended by Laws of 1931, page 378;

County funds - under Section 12188, R. S. Mo. 1929;

The funds of cities of the first, second, third and fourth class - under specific sections of the statute;

School funds of schools of cities, towns and consolidated schools - under Section 9362 R. S. Mo. 1929; and School funds in towns over 500,000

inhabitants - under Section 9580, R. S. Mo. 1929; and

State eleemosynary institutions - under Section 8679, R. S. Mo. 1929;

all of which provide for the giving of depository bonds or the pledging of assets, and it is significant that no statute has been enacted whereby a depository may be selected by the Board of Regents and a depository bond required or the pledging of assets and securities required by the bank to secure said funds so deposited.

Since no provision is made for a depository bond or the pledging of assets to secure the funds of your institution under the statutes of Missouri, we do not think that the National Bank in question could legally do so.

The Supreme Court of Missouri in the case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers College, 264 S. W. 698, decided that the money received by the college from certain fees from students and other work did not become State funds. In the above case the Board of Regents of the College in question had insured the buildings of the institution and the premiums had been paid out of unappropriated money in its hands, derived from student fees from Junior High School extension and other work. Two of the buildings burned, and the insurance companies paid the sum of \$110,000 to the Board of Regents; the state treasurer in an original proceeding for mandamus sought to compel the Board of Regents to pay this money into the State treasury, contending that under the Constitution and the statutes this money was state money and should be payable into the state treasury. The Supreme Court denied the writ and held in effect that it was not state money and should not go into the state treasury to be appropriated by the State Legislature at its will and pleasure.

We think that the money in the hands of your treasurer is not State money within the term "public money of the state" under the Federal Act of 1930, supra. We do not think that the counties comprising the district known as the Northeast Missouri State Teachers College is a political subdivision of the State of Missouri

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for the reason that it does not possess any of the attributes of a political subdivision and no functions of local government have been delegated to it. The Board of Regents possess no authority, neither does it exercise any jurisdiction over the counties of the district which we think is necessary to make the district a political subdivision of the State.

#### CONCLUSION.

It is, therefore, our opinion that the Citizens National Bank of Kirksville, Missouri, cannot pledge its assets and securities to the Board of Regents or the treasurer of said college to secure deposits made by them in said bank, and in event that it did so pledge its assets and securities, said acts would be ultra vires and would be no protection to the college in case of the failure of said bank and could be recovered by the receiver of said bank, as was done in the case of City of Marion, Illinois v. Sneed, supra.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

CRH:EG

WATERWORKS OWNED BY MUNICIPALITY - Cities of the Third Class - Power to use Surplus Earnings for other Municipal Purposes.

7-30  
July 20, 1934.



Honorable Harry M. Cornell, City Clerk,  
City of Carthage,  
Carthage, Missouri.

Dear Sir:

A request for an opinion has been received from you dated June 28, 1934, such request being in the following terms:

"I have a few questions which I would be very grateful to you to give me your decisions on. The reason for this is to try and help the taxpayers of our city, if possible.

1. If bond issues are voted by the people of a city and the ordinance calling for the election states that the interest and principal on bonds will be met by a direct tax against the taxable property of a city, is it legal or possible for a municipal water and electric plant to retire all or a part of any bond issues from the earnings of said plant?
2. If a municipally owned plant cannot help retire the bonds is it permissible for them to meet the interest on various bond issues?
3. Can a municipally owned plant contribute to the General Revenue fund in order to help keep up the streets and sewer systems of a city, thereby helping the city to employ laborers?
4. If a municipally owned plant cannot meet any of the questions asked in Nos. 1, 2 or 3, is it possible for a City council to pass an ordinance requiring the plant to pay a monthly license tax into the General Revenue Fund?

The City of Carthage has at the present time the sum of \$38,000.00 in delinquent taxes on the books and I do not see how it is going to be possible for the majority of the property owners to meet the taxes by November, and according to the new State law these properties are to be put up for sale on the first Monday in November.

It would be a great relief to our property owners if we would get some relief from our Water and Electric Light Plant.

Due to the hard times the City of Carthage has been out a considerable amount of money in purchasing materials and etc. for the C. W. A. men and also the cost of charity in our city has more than doubled in the past year."

You have likewise advised us that Carthage is a city of the third

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class, that of \$100,000 in face amount of bonds originally issued to pay for a city waterworks \$30,000 in face amount are now outstanding, and that said waterworks is managed and administered by a Board of Public Works.

The first three questions raised in your request for opinion can be resolved into two questions, I, the power of the city to use surplus revenue from its waterworks for other municipal purposes, and II, assuming such power to exist under the Constitution and laws of the State of Missouri the possible liability which might arise from such use.

I.

POWER TO USE REVENUE FROM WATERWORKS FOR OTHER MUNICIPAL PURPOSES

A. - RIGHT TO USE SURPLUS

We have found no statutes or decisions in the State of Missouri specifically authorizing use of surplus revenue from municipally owned waterworks for other municipal purposes, nor have we found any express statutory prohibitions against such use. We believe that the case of *Travaille v. Sioux Falls*, 240 N. W. 336 (S. D. 1932) states a suitable and proper rule of law to govern this matter. The court in that case said:

"A municipal corporation is not required to limit the rate to the actual cost of furnishing water, but may fix a rate which is reasonable, resulting in a profit to the municipality. 27 R. C. L. 1436; 1 Farham on Waters, p. 855, Par. 798; *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 345, 21 L. R. A. 519; *Twitchell v. Spokane*, 55 Wash. 86, 104 P. 150, 24 L. R. A. (N. S.) 290, 133 Am. St. Rep. 1021. It is not alleged that the city of Sioux Falls is charging an unreasonable rate for water. If the revenues derived from such rate are applied to municipal purposes, we fail to understand wherein the defendants have contravened any statutory provision." (240 N. W. 336.)

Revised Statutes of Missouri 1929, Section 7651, provides for the appointment of a Board of Public Works and Section 7654 authorizes such Board to "take charge of and exercise control over" such waterworks, and Section 7655 authorizes such Board to "exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said Board shall make all necessary regulations for the government of the Department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof." All of these three sections just named are applicable to cities of the third class.

Section 7661, also applicable to cities of the third class, authorizes them to erect waterworks, and Section 7668 provides that waterworks when acquired "shall be subject to the control and management of a board known as the 'Board of Waterworks Commissioners'".



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Section 7679 provides that "said board of waterworks commissioners shall have full ~~control~~ and management of said waterworks system \* \* \* \* and shall have power to fix the water rates so as to raise funds sufficient for the purposes mentioned in Section 7675, and to adopt such reasonable rules and regulations for the enforcement and collection thereof as it may deem expedient." There is some difficulty in interpreting Article 31 of Chapter 38 of Revised Statutes of Missouri, 1929, in which all of the above sections are included in view of the fact that in frequent instances the same subject matter, or substantially similar subject matter, seems to be found in several different statutes such as, for example, the authority and powers granted to manage city waterworks systems for cities of the third class which is contained in Sections 7654, 7668 and 7679, and see also Section 6821. However, for the purposes of the present inquiry the question of which one of these several statutes, or if all of such statutes, are applicable to the City of Carthage, is immaterial, because in none of such statutes is there any express limitation on the use by the City of Carthage of surplus revenue from its waterworks for other municipal purposes. It must not be understood that we express any approval of such action by the City or its Board in charge of the waterworks as would maintain water rates at a higher rate than necessary for the purpose of raising revenue for other purposes, in view of Section 7675 which provides that the rate shall be sufficiently high to raise money for certain named purposes, and does not include any purposes other than expense of maintenance, bond interest and retirement, but if the rates established by the City of Carthage or its duly authorized Board are reasonable, and if they result in a surplus over the statutory requirements of Section 7675, we find nothing in the statutes or decisions of this state prohibiting the use of a surplus for other municipal purposes, and we believe the rule of *Travaille v. Sioux Falls* set out above would apply, in the absence of some inhibition in the charter of the waterworks company.

#### B. RIGHT TO TAKE SURPLUS BY TAXATION.

In view of the conclusion above reached that as far as the law of this state is concerned there would be no absence of power in a municipality to use surplus earnings from waterworks owned by it for other municipal purposes, it may be unnecessary to consider your question 4 about the right to take such surplus by taxation, but we might say that we do not believe that such taxation would be justified. We have not before us the charter of the waterworks company, but absent some contrary provision in it we believe that because such waterworks plant is public property it would not be subject to taxation under the rule of law announced in *Foster v. Duluth*, 120 Minn. 484, 140 N. W. 123 (1913) which held that land owned by a city and used for a garbage plant was not subject to taxation, and that a tax sale under a tax lien attaching to such property before the city acquired it was void. The court said:

"After its purchase by the city in July, 1905, the property was devoted to public uses, and became public property. It was not thereafter subject to taxation. This is conceded by plaintiff. It is technically inaccurate to say that it was exempt from taxation, for the term 'exemption' rather presupposes a liability removed by some constitutional or statutory provision. The

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property is 'except,' not because of any such provision declaring it except, but because of its character as public property devoted to a public use. The property of the state and of its political subdivisions, arms, or agencies, such as cities within its borders, when used exclusively for public purposes, is not subject to taxation, in the absence of constitutional or statutory provisions making public property subject to the tax laws of the state. This is the undisputed rule; but it is no better established than is the proposition that proceedings for the assessment of taxes against public property, or for their collection by judgment and sale, are absolutely void. This is not only because the property was exempt from taxation, but because it was public property. A reason for the rule is that a sale of the property to enforce collection of taxes assessed against it would destroy its character as public property, to the public injury." \* \* \* \* \*

"\* \* the property is owned by the state, or by its agencies, is devoted to a public use, and is not subject to taxation \* \* "

"\* \* the taxation of public property owned by the state or its municipal divisions would mean that the state would be taxing itself in order to raise money to pay over to itself, and the reason, before suggested, that the collection of such taxes might result in destroying the public character of the property."

Revised Statutes of Missouri, 1929, Section 7631 exempting a waterworks system owned by a city from "seizure, levy or sale under any judgment, execution, decree of court or other proceeding in invitum" would seem to strengthen this view for by it the most effective means for collecting a tax even if it could be assessed would be removed, and it would hardly be presumed to be the intention of the General Assembly to authorize an uncollectible tax especially when the right to assess such a tax would need to be implied in derogation of the common law rule against taxation of public property.

## II.

### PRIVATE LIABILITIES FOR USE OF SURPLUS FOR MUNICIPAL PURPOSES NOT CONNECTED WITH WATERWORKS

It has been demonstrated above that the city would have power to use a surplus from its waterworks for other municipal purposes as far as the question of municipal power delegated by the State of Missouri is concerned, and that to do so would violate no principle of public law. However, there would be a serious danger as far as private liability is concerned in the use of a surplus in this manner. Revised Statutes Missouri 1929, Section 7669 provides that a city may authorize the issuance of bonds in payment for the construction of a waterworks plant which bonds "will be a first lien in the nature of a mortgage or vendor's lien upon all the property, rights, issues



5. Honorable Harry M. Cornell, City Clerk

July 20, 1934.

and revenues of the waterworks system when erected, or in any way appertaining thereto, including any and all funds that may have been or may be derived therefrom, whether in existence at the time of the issuing of the bonds or thereafter acquired." From this statute it appears that the holders of bonds issued to pay for the construction of a waterworks plant would have a first lien on all revenue from the plant. Of course, such holders only have a right to receive interest on the dates fixed in such bonds, and to receive the principal upon the date or dates of maturity of such bonds, and if these payments were made according to the provisions in the bonds there would be no right of complaint by such bondholders. However, if there should be a failure to meet any of the interest or principal payments according to the terms of such bonds, the bondholders would have a right, based on contract, to bring an action for a diversion of property which was subject to their lien, and if such bondholders reasonably felt that even though at present there is no default that there was a probability that such default would be caused in the event funds were diverted from the waterworks fund, such bondholders might be able to enjoin such diversion by an appropriate proceeding. Therefore, the only problem of the City of Carthage in connection with such transfer of funds would be in connection with the holders of bonds secured by the waterworks and its revenues, and the possibility of civil liability in connection with such transfer would be the problem to be faced by the city.

In conclusion it is our opinion that, assuming the water rates of the City of Carthage to be reasonable, any surplus income over and above the requirements of R. S. Mo. 1929, Section 7675 could be transferred by ordinance from the waterworks fund and used by the city for other public municipal purposes, but that holders of bonds issued to pay for such waterworks system would have a cause of action for a disturbance of their prior lien on such funds if by such transfer and use interest or principal payments on such bonds were prevented or endangered.

Yours very truly,

EDWARD H. MILLER

BHM-18

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

SCHOOL DISTRICTS:-Under Section 9607, R. S. Mo. 1929, a person holding a diploma conferring A. B. Degree from State Teachers' College is entitled to teach without further examination.

10-22  
October 13, 1934.



Mr. L. H. Coward,  
County School Superintendent,  
Springfield, Missouri.

Dear Sir:

We just received a letter from you dated October 10, 1934, making inquiry regarding the opinion which you requested. We wrote you on October 3, 1934 in answer to your inquiry. For some reason you have not received our reply. Our letter to you of October 2 is as follows:

"We are acknowledging receipt of your letter in which you inquire as follows:

'We have a case in this county of a person who has been employed to teach a rural school and according to our interpretation of Section 9234, Missouri School Laws, does not have a diploma or certificate entitling her to teach. This section, as you know, states that no teacher can be employed 'until he has received a certificate of qualification therefor signed by the County Superintendent of the county, the State Superintendent, or a certificate or diploma issued by the State University or some normal school of this state entitling him to teach in the public schools.' Section 9235 also makes it a misdemeanor and punishable by fine upon the teacher who teaches a single day and the directors who shall endorse or encourage such teacher. Again, Section 9209, states that when a teacher's contract is made that it shall be signed by the president and clerk of the board only when the teacher's certificate is filed with the clerk.

'The teacher to whom I refer has not, according to my interpretation of section 9234, a certificate entitling her to teach. However, she holds an

A. B. Degree from the State Teachers College here, but as I understand it the B. S. Degree in Education from one of our Teachers Colleges carries the certificate privilege and does entitle the holder to teach according to statements written in the diploma conferring this degree, but the A. B. Degree does not carry this privilege and all persons heretofore having the latter degree have arranged to secure a certificate from the State or County entitling them to teach. The person to whom I refer has refused to do this and is upheld in the matter by a member of her board who has referred to Section 9607 of the School Law which does seem to convey the idea that a teachers' college diploma conferred upon the completion of any prescribed course of study shall entitle the holder thereof to teach in this State without further examination.

'Members of the faculty of the State Teachers College here have always told us that the A. B. Degree did not entitle the holder to teach and made arrangements for their students to secure a certificate from the State or County.

'I should, therefore, like to have your interpretation at once as between Sections 9234 and 9607 since the impression has always been from the State Teachers College and from the State Superintendent's office that an A. B. Degree from a Teachers College does not entitle the holder to teach, since there is not such a statement in their diploma conferring the B. S. Degree in Education.'

The Attorney General is only authorized to render official opinions to the Prosecuting Attorneys and the officials of the State. While we cannot render you an official opinion in this matter, yet we are glad to answer your inquiry.

It is true that Section 9234, R. S. Mo. 1929, provides that no teacher shall be employed in a school supported by public funds until he has received a certificate

signed by the county superintendent of the county, and the state superintendent, or a diploma issued by the State University or some teachers' college, entitling him to teach in public schools. Section 9235, R. S. Mo. 1929, provides that the teacher violating section 9234 shall forfeit any compensation due under her contract and shall be deemed guilty of a misdemeanor punishable by fine, and the director who shall endorse or encourage said teacher in such unlawful conduct shall also be similarly punished. Section 9209, R. S. Mo. 1929, requires that teachers' certificates shall be filed with the clerk. Section 9210, R. S. Mo. 1929, sets out the provisions of the contract between the district and the teacher.

We believe, however, that the matter about which you inquire is definitely settled by Section 9607, R. S. Mo. 1929, rather than the above sections. Section 9607 provides as follows:

'Each board shall have power and authority to confer upon students, by diploma under the common seal, such degrees as are usually granted by teachers colleges and normal schools. A state teachers college diploma conferred upon the completion of any prescribed course of study shall entitle the holder thereof to teach in this state, without further examination, until revoked by the board of regents granting the same or by the county superintendent of public schools, or state superintendent of schools, for incompetency, cruelty, immorality, drunkenness, dishonesty or neglect of duty; boards of regents shall also have power to grant a certificate upon the completion of a course of study prescribed therefor, which certificate shall entitle the holder thereof to teach in this state for a period of two years from date unless sooner revoked for one or more of the causes specified. The provisions of this section shall apply to the school of education of the University of Missouri and to Lincoln University.'

The above section specifically provides that the state teachers' college diploma conferred upon a person

upon the completion of any prescribed course of study shall entitle the holder thereof to teach in this state without further examination. You state that the teacher to whom you refer holds a degree from a state teachers' college and if such be true, under section 9607, she is entitled to teach without further examination. Section 9607 does not require that her diploma shall be conferred by the Department of Education or that she hold a B. S. Degree. The section says, 'any prescribed course of study,' and, of course, the degree of Bachelor of Arts is based upon a prescribed course of study.

Upon the facts stated in your letter we are inclined to believe that the teacher has a right to teach."

Since writing that letter we received another letter from you which is as follows:

"Some days ago I wrote you a letter asking for an opinion on the legal status of a teacher in this county securing a certificate who holds an A. B. Degree from the State Teachers College here. This letter was acknowledged by you on a card mailed September 17 and signed by Edie Mae Widmer.

"Since that time I have talked to Doctor Roy Ellis, President of the State Teachers College here from which college this A. B. Degree was granted. Doctor Ellis points out under Section 9607 which defines powers of the Board of Regents that the statement in that section, 'A State Teachers College Diploma conferred upon the completion of any prescribed course of study shall entitle the holder thereof to teach in this State, without further examination, etc.' is different from an A.B. Degree. He also stated that the A. B. Degree which this teacher holds does not carry the diploma privilege to teach and can only do this except under a special arrangement by which the holder secures twenty hours in Education and thereby secures the certificate privilege. The particular teacher in this case has not done this.



"This explanation after a conference with him is not meant to reflect upon the inability of your department to ascertain facts but a feeling that perhaps his suggestion might be useful to you in arriving at a conclusion."

From your last letter you indicate that it is the opinion of the president of the normal school that the A. B. Degree does not entitle the holder thereof to teach. Section 9607, R. S. Mo. 1929, however, confers upon the board the right to confer by diploma such degrees as are usually granted by teachers colleges and normal schools, and provides that such a diploma conferred upon the completion of any prescribed course of study shall entitle the holder thereof to teach in this state. The section does not provide that the degree must be that of B. S. The Statute provides that the holder of a degree of any prescribed course of study shall be entitled to teach. This certainly was intended to cover the degrees conferred by the schools. It may be that the curriculum of the school does not provide that a course in education is required as a foundation for the A. B. Degree, and it might have been the practice to require holders of A. B. Degrees to acquire a certificate. However, in due respect to the interpretation which has been placed upon this section by the officials of State Teachers Colleges we do not see how you can read into this section a requirement that the teacher hold any particular degree. The section is very broad and says that the holder of any degree from a teachers college shall be entitled to teach. The Legislature, no doubt, presumed that in conformity with this section of the Statutes the officials of the teachers colleges would require the taking of certain courses which would qualify the recipient of all degrees to teach. If such had not been done or was not good educational policy it appears to us that the matters should be remedied by the schools in furnishing the degrees, rather than by an interpretation which is contrary to the spirit of the Statutes.

The diploma which is conferred by the school is simply evidence of the completion of a prescribed course of study. The Statute does not contemplate that a diploma conferring one degree shall give the right to teach and the diploma conferring another shall not give the right to teach. It plainly states that a teachers college diploma conferred upon the completion of a prescribed course of study shall entitle the holder to teach. The only interpretation we can give the section is to follow the express direction in the Statute. As we view it, whenever the state

teachers college confers a degree upon one of its students that entitles such student to teach without further examination. Of course, the holder of a B. S. Degree may be better qualified to teach than one with an A. B. Degree, but those are matters to be taken into consideration along with the other qualifications of the applicant.

It is our opinion, as stated above, that this person has complied with the Statutes and we do not believe that any civil or criminal action could be successfully maintained under these circumstances.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

FWH:MS



STATE HIGHWAY PATROL: Responsibility in cases where automobile strikes live stock on highway.

FILED

18

November 9, 1934.

Missouri State Highway Patrol,  
3rd and Quincey,  
Sedalia, Missouri.

Attention: Officer Paul E. Corl

Gentlemen:

A request for an opinion has been received from you under date of November 3, 1934, such request being in the following terms:

"We have had much controversy about fixing responsibility in cases where stock has been hit by automobiles while said stock was on the Highway right of way.

Would you please quote the statutes governing such cases and give any other information which might help in clearing up the matter."

We have examined the laws governing the Missouri State Highway Patrol (Laws of 1931, page 230, as amended by Laws of 1933, page 409) which define the duties of your Department. We are unable to discover any criminal statute imposing any liability in the event an automobile should strike an animal on a highway of this State, absent an intent on the part of the motorist to strike such animal, or an intent on the part of the custodian of the animal to cause injury to motorists, which we assume do not exist in the cases referred to by you. The only other kind of liability for such an act would be civil liability as distinguished from criminal liability, in that the owner of such animal might have a cause of action against the person operating the automobile for damages in the event the operation of such automobile was negligent, or in that the person operating the automobile might have a cause of action against the owner of the animal for damage to his car, in the event the custodian of the animal was negligent in allowing the animal on the highway. In connection with the possible liability of the owners of animals, Revised Statutes of Missouri, 1929, Section 12803, provided as follows:

"Nothing contained in this article shall be construed as to prevent owners or other persons from driving any of the species of animals enumerated in this article from one place to another, or along any public highway, the owner or owners being responsible for all damages that any person or persons may sustain in consequence of the driving of such stock."

2. Missouri State Highway Patrol.

November 9, 1934

However, in 1931 this Section was amended by striking out such part of said Section as follows the last comma, which would indicate an intention on the part of the General Assembly to restrict the liability of such persons, although the part of the statute still remaining in force shows that it is entirely legal to drive certain animals on the public highways. These two types of possible civil liability would concern only the parties involved, and not the State Highway Patrol.

In conclusion, we are unable to see where the Missouri State Highway Patrol has any duty to fix responsibilities in cases of collisions between automobiles and live stock on the highways of this State.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

**TAXATION:** Back tax collections to be apportioned to various funds, cannot be lumped in school fund.

1/22  
January 18, 1934.

FILED  
19

Hon. Edward Cusick  
Prosecuting Attorney  
Pulaski County  
Waynesville, Missouri

Dear Mr. Cusick:

We herewith acknowledge receipt of your letter of January 1, 1934, wherein you request an opinion of this office on the following matter:

"I understand that it has been the practice in past to place the back tax fund into the teachers fund in this county, will you kindly advise if this practice is correct, or, should the back taxes be apportioned to the various funds for which they were levied, and if so, how should this be apportioned."

We shall predicate our remarks respecting your inquiry upon the following statement to-wit, back taxes are in no event to be considered as differing essentially from current taxes in that their constituent parts lose their identity upon becoming delinquent. In other words, the purpose for which the taxes are levied and collected is in no manner changed by reason of the taxes not being paid promptly. They are still levied and assessed for the purposes set out and the County Court has incurred obligations chargeable to the respective funds in anticipation of the collection of these taxes.

I.

BACK TAXES TO BE APPORTIONED IN  
SAME MANNER AS CURRENT TAXES OF  
SAME YEAR.

Taxes, whether current or delinquent, are levied for public purposes and the various items making up the tax bill

are to be apportioned to the funds for which they were levied and assessed.

Section 9927 R. S. No. 1929, provides:

"Every county collector and ex officio county collector,\* \* \* shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively,\* \* \*"

Various other sections place other duties upon the collector, as Section 9973, providing:

"The county collector shall, whenever he makes a statement of tax collections to the county court as required by law, also furnish the treasurers of the cities and incorporated towns a statement of all delinquent and back taxes due such cities and towns which have been collected to that date, accompanied by the amount thus collected.\* \* \*"

Section 9525 respecting school districts in cities of 75,000 to 500,000 inhabitants, provides:

"The county collector and the county treasurer shall pay over to the treasurer of such school district all moneys received or collected by them, to which said district is entitled, at least once in every month;\* \* \*"

Section 9340 provides in similar language respecting city, town and consolidated schools:

Section 9265, pertaining to schools of all classes, provides:

"The collector shall, at the time of returning the land delinquent list for state and county taxes, return therewith all land school taxes herein provided for which shall remain unpaid, and when so returned, the same shall be a lien on such real estate, and be collected in the

January 18, 1934

same manner that other delinquent taxes on land are collected; and when so collected shall be paid over to the county treasurer as other school taxes."

It is to be noted that all of these sections make no distinction between delinquent and current taxes so far as the duties of the collector are concerned in making remittance. Each requires the money to be paid to the respective treasurers. Particular attention is directed to Section 9927, the general section, which requires the collector to pay "taxes" to the respective treasurers. This, of course, would include all taxes whether delinquent or current.

Our conclusions from the foregoing paragraphs are fortified by the provisions of Section 9950 found at page 427 Laws of Missouri 1933. This section makes provisions for the compromise of back taxes in the event the value of the land is not sufficient to pay the amount of taxes, penalties and costs accrued against the land. This section contains the following proviso:

"\* \* \* in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

CONCLUSION.

It is therefore the opinion of this office that back taxes, when collected, should be accounted for by the county collector as other funds and should be apportioned by the proper officer to the various funds for which the same are levied and collected.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,  
Attorney General.

FILED

19

(Opinion relating to fees of sheriffs for services rendered.)

Jefferson City, Missouri  
January 23, 1934.

Mr. Ray Crow  
Prosecuting Attorney of Chariton County  
Ketyeville, Missouri

Dear Sir:

This department acknowledges receipt of your letter of date January 15th, 1934, in which you state and inquire as follows:

"The sheriff of this county held a warrant, duly issued by a Justice of the Peace, for the arrest of a person living in St. Louis. The sheriff went to St. Louis without an official character of the Justice attached to the warrant, or without having the warrant 'ok'ed by a Justice of that county. The man was arrested by the police and turned over to the sheriff who brought him back to this county. No objection was raised by the arrested man as to the manner of arrest or to returning to this county. The warrant was read to him (evidently a second time) after he was in this county. Is the sheriff entitled to mileage for himself and prisoner beyond the confines of his own county? The charge in the warrant was for a misdemeanor. Thanking you in advance for your opinion, I am,"

In State ex. rel. v. Brown 146 Mo. 1. c. 406, the Court said:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed."

In *Gannon v Lafayette County* 76 Mo. 675 the Court said:

"The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services, he is required to perform, as a public officer, he has no claim upon the State for compensation for such service."

The question then is by what statute is the sheriff under the facts outlined in your request entitled to mileage claimed.

Section 11791 Revised Statute 1929, reads in part as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, etc. .... One dollar and twenty-five cents per day, mileage same as officer, shall be allowed for board and all other expenses of such prisoner."



It is apparent that the above and foregoing provision of the statute entitles the sheriff to mileage fees of five cents per mile for himself and his prisoner, also one dollar and twenty-five cents for each day for himself and prisoner if the number of days exceed one. And this department so rules. We further rule that the requirement with reference to the warrant being countersigned by a Justice of the peace of the county where the prisoner was apprehended, has no application here.

Respectfully submitted,

*J. W. Boone*

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Assistant Attorney General

APPROVED:

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Attorney General

COUNTY COURTS: Right to fill office of Deputy State Commissioner of Health under amended law.

OSTEOPATHIC PHYSICIANS: Eligibility as Deputy State Commissioner of Health.

February 13, 1934.

3-14



Honorable W. W. Crockett  
Prosecuting Attorney  
Ralls County  
New London, Missouri

Dear Sir:

I hereby acknowledge your request for an opinion dated January 18, 1934. Your request reads as follows:

"I would like an opinion relative to the following legal propositions, to-wit:

1st, A local M. D. was appointed in February, 1932 under section 9025 R. S. Mo. 1929, the Legislature for the year 1933 as shown at page 271 of session acts repealed said section, the question is shall the M. D. so appointed in 1932 hold office another year or shall the County Court appoint a man under new Section 9025 for a period of one year?

2nd, Is an Osteopathic Physician eligible under said section to hold said office if appointed?

You will observe in section 9024 at page 269 of said Session Acts what is said as to "different systems of medicine". Is Osteopathy a system of medicine?

I cite you to State ex rel Attorney general 44 Mo. 129 and State vs Gardner 265 S. W. page 998, l. c. on the first proposition.

You have heretofore asked my opinion in writing you. From the above it seems that we should appoint a man under section 9025 this February altho it seems to me that the English view of the matter is better than ours. I understand that Osteopathic Physicians are holding the office under section 9025 R. S. Mo. 1929 and as coroners in several counties over the state. I think it is likely that an Osteopath can prescribe medicine and do about anything that an M. D. can under the present status of the law. Is that correct? if so they can be holders of any office that an M. D. can hold. Better quit before I ask you too many questions?"

Section 9025 R. S. Mo. 1929 provides as follows:

"At the first regular February term of the county court in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years. In case of a vacancy in the office of the deputy state commissioner of health of a county, the county court shall at its next regular term of court appoint a reputable physician for the unexpired term. If the county court fails to appoint a deputy state commissioner of health as above provided at the February term of said court or at the next term following a vacancy, the state board of health shall appoint a reputable physician as deputy state commissioner of health for that county who shall serve until the county court of such county makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the state board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

Section 9025 Laws of 1933, page 271, after repealing the above law, provides as follows:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said

county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

Thus we see that the M. D. who was appointed under the law before its repeal, was appointed for a three year term. With the repeal of the law authorizing his office, the question presented in your first query is: Does this M. D. who in the first instance was a bona fide office holder by appointment, have the rights to the honor and emoluments of said office for another year by virtue of the amended laws of 1933? If not, then how may a County Court, in a county desiring to employ a deputy State Health Commissioner, proceed to legally employ one?

In the case of Sanders v. Kansas City, 162 S. W. 663, 1. c. 665, 175 Mo. Appeals 367, the appellate court stated the law thus:

"In this State our courts always have recognized and applied the doctrine supported by the great weight of authority in America that no one can acquire a vested right in an office established by the legislative department of a State or municipality. All offices are created for the public good and the rights of their incumbents are subordinate and inferior to that prime object. The power to create, unless restrained by law, includes the power to abolish and an officer elected or appointed even for a definite term, takes office with the implied understanding that the power which created the office may abolish it before the expiration of his term, in which event he will find himself out of office."

In an early case of State v. Gordon, 139 S. W. 403, 1. c. 407, 236 Mo. 142, our Supreme Court said:

"There is no doubt of the power of the Legislature to refuse to make an appropriation for the payment of the salary and expenses of any public officer holding office under the Constitution or laws of this State. Neither is there any doubt as to its power to abolish any office not provided for by the Constitution."

Again the Supreme Court said in State ex rel v. Davis, 44 Mo. 129, 1. c. 131:

"A mere legislative office is always subject to be controlled, modified, or repealed by the body creating it."

It is our opinion that by virtue of the new act repealing Section 9025 <sup>18/1929</sup> that one who rightfully claimed title by appointment under the old law is by the new act legislated out of office, and is not entitled to the honor and emoluments of the new office unless he receive his appointment under the provisions of the new law. Under the new law, it is not compulsory for any county court to employ a deputy State Commissioner of Health. In counties where the Court deems such an officer necessary, the Court has to follow the provisions of the new act.

It is to be noted that Section 9025, as amended in Laws of 1933, in express words says, "said court may appoint a reputable physician" and the term "reputable physician" appears once again in this Section. If an Osteopathic Physician is a reputable physician, then, you ask in your second question, is he eligible as an appointee to the office of Deputy State Commissioner of Health, under this section? Our answer must be determined upon what the Legislature meant when they used the term "physician," within this section.

In Section 9024, as amended in Laws of 1933, page 269, which section should be construed along with section 9025 as amended in Laws of 1933, page 271, the Legislature said:



"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

Thus we see that in the appointment of the Commissioner of Health, the law provides that there shall be no discrimination made between the different schools of medicine that are recognized as reputable by the laws of this State. The Legislature, no doubt, intended that the Commissioner of Health and his subordinates, be practitioners from any of the different schools of medicine that are recognized as reputable, by the laws of this State.

Section 13514 R. S. Mo. 1929 provides as follows:

"The system, method or science of treating diseases of the human body, commonly known as osteopathy, and as taught and practiced

by the American school of osteopathy of Kirksville, Missouri, is hereby declared not to be the practice of medicine and surgery within the meaning of article 1 of chapter 53 and not subject to the provisions of said article."

Section 9111 R. S. Mo. 1929, provides as follows:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as hereinafter provided."

The act establishing osteopathy in this State recognized osteopathy as a school of medicine, for Section 13529 R. S. Mo. 1929 provides:

"Every person holding a certificate from the state board of examination and registration shall have it recorded in the office of the county clerk in the county in which he expects to practice, and in the cities of St. Louis, Kansas City and St. Joseph they shall record the same with the same official which records the certificate of graduates of any other school of medicine, and the date of the recording shall be indicated thereon. Until such certificate is filed for record the holder shall exercise none of the rights or privileges conferred therein. The county clerk or city health commissioner shall keep, in a book provided for the purpose, a complete list of all certificates recorded by him, with the date of the recording of such certificates. Each holder of a certificate shall pay to the official a fee of one dollar for making such record."

In the case of Grainger v. Still, 187, Mo. 197, 1. c. 224, 85 S. W. 1114, our Supreme Court said:

"It is said that allopaths are 'antis' and homeopaths are 'similias,' but that



osteopaths are neither. This may be true, but the terms relate rather to the treatment or remedies employed to cure disease, than to the diagnosis of the disease. The disease is the same no matter which school of medicine the attending physician belongs to."

In the Grainger case our Supreme Court reasons that osteopathy may be a school of medicine, although differing from the schools of medicine described in Section 9111 above set out and referred to in Section 13514 defining osteopathy as not to include the schools of medicine licensed under Section 9111.

Again in *Atkinson v. School of Osteopathy*, 240 Mo. 338, 1. c. 353, 144 S. W. 816, our Supreme Court said:

"Our statute, already referred to (R. S. 1899, secs. 8537-8539), expressly recognizes osteopathy as 'a system, method or science of treating disease of the human body,' and the defendant's school as the exponent of its method and practice. It also expressly authorizes persons having diplomas from that or any other legally chartered and regularly conducted school of osteopathy to treat diseases of the human body according to such method. In so doing it necessarily permits and authorizes persons to contract for such treatment. It is true that section 8537 provides that osteopathy is 'not to be the practice of medicine and surgery within the meaning of article 1 of this chapter, and not subject to the provisions of said article;' but the purpose so expressed is simply to segregate this particular system from those for the regulation of which article 1 was enacted.

All these systems, methods or sciences are directed to the treating of diseases of the human body, and each stands upon the merits of its own system."

For the definition of the term physician as used in Section 9025 as amended in Laws of 1933, we look to the content of the section and to the decisions of our courts in forming our opinion. Noah Webster defines the term physician thus:

"A person skilled in physics or the art of healing."

February 13, 1934.

The section does not prescribe what school to which said physician must profess. The terms "homeopath", "allopath", "Hydropath" or "osteopath" are not used in the section. To construe the term "physician" technically, to the exclusion of other schools of healing or medicine would be against the content of the section and repugnant to the intention of the Legislature, when they made it possible for the inhabitants of a county, through their county court, to employ a Deputy State Health Commissioner, whose duties were to look after health measures in the county, under the supervision of the State Commissioner of Health. The will of the taxpayers who are paying for this service can legally be expressed in the "pathy" of the physician they appoint in their respective counties, so long as said school of medicine be recognized by the laws of Missouri. The section providing for the appointment of a Deputy State Health Commissioner, was not intended to promote the welfare of any medic profession to the exclusion of another, and at the expense of the taxpayers.

The regulations of the Federal Government, approved April 1, 1931, by the Secretary of the Treasury and Attorney General of the United States, permit osteopathic physicians to qualify on the same basis as "physicians of other schools of medicine" for permits to prescribe the use of intoxicating liquors for medicinal purposes.

As to your second question, it is our opinion that a reputable osteopathic physician is eligible as an appointee to the office of Deputy State Commissioner of Health.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.

WOS:H

ASSESSORS - Duties; When paid; Out of What Year's Revenue Paid;  
Compensation under County Budget Law.

3-5  
February 23, 1934.



Hon. Joseph C. Grain  
Prosecuting Attorney  
Christian County  
Ozark, Missouri

Dear Sir:

In reply to your request for an opinion of February 14, 1934, we are herewith listing the questions listed in your letter under the following titles:

- I Duties of the assessor.
- II When the assessor is paid.
- III Out of what fund the assessor is paid.
- IV Assessor's compensation under the County Budget Law.

The references to sections not otherwise specified herein refer to the County Budget Law, Laws 1933, p. 340-351.

I.

DUTIES OF THE ASSESSOR.

In assessing all property of a taxpayer, it is made the first duty of the assessor to call upon the taxpayer personally. Section 9756 R. S. Mo. 1929 provides:

#2 - Hon. Joseph C. Crain

"The assessor or his deputy or deputies shall between the first days of June and January, \*\* proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, \*\*\*

In the event that the assessor, when calling upon the taxpayer, finds either that the taxpayer is, first, sick, or, second, absent, then it is made the duty of the assessor, under Section 9757 R. S. Mo. 1929, to

"leave at the office, the usual place of residence or business of such person, a written or printed notice, requiring such person to make out and leave at the place named by said assessor, on or before some convenient day named therein, not less than ten days nor more than twenty days from the date of such notice, a sworn statement of the property which he is required to list, and shall leave with such notice a printed or written blank for the statement required of such person."

If the taxpayer fails to comply with such notice and fails to turn in a sworn list of his property, then "the assessor shall make the assessment as required by this chapter".

#3 - Hon. Joseph C. Crain

If the assessor fails to perform this, or any other duty enjoined upon him by law under the provisions of Section 9755 R.S. Mo. 1929, he "shall be removed from office by the County Court, who shall appoint another in his stead."

If the taxpayer fails to turn in a list of his taxable property to the assessor, Section 9760 R. S. Mo. 1929, provides:

"the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

The above section (9760) is directory, and not mandatory, upon the assessor to make such a list. - State ex rel. v. Carr, 178 Mo. 229 (1908). The assessor may make the assessment in a lump sum instead of attempting to list the various pieces of property.

The assessor, in making out such list, should bear in mind the provisions of Section 9761, which are as follows:

"If any person, being notified as aforesaid, shall fail to deliver the required list to the assessor, the property which ought to have been listed shall be assessed at double its value; and if the assessor shall neglect or refuse so to do, he shall be liable, in each case, to a penalty of fifty dollars, to be recovered at the suit of the county, and to be paid into the county school fund."

#4 - Hon. Joseph C. Crain

In order to prevent injustice to any taxpayer who has omitted to make a list, as provided by law, of his taxable property, Section 9757 provides:

"the assessor may omit assessing the penalty in case of neglect, where it is satisfied the same is unavoidable and not willful."

It is, therefore, made the duty of the assessor to assess property which taxpayers failed to list with the assessor, and in making such assessment the assessor should comply with Section 9761 and list the property assessed at double its value, unless the taxpayer who failed or omitted to list the property shall satisfy the assessor that his failure to comply with the law, in not listing his taxable property, is unavoidable and not willful. This is a matter which the assessor must pass upon, and his judgment in the matter is final. The doubling of the assessment is not made by law, but is made by the assessor. - State ex rel. v. Scullin, 266 Mo. 319, 1. c. 353 (1915).

It is, therefore, the opinion of this office that the assessor should:

1. Make a personal call upon the taxpayer.
2. If the taxpayer be sick or absent at the time of the assessor's call, then the assessor should leave written notice and a printed form for the taxpayer to list his property on.
3. The failure of the taxpayer to list his property with the assessor requires the assessor to assess the property from the best information he can obtain.
4. Such property should be listed at double its value unless the taxpayer satisfies the assessor that his non-compliance with the law was unavoidable and not willful.

II.

WHEN THE ASSESSOR IS PAID.

As we have heretofore pointed out, the assessor is given the last six months in every year in which to make and collect assessment lists. These assessment lists are only memoranda for the personal use of the assessor in making up the assessment books and are not required to be returned by the assessor to the County Court. - State ex rel. v. Carr, 178 Mo. 229, 1. c. 234 (1903).

It is made the duty of the assessor, not later than January 20th of each year, under Section 9800 to,

"make out and return to the county court \*\*  
a fair copy to the assessor's book, verified  
by his affidavit annexed thereto, \*\*"

Section 9800 R. S. Mo. 1929 also provides:

"And upon a failure to make such return  
to the court on or before the day above  
mentioned, the court shall deduct twenty  
per cent from the amount of fees allowed  
to such assessor."

It would, therefore, appear that the amount of fees an assessor is to receive as compensation for his services is not definitely determined by law until the assessor has made out and delivered tax books to the County Court. The compensation of assessors in all counties under 40,000 population in this state is fixed by Laws of 1931, p. 359, and provides:

"one-half of which shall be paid out of  
the county treasury and the other half  
out of the state treasury:"



#6 - Hon. Joseph C. Crain

It is, therefore, the opinion of this office that the assessor cannot be paid any compensation for the discharge of his duties until he had made out and delivered to the County Court the tax books prescribed in Section 9800 R. S. No. 1929.

### III.

#### OUT OF WHAT FUND THE ASSESSOR IS PAID.

From the standpoint of the county's liability, the payment to the assessor of one-half of his compensation by the county "out of the county treasury" can mean only one thing, namely, that the assessor is to be paid out of the general revenue of the county. When the assessor delivers the tax books to the County Court he has completed his work, and his fees then become due and payable. It therefore appears that the assessor's compensation is to be paid from the revenue of the county for the year in which he is required to turn over and deliver the tax books to the County Court. If the assessor turned over the tax books to the County Court in January of 1934, then his compensation is to be paid as other salaries and fees accruing to county officers in the year 1934.

### IV.

#### ASSESSOR'S COMPENSATION UNDER THE COUNTY BUDGET LAW.

Class 4 of the Budget Act provides:

"The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue

#7 - Hon. Joseph C. Crain

of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

It may be urged that since the assessor is paid fees, and Class 4 of the County Budget Law refers only to salaries, that the assessor would not be entitled to compensation under Class 4 of the Budget Act. If this construction be followed, then the County Budget Act would make no provision for the compensation of assessors, because nowhere do we find reference made to the term "fees".

The Supreme Court of Missouri, in State ex rel. v. Riedel, 46 S. W. (2d) 131 l. c. 133 (1932), speaking of the general term "fees", said:

"The word 'fees,' if used in its narrow distinctive sense, signifies the compensation for particular acts or services rendered by county officers in the line of their duties, to be paid by the individuals obtaining the benefit of the acts, or receiving the services, or at whose instance they were performed. But a glance at the statutes in force at the time (Wagner's Statutes 1872), will show that in the main only state officers then received salaries within the strict meaning of that term. Practically all county officers (with whom alone the constitutional provision was dealing) were compensated by fees, but, when a limit was placed on the amount of fees an officer might retain, that maximum was re-

#8 - Hon. Joseph C. Crain

garded as his salary, and therefore, in a generic sense, the word "fees" implied compensation or salary, since it was the source of these. In a case involving questions of this nature decided in 1893, it was held the word "fees" in its more comprehensive signification meant compensation, Callaway County v. Henderson, 119 Mo. 32, 39, 24 S. W. 437, 439; and there is authority for that view from other jurisdictions, 3 Words And Phrases, First Series, 2713; 2 Words And Phrases, Second Series, 478. In a number of cases in recent years this court has assumed, and therefore by implication held, that the constitutional provision comprehends the salaries of county officers."

The assessor is required by Section 3 of the County Budget Act to furnish to the County Clerk on or before the 15th day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or other expenses for the current year.

It therefore appears that the assessor, on or before January 15th of each year, knows what his compensation will be for the tax books which he is required to deliver on or before January 20th of that year, and this amount of compensation should be included in the county budget. In the long run, it is immaterial whether the assessor is to be paid out of one year or another, since the early comers and the first reciprocants of county warrants obtain no preference or priority over other county officers in payment of their salaries. Section 3 of the Budget Act provides:

"If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate

#9 - Hon. Joseph C. Crain

to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

If the assessor's claims, under Class 4, constitute, for example, ten per cent of the total budget allowed under Class 4, then the assessor is only entitled to receive ten per cent of whatever amounts are available for distribution in Class 4 in the event there are insufficient funds to pay all of Class 4 in full.

It is, therefore, the opinion of this office that the compensation of the assessor for assessments made in 1933 for the current year 1934 are to be paid as other county officers compensation are paid from Class 4 of the 1934 revenue.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

LABOR AND INDUSTRIAL INSPECTION DEPARTMENT - Right to collect license fee  
imposed solely upon shipping bedding into Missouri.

3-2

February 26, 1934.



Miss Mary Edna Cruzen, Commissioner,  
Labor and Industrial Inspection Department,  
Jefferson City, Missouri.

My dear Miss Cruzen:

A request for an opinion has been received from you under  
date of February 12, 1934, such request being in the following terms:

"Has the Labor and Industrial Inspection Department  
the right to collect a license for shipping bedding  
into Missouri?"

This Department has received a check for \$20.00 from  
the Superior Felt & Bedding Co. of Chicago, covering a  
license, which I am holding up awaiting your opinion.

I will appreciate it very much if you will give me your  
opinion on this matter as soon as possible in order that  
I may either issue a license to this company or return  
their check."

The State of Missouri is prohibited by the Constitution of the  
United States from taxing or imposing a license upon the privilege of  
doing a business which is exclusively interstate commerce. In the case  
of *Dahake-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921) the  
Supreme Court of the United States said:

"The commerce clause of the Constitution, art. 1, Sec. 8,  
cl. 3, expressly commits to Congress and impliedly with-  
holds from the several states the power to regulate commerce  
among the latter. \* \* \* A corporation of one state may  
go into another, without obtaining the leave or license of  
the latter, for all the legitimate purposes of such commerce;  
and any statute of the latter state which obstructs or lays  
a burden on the exercise of this privilege is void under  
the commerce clause. *Crutcher v. Kentucky*, 141 U. S. 47, 57,  
35 L. ed. 649, 652, 11 Sup. Ct. Rep. 351; *Eastern U. Teleg.  
Co. v. Kansas*, 216 U. S. 1, 27, 54 L. ed. 355, 366, 30 Sup.  
Ct. Rep. 190; *International Textbook Co. v. Pigg*, 217 U. S.  
91, 112, 54 L. ed. 676, 687, 27 L. R. A. (N. S.) 493, 30  
Sup. Ct. Rep. 431, 16 Ann. Cas. 1103; *Sioux Remedy Co. v.  
Cope*, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57." (257  
U. S. 290, 291)

It is, therefore, our opinion that the Labor and Industrial Inspection

2. Miss Mary Edna Cruzen

February 26, 1934.

Department has no right to collect a license from any person or entity imposed solely upon the right of doing a business of shipping bedding into Missouri.

Very truly yours,

KEM-13

ASSISTANT ATTORNEY GENERAL.  
EDWARD H. MILLER

Approved:

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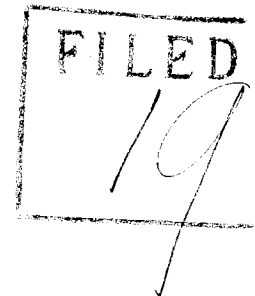
ATTORNEY GENERAL.

LABOR:--Section 13267, R. S. Mo. 1929, providing for the building of shelter sheds by railroads, having been declared unconstitutional by the Federal Court, this provision cannot be enforced.

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3-13

March 12, 1934.



Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Labor and Industrial Inspection Department the right to enforce Railroads to build shelter sheds in accordance with Section 13267 under the following conditions?

The St. Louis San Francisco Railroad Company writes as follows:

'As to Section 13267 -- It is our opinion that a building is not required as the provisions of this section are not applicable where ordinary light repairs are required, and by the term light repairs is meant such as can be made to cars in switching yards in a short time. In fact, in less time than would be required in switching such car or cars to repair building.'

Upon investigation this department finds that it takes, in many instances, longer than one-half hour to repair these cars."

Section 13267, R. S. Mo. 1929, provides as follows:

"Every person, firm, corporation or receiver of such person, firm or corporation engaged within this state in the construction or repairing of passenger or freight cars or car trucks used in the transportation of passengers or freight by rail, shall erect and maintain a building or buildings at every point or place within this state where such construction or repairing is done, and where six or more men are regularly employed on such work. The building or buildings provided for in this section shall be so constructed



and equipped as to fully protect all employees engaged in such construction or repair work from exposure to cold, rain and sleet, snow and all inclement weather during the hours of employment of such employees, providing that the provisions of this article shall not apply where ordinary light repairs are required. The term, light repairs, as used in this article shall be such repairs as can be made to cars in switching yard in thirty minutes or less, or which may be made in less time than would be required to switch such car or cars to the repair building provided for in this article."

The above section, together with Section 13268, R. S. Mo. 1929, which provides the penalty for the violation of Section 13267, is commonly called the "Car Shed Act," and was passed by the Legislature in 1917. In 1922 an injunction suit was brought by the Wabash Railroad Company in the Federal Court, before a three-judge Court, to enjoin the enforcement of this Act. The Court held in the case of Wabash Railroad Company v. O'Bryan, 285 Fed. 583, that the Act was unconstitutional and enjoined the prosecuting attorney of Randolph County from the enforcement of the Sections. The Court says at page 586:

"It is obvious that persons against whom the provisions of the act are aimed might erect a building or buildings for the purposes and uses of this act, and yet find themselves amenable to prosecution and liable to be fined a maximum of \$500 a day, because in the view of some court or some jury the building erected did not 'fully protect all employees engaged in construction and repair work from exposure to cold, rain, sleet, snow and all inclement weather.' 'What,' said Judge Booth, in a similar case touching a similar statute, 'is the standard of guilt? When is it fixed, and by whom? The words 'rain and snow' are hardly definite enough in a criminal statute. The words 'heat and cold' are so elastic in their meaning as to cover the whole range of temperature. The words 'inclement weather' are equally indefinite. What is meant by 'Inclement weather?' Will a fog or mist come within the language? Will wind be included? It is surely necessary that limitations shall be placed on all of these terms. But who is to supply the limitations, the employer, or the employe, or the court

or the jury? The Legislature is the only proper authority to define a statutory crime against the state. This power cannot be delegated to individuals, to courts, or juries.' Chicago, etc., Ry. Co., v. Railroad, etc., Com., 280 Fed. l. c. 399.

So, also, may similar criticism, for that the language is indefinite, uncertain, and obscure, be directed against the proviso in the act, which relieves an alleged offender, if so it be, that the repairs may be done in 30 minutes or less, or in less time than would be required to move the car needing repairs from the yards to the car repair shed. Who is to guess as to these things? The ability to guess correctly makes up the difference between guilt and innocence. Railroad yards differ in size, and employes differ in ability and in the rapidity with which they work. The situation of the car needing repairs, or the location of it in the train, or in the yards, might be such in some cases as to require only 5 minutes to move it into the car repair shed, and under other conditions and situations such removal might require an hour or more. Yet some one must correctly estimate these differing elements, under peril of prosecution and fine. If he guesses right, he is innocent; if he guess wrong, he is guilty of a misdemeanor. But we need go no further into this; the lack of definiteness and certainty is too plain for argument."

"It follows that (since, in our opinion, the act is, for the reasons stated, unconstitutional, and it ought not to be and cannot be enforced) the motion to dismiss should be overruled, and a temporary injunction should be issued, as prayed in the Bill of complaint."

In view of the foregoing decision, we do not believe it is possible to compel railroad companies to build shelter sheds, as provided for in Section 13267. Section 13268 provides the penalty, but the Court above held that the Act was too indefinite to support a criminal prosecution, and there being no way to prosecute the Company for failure to build the shelter shed, we do not see how this Section can be enforced.

It is therefore the opinion of this Department

Mrs. Mary Edna Cruzen,

-4-

March 12, 1934.

that in view of the case above cited, you cannot compel  
railroads to build shelter sheds, as provided for in  
Section 13267, R. S. Mo. 1929 above.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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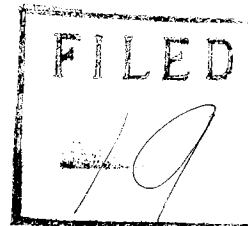
Attorney General.

FWH:S

LABOR DEPARTMENT:-Under National Bedding Code certain State regulations are still effective and may be enforced by the Commissioner.

3-22

March 20, 1934.



Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Labor and Industrial Department the right to enforce the provisions of the bedding code?"

You will find herewith a copy of the code."

With your inquiry you enclosed a copy of the Code of Fair Competition for the Bedding Manufacturing Industry and inquire whether your Department has a right to enforce the provisions of this Federal Code. The Code itself, which we will not copy because of its length, provides its own machinery for enforcement of its provisions. Naturally the enforcement of Federal laws and regulations is incumbent upon Federal officials and not upon State officials.

Section 5 of Article V of the Code provides as follows:

"Within each State this Code shall not supersede any laws of such State imposing more stringent requirements on employer, regulating the age of employees, wages, hours of work, or health, fire or general working conditions than under this Code."

Paragraph (g) of Section 4 of Article VII of the Code provides as follows:

"Wherein a provision of the foregoing Sections 1 to 4, inclusive, is irreconcilably in conflict with a State statute, such statute shall supersede within such State. It is the intent herein to preserve and supplement state bedding laws."

Under Section 5 above quoted, your Department may

March 20, 1934.

still enforce the State laws regulating the age of employees, wages, hours of work, etc., where such laws impose more stringent requirements on the employers than the requirements specified in the Code. However, when you do that you are enforcing the laws of this State by permission of the Federal Government and are not enforcing the provisions of the Code.

Article 12 of Chapter 95, R. S. No. 1929, is a chapter dealing with mattresses and it is the duty of your Department to enforce the regulations and requirements of that chapter. Under paragraph (g) of Section 4 of Article VII of the Code, it is provided that where the State statutes are irreconcilably in conflict with Sections 1 to 4 of Article VII of the Code, then such State statutes shall supersede the provisions of the Code. In such a case you are again enforcing the provisions of the State statutes by permission of the Federal Government, as contained in the Code. In both of the instances referred to, the effect is that the Federal Government has adopted the provisions of the State law in some respects, and in that event the enforcement thereof is dependent upon the Labor Commissioner.

It is therefore the opinion of this Department that where the State laws regulating the age of employees, wages, hours of work, etc., are more stringent than the requirements of the Code, you may enforce the State statutory provisions and where the State statutes are irreconcilably in conflict with Sections 1 to 4 of Article VII of the Code, then the State statutes supersede the provisions of the Code and may be enforced by you. In either event you are not enforcing the provisions of the Federal Code, which carries its own enforcement provisions, but by permission you are enforcing the provisions of the State law.

We are retaining a copy of the Code for our files and if you desire same you may request it.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

LABOR DEPARTMENT:-Under Section 13219, R. S. Mo. 1929, whether shelter sheds built by railroads are within section is purely question of fact.

3-22  
March 30, 1934.



Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Labor and Industrial Inspection Department the right to inspect and collect fees for car sheds such as provided by railroads as a shelter for protection against inclement weather?"

I have the following communication from the St. Louis San Francisco Railway Company under date of February 13th.

'Am enclosing inspection certificate covering inspection of the car shed at our North Side Car Shop, Springfield, Mo., Feb. 3rd, which calls for inspection fee of \$4.00.

It is the opinion of our Legal Department that the statute providing for inspection of buildings and shops would not apply in this instance. This is merely a shelter for protection against inclement weather and cannot be construed as a building or shop as generally understood, and the statute, to-wit, Section 13219 of the R. S. of Mo. 1929, is not in our opinion applicable to this car shed, and we respectfully ask that you have the certificate cancelled.'

May I have your opinion on this matter as soon as possible, as there seems to be quite a controversy over this question."

Section 13219, R. S. Mo. 1929, provides: "For the inspection of every building or shop in which three or less persons are employed or found at work, the sum of fifty cents." Then follows various provisions regulating the rates for the inspection of buildings and shops in which larger numbers of

employees are found at work. Whether or not you are entitled to collect an inspection fee for a shelter house built for the protection of employees depends upon whether or not the shelter house can be declared to be a "building or shop." You do not state how such shelter houses are constructed and our knowledge of their construction is so meager that we cannot determine whether they could be declared to be a building or shop. It strikes us that whether any structure can be declared a building or shop, under the terms of this Section, is a matter of fact and depends upon how they are constructed, and must always be a question of degree. In 9 C. J. page 685, among other things, a building is defined as follows:

"Any structure with walls and a roof; in the nature of a house built where it is to stand, which has a capacity to contain, and is designed for the habitation of man or animals, or the sheltering or property; a structure or edifice inclosing a space within its walls and usually covered with a roof, such as a house, a church, a shop, a barn, or a shed. \*\*\*\*As commonly understood, a house for residence, business or public use, or for shelter of animals or storage of goods, and imports a structure of considerable size and intended to be permanent or at least to endure for a considerable time. Taken in its broadest sense it can mean only an erection intended for use and occupation as a habitation, or for some purpose of trade, manufacture, ornament, or use, constituting a fabric or edifice, such as a house, a store, a church, a shed. What is a building must always be a question of degree."

In 36 Cyc. page 431, a shop is defined as:

"A building inside of which a mechanic carries on his work; \*\*\* any building or room used for carrying on any trade or business adapted to be carried on in a building or room and employing a stock in trade; \*\*\* a place in which a mechanic pursues his trade\*\*\*."

As stated above, what is a building is purely a question of degree. Whether the shelter sheds, as built by the railroad, are buildings or shops, is purely a question of fact. We are not familiar with how they are constructed and as pointed out to you in an opinion a few days ago, the Federal Court held that the statute requiring their construction was too indefinite in its terms as to the construction of the sheds to support a criminal prosecution. The statute is, therefore, to indefinite



March 20, 1934.

to apprise us of the type of sheds constructed. It occurs to us, however, that it was not the intention of Section 13219 to require inspection fees of temporary structures or structures loosely thrown together for the purpose of serving a temporary purpose. We believe that the general intent of the Act was to cover buildings and shops of permanent and substantial character where persons are regularly employed. Sometimes it is difficult to say with definiteness just where the line of demarcation is, but upon the facts as they appear from your inquiry, and the general purpose of the statute as we interpret it, we are inclined to be of the opinion that a temporary shelter shed was not intended to be within the Act. We say this advisably because we do not have before us the character of construction and assume that it is a structure which is very loosely built and is not a complete structure, and is a place wherein persons are only temporarily employed at various times. In any event, whether this shed or any other shed is a building or shop within the meaning of the Act, is purely a question of fact.

We are therefore of the opinion that Section 13219, providing for inspection and inspection fees was only intended to apply to buildings and shops of permanent and substantial nature wherein people are regularly employed, and that it would not apply to loosely and incompletely built sheds, such as apparently shelter sheds are, wherein people work for a short time at various intervals.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

BANKS and - County  
BANKING: Depositories

- Banks selected as County Depositaries are obligated to pay interest on public funds so deposited and are not relieved of the obligations by being placed under restrictions.

3-26

March 20, 1934.



Honorable Edward Cusick  
Prosecuting Attorney  
Pulaski County  
Waynesville, Missouri.

Dear Sir:

This department is in receipt of your letter of recent date with a request for an opinion which letter of request is as follows:

"I have been requested to get your opinion on the following:

"About two years ago the county court of this county chose certain Banks of this county as their depositories of several thousand dollars, at the rate of 2.75% interest, which was at this time the highest bidders.

"On March 4th, 1933, these Banks were placed under restriction by the State Finance Commissioner, and are still under this restriction, now the court would like to know if they are entitled to this interest rate of 2.75% since the time of this restriction."

The fact that the banks in question were placed under restrictions by the Commissioner of Finance in March, 1933, did not change the obligations of contracts theretofore made by the banks relative to the payment of interest on obligations made by the banks. The loans made by the banks to customers before restrictions were placed on the banks continue to draw

interest notwithstanding the restrictions and we see no reason why the banks should not pay interest on its obligations created before restrictions were placed on them.

It is therefore our opinion that the banks which have been selected as the county depositories are obligated to pay the interest, at the proper time subject to the restrictions, on the public funds so deposited and the banks are not thereby relieved of the obligations by being placed under restrictions.

Yours very truly,

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GOVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH/afj

LABOR: Fee paid either by applicants or employer determines status as to whether one is operating an employment agency or office.

49  
April 7, 1934.



Mrs. Mary Edna Cruzen  
Commissioner of Labor  
Jefferson City, Missouri

Dear Mrs. Cruzen:

This is to acknowledge your letter as follows:

"Has the Labor and Industrial Inspection Department a right to collect fees covering license fees for an employment Agency operating strictly on an exchange, as per the attached letter from Edna Deal of the Edna Deal-Grover LaRose Theatrical Exchange?"

The letter referred to by you (which was attached to your communication) in part reads as follows:

"We operate strictly an exchange. Whereby, our clientele buy shows including various types of performers for so much money and we in turn, pay these performers. Where there is a fee concerned the management hiring these people pay the fee themselves. You are at liberty to check up on this statement, by inquiring of our clients, just what position is in this matter."

Section 13190 R. S. Mo. 1929, is found in Article 2, Chapter 95, caption "Employment Bureaus and Employment Agents",

and said section in part reads as follows:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection."

Whether one operates or maintains an employment office or agency for hire is a question of fact. For example, enclosure says this:

"We operate strictly an exchange. Whereby, our clinetele buy shows including various types of performers for so much money and we in turn, pay these performers."

If such be the fact, then it would be our opinion that such theatrical exchange is not operating or maintaining an employment office or agency for hire. However, the letter further reads:

"Where there is a fee concerned the management hiring these people pay the fee themselves."

This is ambiguous. However, we construe it to mean that the management pays the fee to the exchange by virtue of the efforts of the exchange in furnishing theatrical talent to its clients. If such is a fact, then such exchange, in our opinion, is operating an employment agency or office for hire and would have to be licensed.

Thus, we cannot advise you in the premises because the facts, as stated in enclosure, sustain either an affirmative or negative answer. We, therefore, limit this opinion to a general statement of the law and request that you apply the true facts to the law and determine if such exchange is operating an employment agency or office for hire.

We find that on two occasions we answered these identical questions by formal opinions to your Department and a reading of same will support the conclusions above stated.

On October 13, 1933, this Department held:

"The statute, however, makes no distinction, and because of the broad wording of the statute we are of the opinion that you would be within your rights to collect a license fee under said section from persons maintaining an employment office and charging fees to applicants, even though the employment sought to be effected was the booking and hiring of the theatrical talent."

And on December 7, 1933, we said the following:

"It is therefore our opinion that unless the applicant pays a fee for the purpose of getting employment, or the employer pays a fee in order to acquire the employment, that this concern would not come within the statute."

Thus, we again conclude that the matter of payment of fee by either applicant or employer, to the end that the applicant will be employed by the employer, or the employer will be assisted in obtaining the services of the employee through a mutual agency, then such agency having effected such arrangement for a fee between the employer and employee constitutes the operating of an employment agency or office for hire and such must obtain a license so to do.

We are attaching hereto copies of opinions referred to herein.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLE:EG



LABOR AND INSPECTION DEPARTMENT:-Persons engaged in using sterilizing or exterminating processes on mattresses would not come under Section 13308, R. S. Mo. 1929, unless, as a matter of fact, they were rebuilding or renovating mattresses.

4-23

April 21, 1934.



Mrs. Mary Edna Cruzen,  
Labor Commissioner,  
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"My attention has been called to Section 13308, R. S. Mo. 1933, where it is stated:

No person shall make, remake or renovate bedding, except a person making, remaking or renovating bedding for his own use, until he has secured a permit."

A dispute has arisen over the word 'renovate.' Some mattress firms who are using a sterilizing process claim they do not have to secure a mattress permit, because the word 'sterilizing' does not mean the same as 'renovating.' They also claim that the word 'exterminating' is different than the words 'renovating' and 'sterilizing.'

I will appreciate it very much if you will issue an opinion on this particular phase of the mattress law, as there is quite a controversy over this matter in St. Louis and a number of these firms are threatening to go to court about the provisions of this section if we insist on collecting a permit when they claim they are 'sterilizing' and 'exterminating', but not 'renovating' mattresses.

I will appreciate it very much if you will give me your opinion on the above matter as soon as possible."

Section 13308, R. S. Mo. 1929, provides as follows:

"No person shall make, remake or renovate bedding, except a person making, remaking or renovating bedding for his own use, until he has secured a permit from the state commissioner of labor and industrial in-

spection and has paid to the state commissioner of labor and industrial inspection an inspection and permit fee of twenty dollars, which such payment or charge shall constitute a factory inspection charge for the purpose of enforcing this article. The permit so issued by the state commissioner of labor and industrial inspection shall remain in force and effect until the end of the calendar year in which it was issued or until voided by the state commissioner of labor and industrial inspection for failure to maintain the required sanitary conditions in and around a factory in which bedding is made, remade or renovated or for failure to sterilize and disinfect properly all previously used materials used in making, remaking or renovating bedding."

You inquire whether under the above Section a person engaged in the business of using a sterilizing or exterminating process can be made to pay a permit fee.

The above Section does not mention the term "sterilizing or exterminating," but expressly covers persons who "make, remake or renovate bedding." The solution to your question then must depend on whether a person engaged in using a sterilizing or exterminating process is, as a matter of fact, renovating bedding.

The word renovate is defined in the dictionary as meaning, "to renew, to make new again, to restore, to a state of freshness or vigor; to repair."

The word sterilize is defined as meaning, "to make sterile, barren or unproductive, to impoverish, to exhaust of fertility, to deprive of fecundity, or the power of producing young." The word exterminate is defined as meaning "to extirpate, to destroy utterly; to root out, to put an end to."

We do not believe that either as defined technically or as generally understood that the word renovate is synonymous with the word exterminate or the word sterilize. To renovate mattresses, as we understand it, means to rebuild them by adding new materials or changing the structure of the mattress in such a way as to make it appear as new. The exterminating or sterilizing process, as used by these people, does not necessarily contemplate the rebuilding of the mattress, but rather gives the impression that they are destroying and killing germs of various kinds which infest mattresses. If they, as a matter of fact, to rebuild mattresses by adding new materials, then we believe they would be engaged in the business of renovating mattresses, even though they might see fit to call their process a different name. If, however,

April 21, 1934.

the process that they are using is not of rebuilding or restoring the mattresses to their former condition structurally, but is rather one of eradicating or destroying germs, etc., that infest mattresses, then we would be of the opinion that they would not, as a matter of fact, be renovating mattresses. As we interpret the statute it is a question of fact as to what is actually done and not the technical name by which the business is designated, and we believe that an investigation of the facts will make it possible for you to decide whether or not they can be classed as renovators of mattresses even though they use a so-called different name.

It is therefore the opinion of this Department that whether or not the persons who are using the exterminating and sterilizing process can be required to take out a permit under Section 13308 depends, as a matter of fact, upon what is actually done to the mattresses. If the process they use is simply to eradicate and destroy germs which infest mattresses, then we would say they are not renovators. However, if they do rebuild or add new materials so as to restore the mattresses to their former condition, then we believe they might come under this Section. Since you do not state in your letter that they are in fact rebuilding or renovating mattresses, we would be of the opinion that the process they are using would not bring them within the terms of this Section of the Statutes.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

LIVESTOCK:   STATE VETERINARIAN:   ONE WHO SHIPS, TRANSPORTS, DRIVES;  
OR OTHERWISE MOVES LIVESTOCK CON-  
TRARY TO GOVERNOR'S QUARANTINE  
PROCLAMATION IS CHARGEABLE WITH  
A CRIME.

5-23  
May 22, 1934.

Mr. H. E. Curry  
State Veterinarian  
Department of Agriculture  
Jefferson City, Missouri



Dear Sir:

Your letter requesting an opinion from this  
office reads as follows:

"I am taking the liberty of en-  
closing a letter from Mr. E. W.  
Salmon of Grant City, relating  
an experience that he and other  
farmers in Worth County have  
had with stock pigs which they  
recently purchased at the commu-  
nity sale in Grant City.

"I am also enclosing a copy of  
Proclamation, issued March 4th,  
1932, by Governor Caulfield, which,  
as far as I know, is the only rules  
and regulations we have in the State  
of Missouri which attempts to con-  
trol the transporting and the buy-  
ing and selling of stock pigs in  
this state.

"You will note from Mr. Salmon's  
letter that he and other farmers  
have sustained rather heavy losses,  
and, as far as I know, these ani-  
mals were not moved in accordance  
with the provisions in the Governor's  
Proclamation, and the operator of this  
sale should be liable; however, there  
have been a few cases of this sort  
tried, and, for various reasons, we  
have failed to secure conviction,  
therefore, I am rather reluctant to  
enter into any other cases unless

someone on your staff is able to show us how we may proceed in order to obtain convictions.

"I regret very much to bother you with this matter; however, it is of much importance to the farmers of this state, and I sincerely trust that we may be able to find some way whereby we can legally stop the practice of promiscuously moving of stocker and feeder pigs from one point to another and offering them for sale in this state unless they are safeguarded with vaccination and health certificates as prescribed by law."

The letter received from Mr. Salmon, referred to in your communication, reads as follows:

"Your letter of the 13th - is at hand, and will say in reply, that I have lost all of the 30 head of Stock pigs - that I have bin writing you about, every one of them died, which cost me \$65.00 at this sale.

"Mr. Bill Phillips of our City, bought 67 head at this same sale, and he has lost most all of them. Mr. Olever Roberts, of Our County bought 44 head at this same sale and has lost all of them, Mr. Ben Prough, of our City bought 53 head on the same day that I bought mine and has lost all of them. Mr. Joseph Hughes of Worth, Mo. bought 48 head at this same sale and lost all of them.

"I have been inquiring around and find out most all of these stock pigs came from Joplin, Missouri, into our County, was trucked up here and sold while sick, and I think there had ought to be some way to stop it. There is two damage suits filed in this County, now, and will be more, if this public sale is not stopped.

"Now I have given you the exact facts and would like for you to take this matter up with the above parties who have lost hogs by buying them at this sale.

"This public sale has been going on for over one year, and I am sure it is spreading this disease all over this County, and had ought to be stopped, hoping you will look after this matter and put an embargo on public sales of this kind in Worth County. You probably will hear from some of the other boys in regard to their losses in the near future as they tell me they expect a damage suit will be brought for a good many of these losses in our County, caused by this public sale - every Thursday afternoon at one o'clock, in our City, hoping to hear further from you,"

Portions of Governor Caulfield's Proclamation, referred to in your letter, appear as follows:

Section 1, entitled "Rules and Regulations" at page 1, in paragraph 1. provides:

"No swine to be used for stocker, feeder, and other special purposes, as hereinafter designated, shall be shipped, transported, trailed, driven, or otherwise moved, from one point to another within this state, except as hereinafter provided."

Paragraph 6, of the same section, at page 2, provides:

"Swine to be used for stocker and feeder purposes are permitted to be transported to any sale pen, assembling yards, holding quarters, or other concentration pens, for purposes of resale or reshipment as hereinafter provided."



Section 3, entitled "Movement of Stocker and Feeder Hogs other than from public stockyards," at page three, paragraph 1, provides:

"The following classes of swine shall come within the scope of this section:

"(a) Swine which are offered for sale by any speculator, dealer, or any other person engaged in the business of assembling, reselling, or trafficking in swine.

"(b) Swine assembled at concentration points, either at railroad stock pens in cities or villages, or elsewhere, at or through which said swine from different farms or communities are brought in contact and offered for sale or trade. Provided that nothing in this section shall be so construed to apply to swine assembled for the purpose of reshipment or transportation to a public market operating under federal or state supervision.

"(c) Swine to be used for stocker and feeder purposes shall only be shipped, or transported, from points designated in this section under the following conditions:

" 1. All such hogs before being shipped, or otherwise transported, from such points as designated in this section shall be inspected by a recognized veterinarian and found free from hog cholera and other infectious or communicable diseases, as hereinafter provided.

" 2. All inspection of hogs shipped or transported from such places to another within the State of Missouri shall be made by the State Veterinarian, an official deputy state veterinarian, or by a competent graduate veterinarian whose certificate of health shall be approved in writing by the State Veterinarian of Missouri.



" 3. The inspection of such hogs for shipment or transportation, shall include the immunization of each and every hog with the Dorset-Niles-McBride hog cholera serum. If such inspection discloses said hogs are healthy at the time of immunization then such shipment may immediately move forward to destination, subject to quarantine rules.

" 4. In case of emergency, or at points where competent veterinary supervision is not available, swine coming under the provisions of this section may by special permission obtained from the State Veterinarian be shipped, trucked, or otherwise moved, to destination subject to quarantine, inspection, and vaccination, at the expense of the owner by a recognized veterinarian. Request for such permits shall come from the consignee, or his agent, whose duty it shall be to designate a veterinarian approved by the State Veterinarian, and failure of the consignee to permit such veterinarian so designated to attend to the inspection and quarantining of such shipment shall constitute an infraction of these regulations.

" 5. This section is in nowise to be construed to apply to any hogs to be used for feeding or stocking purposes, trucked, driven, or hauled from farm to farm in this state.

" 6. Sows to be used for breeding purposes shall occupy the same status as stocker and feeder hogs, except purebred sows and males shipped, or transported, in crates.

" 7. Test pigs from government or state supervised serum plants may be transported from such plants to points within this state when properly passed and certified to by the inspector in charge."

The law authorizing Governor Caulfield to make such a proclamation giving sanction to same, and providing a penalty for violation of the rules laid down in said proclama-

tion can be found in Sections 12535, 12536 and 12537, R. S. Mo. 1929. This proclamation, I am assuming, has never been revoked. If that be true, the rules set out above are as binding to-day as when proclaimed. The proclamation, by its express allegations, shows upon its face that it was made according to the terms of the statute, and that the author followed the procedure outlined in the statute when he promulgated this proclamation.

Section 12535, R. S. Mo. 1929, provides:

"The governor of Missouri may, in his discretion, order said veterinary surgeon to visit any state or territory and investigate any dangerous or infectious disease, including contagious or infectious abortion, said to exist in any designated locality in the state named and report to the governor the result of said investigation, together with such suggestions that he may deem proper and right. On receipt of such report, or any official report of the state veterinarian, the governor may call the secretary of the state board of agriculture and the state veterinary surgeon together, and said secretary and said veterinary surgeon may, if deemed wise, arrange and adjust such rules and regulations as safety may demand for the transportation of live stock through or into this state from any state or territory, or any foreign country or parts thereof, where dangerous, contagious or infectious diseases, including contagious or infectious abortion, may exist. Such rules and regulations shall not be in contradiction with constitutional laws of transportation and commerce, and shall be subject to the approval of the governor. The governor, on the approval of such rules and regulations, shall issue his proclamation, scheduling and quarantining against such localities

in which domestic animals may be considered as capable of conveying infectious or contagious diseases, including contagious or infectious abortion, and prohibit the importation and the unloading in this state of any livestock of the kind capable of causing such disease, except under the aforesaid rules and regulations. Such rules and regulations, after approval by the governor, shall be sent to all corporations or other agencies doing the business of transportation or conveying live stock through or into the state of Missouri; and any corporation or agency or individuals who shall violate such rules and regulations by transporting prohibited animals shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than a thousand dollars nor more than ten thousand dollars for each and every offense, and shall be liable for any and all damages or loss that may be sustained by any party or parties by reason of such importation or transportation: Provided, that in no case shall such corporations or agencies or individual be liable for any damages resulting from the shipping of stock into this state which has been inspected by the proper authorities and a certificate of health as to same having been given by said authorities. Such penalty shall be recovered in any county in this state into or through which such stock is brought upon information filed in the circuit court of any such county."

Section 12536, R. S. Mo. 1929, provides:

"The governor, when informed by the state veterinarian that either contagious pleuro-pneumonia, rinderpest, foot and mouth disease, maladie du coit, contagious or infectious abortion, or any other contagious or infectious live stock disease has become largely disseminated or epidemic among domestic animals throughout any

municipality or geographical district in this state, or is found to exist in any herd or herds in this state, may call the state board of agriculture and the state veterinarian together, and said board and said veterinarian shall, if deemed necessary to eradicate or prevent the spread of such disease, formulate for the state veterinarian and the county courts rules and regulations under which stock capable of carrying said diseases, or any of them, shall be permitted to move to other parts of the state; such rules and regulations shall be subject to the approval of the governor, who thereupon shall issue his proclamation scheduling and quarantining such localities, and forbidding the carrying or transportation or moving of all domestic animals of the kind diseased from such municipalities or district or county to another, or from one premises to another, or over any public highway or any lot or ground not sufficiently fenced to prevent animals from going through or from being brought into such infected districts, municipalities or counties except in accordance with the aforesaid rules and regulations. The county court or other legally substituted court of the county in which such infected locality or district shall have been quarantined by the governor, shall be notified by the state veterinary surgeon and furnished with copies of said regulations. Said county court shall thereupon comply with said rules and regulations, and issue orders to the sheriff to assist said veterinary surgeon in carrying out the provisions of the same."

Section 12537, R. S. Mo. 1929, provides:

"Any person or persons who shall in any way interfere with or obstruct said veterinary surgeon in the discharge of his duties, or any owner or owners, person or persons, who shall be notified to quarantine the same as provided in this article and who shall violate any of the provisions thereof, or any person or persons who shall violate any of the provisions of the article regard-

ing district or municipality quarantine, shall be guilty of a misdemeanor, and punished by a fine not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail not less than one month nor more than one year."

Thus we see that the Legislature has delegated to an administrative officer, the Governor, the right to proclaim rules, the violation of which are provided for in the statute to be a misdemeanor. We also see by the letters set out, supra, that there can be evidence collected from those who purport to know that these rules have been and are being violated. The question presented is this: Is one, guilty of violating those rules of an administrative officer, chargeable with a crime?

In the case of State v. Dixon, a Missouri case decided by Division No. 2 of the Missouri Supreme Court, not yet reported, which is pending in the Court In Banc, the court held that where the Legislature delegates the power to make reasonable rules to the Public Service Commission, an administrative body, and at the same time provides that the violation of said rules duly promulgated be a misdemeanor, then one charged with the violation of said rules is properly charged with a crime. Such is the exact circumstance in the instant case.

#### CONCLUSION.

It is our opinion that the rules laid down in Governor Caulfield's proclamation are reasonable rules. Following the logic of the Dixon case, we are of the opinion that said rules have the sanction of law, and have been properly promulgated as required by law. We are of the further opinion that one who violates these rules should be charged with the violation of said rules - which is a crime, and should be punished, if found guilty, under the provisions of Section 12537, supra.

Respectfully submitted,

APPROVED:

ROY McKITTRICK  
Attorney-General.

WM. ORR SAWYERS  
Assistant Attorney-General.

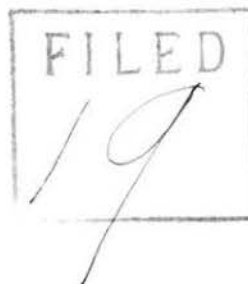
WOS/afj

MUNICIPALITIES - Powers of mayor of Louisiana, Missouri.  
Construction of city charter.

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May 24, 1934.

5-26



Honorable J. W. Crewsdon, Mayor  
Louisiana, Missouri

Dear Sir:

Your request for an opinion, in substance, is  
as follows:

"Does the charter of the City confer  
upon the President pro tempore of the  
Council the nominating powers of the  
Mayor, merely because the Mayor is ab-  
sent from a council meeting?"

We call your attention to Article II, Section 4,  
of the charter of Louisiana, which provides that the presi-  
dent pro tem of the city council shall perform all the duties  
of the mayor under three circumstances, and no other. These  
circumstances are:

- (1) During the absence from the city  
of the mayor.
- (2) During the vacancy in the office of  
the mayor.
- (3) Inability of the mayor to serve.

The power to appoint all city officers shall, by  
Article IV, Section 6 of the charter, be vested in the mayor,  
and before the president pro tem of the council is authorized



#2 - Honorable J. W. Crewsdon

to make any appointments, he must have occupied the office of mayor under one of the three above circumstances set out in the charter, whereby he becomes acting mayor, because the president pro tem of the council as such has no appointing power.

That part of Article II, Section 4, of the charter relating to the mayor's absence from the city is fully interpreted in Chapter XX, Article I, Section 12 of the Ordinances, which provides that if the mayor intends to be absent from the city for more than twelve weeks he shall notify the city council thereof, and the president pro tem of the council shall perform the duties of the mayor during his absence. This section and charter, when construed together, mean that the mayor is not absent from the city within the meaning of the above charter provision unless he intends, at the time of leaving, to be gone for a period of twelve weeks.

There was no vacancy in the office of mayor in the circumstances outlined in your letter. The mere fact that the mayor went home after an all night marathon council meeting did not create a vacancy in the office of mayor within the meaning of the above charter.

The city council cannot resort to a marathon meeting for the purpose of wearing out and exhausting the mayor physically, and then when he is compelled to leave the meeting because of physical exhaustion declare that the mayor's inability to attend that meeting longer is an inability to fill the office of mayor generally. No city council can, by such methods, remain continuously in session and create a state of inability on the part of the mayor to attend such meetings so as to transfer the appointive powers of the mayor to the present president pro tem of the council, as was attempted to be done in this case. The appointive power of the mayor, under the charter of your city, has heretofore been upheld in State ex rel. Kuhlman v. Poucher, 98 Mo. App. 109.

It is, therefore, the opinion of this office that the attempted appointment of a street commissioner by the president of the council, under the circumstances, was void.

Yours very truly,

APPROVED:

FRANKLIN E. REAGAN  
Assistant Attorney General

ROY McKITTRICK  
Attorney General

FER:FE

*copy of City Council Resolution & Ordinance re City of Peoria, Illinois, filed in Public Title*



SCHOOLS: Duties of treasurer in six-director school district of first, second and third class cities must keep financial records and reports.

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June 7, 1934. 6-11.



Mr. Chas. C. Crosswhite  
Statistician  
Department of Public Schools  
Jefferson City, Missouri

Dear Mr. Crosswhite:

This is to acknowledge your letter dated May 5th as follows:

"I have your opinion concerning the duties of the treasurer in a six director school district, but I would like to have this opinion supplemented to include the duties of the treasurer with reference to keeping of financial records and reports in a six director district of all first, second and third class high schools in the state.

"Your opinion written on April 28, 1934 sets out the duties of the treasurer in the city districts only. Your supplementary opinion on this point will be greatly appreciated and will be of considerable service to the officials concerned."

Our opinion rendered on April 28, 1934, as referred to in your letter, only touched upon the duties of the treasurer in a six director school district organized under Section 9515, R. S. 1929, because as stated therein your letter was ambiguous. So this supplemental opinion will concern the keeping of "financial records and reports in six director districts of all first, second and third class high schools in the state."

Section 9194, R. S. Mo. 1929, provides in part as follows:

"The public schools of this state are hereby classified as follows:  
\*\*\*\* fourth, all districts in which is located any city of the first, second or third class shall be known as city school districts."

Article IV. Chapter 57, and Amendments, R. S. 1929, pertain to "Laws Applicable to City, Town and Consolidated Schools." Section 9327 of said article and chapter provides in part as follows:

"The government and control of such town or city school district shall be vested in a board of education of six members, \*\*\*\*."

Article II. of Chapter 57, concerns "Laws Applicable to All Classes of Schools."

Nowhere in the statutes do we find where it specifically and in so many words requires the treasurer to keep financial records and reports. However, such does provide indirectly that the report shall be kept. The following sections relate to the treasurer of a six-director district of high schools located in cities of the first, second and third classes - Sections 9266, 9329, 9335, 9336, 9337, 9338 and 9340.

Section 9266 in part provides:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the Board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law.  
\*\*\*\*."

Section 9329 amended, Laws 1931, page 333 provides in part as follows:

"\*\*\*\*, and the board shall, \*\*\*\*, elect a secretary and a treasurer, \*\*\*\*; said secretary and treasurer may be or may not be members of the board. No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs.\*\*\*\*"

Thus the above statute provides for a report and settlement of the treasurer.

Section 9335 provides that a bond is to be given by the treasurer before he enters upon his duties as such, and further provides as follows:

"\*\*\*\*; and thereafter said treasurer shall be the custodian of all school moneys derived from taxation for school purposes in said district until paid out on the order of the board, \*\*\*\*"

Section 9336 provides for the liability of the treasurer for sinking fund and interest, and in part provides:

"The treasurer of the board shall be the custodian of all moneys collected for liquidating any bonded indebtedness and interest on the same, and shall be responsible on his official bond for the safe-keeping and proper appliance of such sinking fund and interest as may be by him received, \*\*\*\*."

Section 9337 provides:

"Whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by

law, the same shall, on the application of the treasurer of said town, city or consolidated school district, be paid over to him by said county or township treasurer, and the receipt of any such school district treasurer for said money shall be a lawful voucher for the disposition of said money by said county or township treasurer, and be accepted as such by the county court or other body or person having authority by law to make settlements with said county or township treasurer."

Thus when the school district treasurer receives school moneys from the county treasurer he issues to him a duplicate receipt. So by implication the district treasurer would have to keep some record of the money he received also a record of what receipts he has issued.

Section 9338 provides for the settlement of treasurer and reads as follows:

"The treasurer of the board of education of any town, city or consolidated school district shall, annually, between the first and fifteenth of July, settle with the board of education, and account to said board for all school moneys or funds received, from whom and on what account, and the amount paid out for school purposes in such town, city or consolidated school district, which settlement, if found correct by said board of education, shall be approved by said board; and when the said settlement is thus approved, it is hereby made the duty of said treasurer to present his settlement to the clerk of the county court of said county, and the said clerk shall make a careful examination of the said settlement, and, if found correct, he shall certify the same, which certificate shall be prima facie a discharge of such liability of the treasurer for the funds expressed in the vouchers;

and at the expiration of his term of office said treasurer shall deliver over to his successor in office all books and papers, with all moneys or other property in his hands and also all orders he may have redeemed since his last annual settlement with the board of education and with the county clerk, and take the duplicate receipts of his successor therefor, one of which he shall deposit with the secretary of said board of education and the other with the clerk of said county court."

Thus the above section implies that he will have books and papers connected with his tenure of office.

Section 9340 provides:

"The county or township collector shall pay over to the treasurer of said board of education all moneys received and collected by him to which said board is entitled at least once in every month; and upon such payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education, and the other shall be filed in his settlement with the county court."

From the above and foregoing, it is our opinion that it is the duty of the treasurer in a six-director school district of cities of the first, second and third classes to keep true, complete and correct records of all moneys that have come into his possession, also into what fund he has placed the same and a record showing the disbursement thereof.

Yours very truly,

APPROVED:

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James L. HornBostel  
Assistant Attorney-General.

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Roy McKittrick  
Attorney-General.

JLH/afj

LABOR; Electric Line Crews, Leaking Crews, Meter Men, etc., are not to be included in fixing the amount of inspection fees of buildings or shops, as they are not employed within such buildings or shops.

June 9, 1934.



Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the State Labor and Industrial Inspection Department in St. Louis authority to collect inspection fee for employees working on the outside of the St. Louis County Gas and Union Electric Company in some of the following capacities, such as Meter Men, Electric Line Crews, Gas constructors, Leaking Crews, Electric & Gas trouble men?

The St. Louis branch of this Department is of the opinion that these particular places come under the inspection fee because the men use the buildings going in and out for orders and changing their clothes, etc.

I would appreciate your opinion on this subject as soon as possible in order that this question may be straightened out in the minds of the various inspectors in this Department."

Section 13219, R. S. Mo. 1929, among other things, provides how the fees for inspection shall be fixed. It provides that:

"\*\*\*\*For the inspection of every building or shop in which three or less persons are employed or found at work, the sum of fifty cents; for the inspection of every building or shop in which more than three and not exceeding thirteen persons are employed, the sum of one dollar;\*\*\*\*."

The section then enumerates how the fees shall be increased as the number of persons increase. The statute expressly provides that the amount of fees to be collected



shall be regulated by the number of persons employed within the building or shop. The purpose of the inspection statute is to provide suitable working conditions in buildings and shops for the benefit of the people who are employed within the buildings or shops. Such being true, it is consistent that the Legislature should provide a graduated scale of fees based upon the number of persons employed within the building or shop. We do not believe that it was the intention of the Legislature the employes of the Company, who are not employed within the buildings or shops, should be included in fixing the amount of the fees to be charged for the inspection. Men whose chief and substantial duties require them to work out in the open and whose contact with the buildings or shops inspected is simply incidental because of being an employe of the Company should not be included in determining the fees to be charged. Meter men, Electric Line Crews, Gas Constructors, Leaking Crews and Electric and Gas Trouble Men, by the very nature of their work, are not employed within <sup>the</sup> buildings or shops in question.

Of course, it may be true that they go to such buildings for the purpose of getting orders and changing their clothes, etc., but it cannot be said that they are employed within the building or shop. All of their substantial duties are carried on outside of the building or shop. The fact is that they are employed not for the purpose of working within the building or shop, but on the contrary, employed to work outside of the building or shop. If they can be included because they enter the building for incidental purposes, then it would appear that the amount of fees would be fixed by the total number of persons employed by any company, because every employe must, for some minor purpose at some time, enter into some of the buildings of the Company. We believe that it is only those people who are employed within the buildings that may be included in fixing the amount of the inspection fees, because the inspection statutes were made for their benefit and, of course, the more employes within a building the more inspection is required, but we do not believe that it was ever the intention of the Legislature that such employes as you have enumerated in your inquiry should be included in determining the amount of fee to be charged when none of the work they are employed to do is within a building.

We are therefore of the opinion that trouble men, meter men, etc., as set out in your inquiry, should not be included in determining the amount of the inspection fee. These men are not employed within a building or shop, as required by the statute, and the mere fact that they incidentally use the buildings inspected would not make them persons employed within the Building within the contemplation of the statute.

As a matter of fact, they are employed to work



Mrs. Mary Edna Cruzen,

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June 9, 1934.

not within the buildings inspected but their substantial duties are all performed outside of any building or shop.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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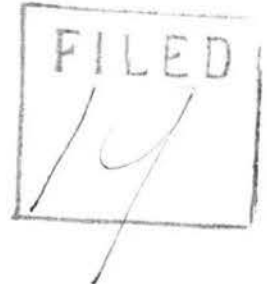
ROY MC KITTRICK,  
Attorney General.

FWH:MS.

GUARDIANS - WARDS - Estates of World War Veterans under guardianship. Invested how?

June 20, 1934

Honorable Ray J. Cunningham  
Chief Attorney  
Veterans Administration  
4030 Chouteau Avenue  
St. Louis, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion dated June 6, 1934, which is as follows:

"This has reference to an opinion rendered by you under date of November 20, 1933, dealing with the investment of funds in estates under guardianship in Home Owners Loan Bonds.

"At the time of the rendition of your opinion the Home Owners Loan Act provided in effect that the United States Government only guaranteed the interest on said bonds, however the Home Owners Loan Act of 1933 has been amended by Public No. 178, 73d Congress, a copy of which Act is enclosed herewith.

"The Act, as amended, provides that the bonds issued by the Home Owners Loan Corporation, with the approval of the Secretary of the Treasury, 'shall be fully and unconditionally guaranteed, both as to interest and principal, by the United States, and such guaranty shall be expressed on the face thereof and such bonds shall be lawful investments, and may be accepted as security for all fiduciary, trust and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof.'

A further interpretation from your office is requested as to the legality of an investment on the part of a guardian in Home Owners Loan

June 20, 1934.

Bonds as being bonds of the United States under the provisions of Section 418 Revised Statutes, State of Missouri. This Service now has pending numerous requests for investments of this character so that your early consideration to the above will be appreciated.

"Under the Act it would seem that the Home Owners Loan Corporation, as such, is an instrumentality or agent of the United States through which the bonds are sold and liquidated."

It is true that the Home Owners' Loan Act of 1933 has recently been amended by virtue of Senate Bill 2999, Public No. 178--73D Congress, and provides in part as amended, as follows:

"The Corporation is authorized to issue bonds in an aggregate amount not to exceed \$2,000,000,000, which may be sold by the Corporation to obtain funds for carrying out the purposes of this section, or exchanged as hereinafter provided. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof.\* \* \* \*"

Section 418 R. S. Mo. 1929 provides in part as follows:

"Guardians and curators shall, unless the money be invested in improving the real estate of the wards as hereinafter provided, loan the money of their wards at the highest legal rate of interest that can be obtained, on prime real estate security, or invest it in bonds of the United States, or of the state of Missouri, or of the federal farm loan bank except where the estate is less than three hundred dollars, in which case good personal security may be taken, \* \* \* \*"

Our Supreme Court in the case of *In Re: Farmers' Exchange Bank of Gallatin*, 37 S. W. 936, 1. c. 942, while interpreting the above section spoke as follows:

"Section 418, above quoted, speaks in no uncertain terms with reference to the manner in which the funds in the hands of a guardian and curator must be invested. If funds are otherwise invested, except as provided by statute, it is unlawful. Even the probate court cannot legally authorize the investment of such funds, except as prescribed. Therefore, the action of the bank, with full knowledge of the situation in this case, in taking the money of the wards and attempting to give the guardians and curator worthless notes in lieu thereof, was not only a violation of the bank's agreement, but was contrary to the provisions of the statute referred to. Such conduct of a third person in dealing with property of a ward cannot be ratified by the guardian and curator on behalf of the ward. Plaintiff had no power or authority to waive any right the wards may have had against the bank or the finance commissioner. She was legally bound to exhaust every legal remedy available to redeem the wards' property."

We note that a similar problem was presented to the Legislature of Missouri when considering the statutory right of the Building and Loan Companies operating in Missouri to assign evidences of debt, together with mortgages and deeds of trust, securing same to the Home Owners' Loan Corporation and to accept in payment thereof and in consideration of said assignment, bonds

of said corporation. The law then existing was set out in Section 5594, Laws of Missouri, 1931, page 150, and gave the building and loan corporation the following power:

"In case there shall be a balance of money remaining undisposed of at any stated meeting, the directors may at their discretion loan the funds so remaining on hand to others than stockholders on the security of prime unencumbered real estate or invest in obligations of the United States or of the State of Missouri and may dispose of such loans and investments at any time the said funds are needed for making loans to members, or for other purposes of the association: \* \* \* \* \*"

That provision, although broader than the provision relating to guardians investing the ward's money, was not considered broad enough to authorize building and loan companies, by implication of the law, to invest in Home Owners' Loan Bonds and, consequently, the legislation, in the Extra Session, 1933, page 49, Section 5594A, expressly provided for the power of building and loan companies to invest in Home Owners' Loan Bonds.

In your query the question presented is this, viz; can a guardian operating under the provisions of Section 418 R. S. Mo. 1929, supra, invest or reinvest the money of his ward in Home Owners' Loan Bonds on which the United States Government has guaranteed payments of principal and interest?

#### CONCLUSION.

Guardians have express authority in Missouri to invest in Bonds of the United States. Home Owners' Loan Bonds are not Bonds of the United States, and this is true in spite of the fact that the United States guarantees payment of principal and interest on the face of the bond. Our Supreme Court is quoted above as limiting the power of a guardian to invest the money of his ward in the certain manner provided by law and holds that to invest them otherwise than is provided by statute, is unlawful. It is not provided by statute that said funds can be invested in Home Owners' Loan Bonds and to say that because a guardian is authorized to invest in bonds of the United States and Home Owners' Loan Bonds being guaranteed by the United States hence are United States Bonds within the meaning of the law, is too forced a construction of the statute to be harmonized with the

June 20, 1934.

ruling in the Farmers Exchange Bank case, supra. In the building and loan analogous circumstance a new law was enacted making such an investment possible, and it is the opinion of this office that it will take an act of the Missouri Legislature, fashioned after the amendment relating to building and loan companies, before it is possible for a guardian, in Missouri, to invest or reinvest the money of his ward in Home Owners' Loan Bonds. There is no separate rule affecting a guardian of a ward who happens to be a World War veteran having an estate under guardianship.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General.

WOS: AH

LABOR - Inspection by Commissioner of Labor under R. S. Mo. 1929, Secs. 13218 and 13219, and applicability thereof to municipally owned utility companies.

7-16  
July 3, 1934.



Honorable Mary Edna Cruzen,  
Labor Commissioner,  
Labor and Industrial Inspection Department,  
Jefferson City, Missouri.

Dear Madam:

A request for an opinion has been received under date of June 21, 1934 from you, such request being in the following terms:

"Does the State Labor and Industrial Inspection Department have the authority under section 13218 and 13219 to inspect municipally owned utility companies, charging them a fee for such inspection?"

The language of Revised Statutes Missouri 1929 Sections 13218 and 13219 lacks any specific reference to municipally owned public utilities, the language used requiring inspection of "all factories", etc., and "all other manufacturing, mechanical and mercantile establishments and work shops" and provides that fees shall be paid by "the owner, superintendent, manager or other person in charge of every establishment inspected", so that the language of the statute seems broad enough to cover any type of establishment regardless of the nature or character of its owner. Furthermore, the object of Chapter 95 of R. S. Mo. 1929 dealing with the protection of laborers is stated in Section 13179, as follows:

"Sec. 13179. Object of department.-The object of this department shall be to collect, assort, systematize and present in annual report to the governor, to be by him transmitted biennially to the general assembly, statistical details and information relating to all departments of labor in the state, especially in its relations to the commercial, industrial, social, educational and sanitary condition of the laboring classes and to the permanent prosperity of the productive industries of the state."

The purpose of this chapter being for the protection of labor and for the maintenance of healthful and sanitary conditions for persons performing such labor, it would not seem that a reasonable construction of this chapter would discriminate against those persons employed by municipally owned utility companies, or that such persons should receive less protection than those employed by private companies. Perhaps it might be argued that the municipality would properly safeguard the interests of persons employed in one of its own enterprises, but the statutes under consideration do not make any exemptions and consequently it would seem that Sections 13218 and 13219 in view of the language and purpose would properly apply to municipally owned utility companies.



2. Honorable Mary Edna Cruzen

July 3, 1934.

It is our opinion that Revised Statutes Missouri 1929, Sections 13218 and 13219 apply to municipally owned utility companies, and that such companies are subject to inspection and payment of fees in the same manner as privately owned companies.

Very truly yours,  
EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

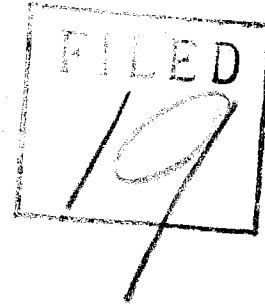
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ATTORNEY GENERAL.

N. SM:-Assessor may receive gratuitous service from son o  
pay him out of his own salary or fee without viola-  
ting Section 13 of Article XIV the Constitution.

7-30

July 23, 1934.



Mr. W. W. Crockett,  
Prosecuting Attorney,  
New London, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"Please advise as to whether the married  
son of an assessor would be permitted to  
work on assessor's books, at your ear-  
liest possible convenience."

Section 12 of Article XIV of the Constitution  
of Missouri provides as follows:

"Any public officer or employe of this State  
or of any political subdivision thereof who  
shall, by virtue of said office or employ-  
ment, have the right to name or appoint  
any person to render service to the State  
or to any political subdivision thereof,  
and who shall name or appoint to such  
service any relative within the fourth  
degree, either by consanguinity or affini-  
ty, shall thereby forfeit his or her  
office or employment."

Under the foregoing constitutional provision  
any officer or employe of the State or of any political  
subdivision thereof who exercises his right to name or  
appoint a relative related within the fourth degree to  
render service to the State or any political subdivision  
thereof shall forfeit his office. We have repeatedly  
construed this provision to mean that the person appoint-  
ed must be appointed to an official position created by  
the Laws and Constitution of this State, and that the pro-  
vision does not prohibit a public officer from receiving  
gratuitous service from his son or from using his own  
funds for the purpose of paying for the services of the  
relative. In the case you put, if the son renders grat-  
uitous service to the assessor or is paid by the assessor  
out of his personal fees or salary, we see no objection  
to the son working in the office. However, if the son is  
appointed to an official position and receives a salary

July 23, 1934.

from the county, then we believe that such situation would be in conflict with the above constitutional provision.

We are therefore of the opinion that if the assessor receives gratuitous service from his son or pays his son for the service rendered out of the assessor's fees or salary, that the Constitution would not be violated, but that the Constitution would prohibit the appointment of the son by the assessor to an official position, wherein the salary or fees of the son were paid out of public funds.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

FWH:MS

RELIEF COMMISSION:

Governor has right to direct expenditure of \$5,000,000.00 appropriation and to enforce self insurance plan.

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August 15, 1934

Honorable Wallace Crossley  
Director  
Jefferson City  
Missouri



Dear Mr. Crossley:

Receipt of your letter dated July 24, 1934  
is acknowledged.

Your letter is as follows:

"Enclosed please find copy of letter which we have received from the Federal Emergency Relief Administration regarding self insurance plan for those injured in the performance of duty on work division.

Will you please give us your written opinion regarding the possibility of using relief funds, either state or Federal, for this purpose?

I know that funds may not be used for any purpose other than that for which they are appropriated, but our state appropriation is so worded as to cover all relief purposes, and it seems to me that in the broad interpretation a voluntary assessment plan would not conflict with the purpose of the law.

May we have your opinion at once so we can proceed with a plan for providing this insurance? "

August 15, 1934

On February 15, 1934 the President of the United States issued an Executive order as follows:

"By virtue of and pursuant to the authority vested in me by the act of February 15, 1934 (Public, No.93, 73d Cong.), appropriating \$960,000,000 to carry out the purposes of the Federal Emergency Relief Act of 1933 (ch.30,48 Stat.55), and to continue the civil-works program, and for other purposes, there is hereby allocated from the said appropriation to the Federal Emergency Relief Administration the sum of \$500,000,000, of which \$150,000,000 shall be available for expenditure during the fiscal year ending June 30, 1934, and \$350,000,000, together with any unexpended portion of the said sum of \$150,000,000, for the fiscal year ending June 30, 1935.

The sum herein allocated shall be available for making grants to States and for administrative expenses under the provisions of the said Federal Emergency Relief Act of 1933, and under the existing rules and regulations of the Federal Emergency Relief Administrator which are hereby adopted by the President.

The said Administrator is hereby authorized to prescribe such other rules and regulations as may be necessary to effectuate the purposes of the rules and regulations herein adopted by the President."

Laws of Missouri in Extra Session 1933-1934 at page 14, Section 12L, provides:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of five

August 15, 1934

million (\$5,000,000.00) dollars, or so much thereof as may be ordered by the Governor to be used in the manner authorized and directed by the Governor, together with any funds advanced through any agency of the Government of the United States of America, for the relief of citizens of the State of Missouri, who are in need of aid, by reason of being reduced to dire distress and want through such unemployment and ruinously low prices of agricultural commodities, as to constitute, in the opinion of the Legislature, a public calamity, which the Legislature declares now exists; provided, however, that the expenses of the administration of the amount hereby appropriated shall be paid out of any appropriation made for that purpose, and shall not exceed the amount in such appropriations authorized; provided further, that this appropriation shall expire April 1st, 1935, and not more than four million dollars (\$4,000,000.00) of such appropriation shall be used during the year 1934. "

Of course, if those accepting relief from the above appropriation agree that a portion of the money that might otherwise come to such persons, be reserved by you for the purpose of carrying out a self insurance plan there could be no question as to the legality of such procedure. However, we take it that you mean to inquire if a compulsory self insurance plan among those to whom relief is afforded can be legally carried out.

Section 12L above set out does not provide the details for the expenditure of the five million dollars (\$5,000,000.00) appropriated for relief purposes. Necessarily this could not have been intelligently done; the moneys so appropriated, 'together with any funds advanced through any agency of the Government of the United States of America,' are to be used for the relief of the citizens of the State of Missouri who are in need of aid by reason of distress and want. The five million dollars (\$5,000,000.00) or so much thereof as may be ordered by

August 15, 1934

the Governor, is to be used and expended in the manner as authorized and directed by the Governor. The amount or amounts to be paid to any person rests in the hands of the Governor or those appointed by him to determine that question. We see no reason why the Governor can not attach any reasonable and proper condition to the expenditure of the money so appropriated as will in his judgment best carry out the purposes for which such appropriation was made, and it is our opinion that the Governor by rule and order can direct the carrying out of such self insurance plan and compel compliance therewith if the same would meet the aim and end attempted to be affected by Section 12L above quoted.

Unless the United States Government attaches some contrary condition to the money granted to the State of Missouri, we are of the opinion the same provision would apply to the money granted by the United States Government to the State of Missouri for relief purposes.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



LABOR AND INSPECTION:-Labor Commissioner has no right to require Federal Relief Administration to take out license and pay permit fee.

8-17  
August 15, 1934.

Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.

FILED  
19

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Labor and Industrial Inspection Department the right to insist upon the Relief Administration securing mattress permits in order for them to make mattresses to be used in their relief work?"

Section 13308, R. S. Mo. 1929, provides as follows:

"No person shall make, remake or renovate bedding, except a person making, remaking or renovating bedding for his own use, until he has secured a permit from the state commissioner of labor and industrial inspection and has paid to the state commissioner of labor and industrial inspection an inspection and permit fee of twenty dollars, which such payment or charge shall constitute a factory inspection charge for the purpose of enforcing this article. The permit so issued by the state commissioner of labor and industrial inspection shall remain in force and effect until the end of the calendar year in which it was issued or until voided by the state commissioner of labor and industrial inspection for failure to maintain the required sanitary conditions in and around a factory in which bedding is made, remade or renovated, or for failure to sterilize and disinfect properly all previously used materials used in making, remaking or renovating bedding."

You inquire whether your Department can insist upon the Relief Administration securing mattress permits

before they would be entitled to make mattresses to be used in their relief work. We assume by the inquiry that you are referring to the Relief Administration of the Federal Government and the various agencies employed by them in making mattresses.

Under the foregoing section, any person is prohibited from making, renovating, etc., mattresses until he has secured a permit from your Department and until he has paid a permit fee of twenty dollars. As we view the above section you cannot issue a permit unless the permit fee is paid. In other words, the payment of the fee is a prerequisite to the right to secure the permit. The paying of the fee is a very essential requirement under the foregoing section and the issuing of the permit and the paying of the fee are so closely related that we do not see how the two can be separated. Since both go hand in hand the question arises whether your Department can compel the Relief Administration of the Federal Government, or one of its agencies, to take out a permit and pay the fee required by statute. We conclude that you cannot do so, because where it is necessary, before the Relief Agency can obtain a permit, that they pay a fee of twenty dollars, we conclude that your Department has no right to levy a tax or license fee upon an agency of the Federal Government.

The general rule applicable to the independence of the Federal and State Governments from the taxing powers of each is generally stated in 37 Cyc. page 878, as follows:

"The necessary independence of the federal and state governments imposes a limitation upon the taxing power of each. Neither can so exercise its own power of taxation as to curtail the rightful powers of the other, or interfere with the free discharge of its constitutional functions, or obstruct, embarrass, or nullify its legitimate operations, or destroy the means or agencies employed by it in the exercise of those powers and functions.

"According to this rule, it is not within the power of a state to lay any tax on the instruments, means, or agencies provided or selected by the United States government to enable it to carry into execution its legitimate powers and functions; but a state tax upon the property of an agent of the federal government is not prohibited merely because it is the

property of such an agent. State taxation of the instruments or agencies of government is not objectionable on this ground if it does not impair their usefulness or efficiency or hinder them from serving the government as they were intended to serve it.\*\*\*\*\*

In view of the foregoing we are of the opinion that your Department should not attempt to exact the permit fee from the agency of the Federal Relief Administration. While the exaction of one single permit fee might not be said to impair the usefulness or efficiency of the agencies of the government, yet if one fee could be required then a fee could be required for every agency used by them in this State. Naturally, if Missouri could exact a permit fee, then, of course, every other state in the Union could do likewise and the result would be that the usefulness and efficiency of the agencies of the Government would be greatly impaired.

While in the instant <sup>case</sup> there might be some doubt as to whether the exaction of this single fee would embarrass or obstruct the Federal Government in the exercising of its governmental powers and functions, yet we prefer to base our opinion upon the broad proposition that the Federal Government is exempt from taxation, license fees and permits in discharging its constitutional functions and in the operation of its powers of government. Generally speaking, it has always been held that the Federal Government and the State Government may exercise, through its agencies, governmental functions without being impaired by taxation by the other. We think this broad principle should govern in the answer to your inquiry.

It is therefore the opinion of this Department that your Department would have no right to exact from the Federal Relief Agency a permit fee before they would be entitled to make mattresses as an agency of the Federal Government in carrying out its governmental functions. Since you cannot require them to pay the permit fee, whether or not you issue them a license becomes immaterial.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

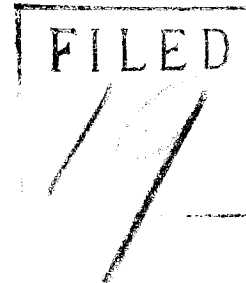
APPROVED:

ROY McKITTRICK,  
Attorney General.

FWH:MS

LABOR DEPARTMENT:-Under Section 13190, R. S. Mo. 1929, any person, firm or corporation maintaining an employment office where their service are charged for must obtain license from Labor and Industrial Inspection Department.

8-17  
August 15, 1934.



Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.

Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Labor and Industrial Inspection Department the right to collect Employment Agency license fee from agencies operating under the following plan:-

"Instead of charging the regular registration fee, they charge 5% of the first year's salary as the registration fee.

"I would appreciate your opinion on this as soon as possible because there are a number of teachers' agencies and other agencies using this method."

Section 13190, R. S. Mo. 1929, among other things, provides:

"No person, firm or corporation in this state shall open, operate or maintain an employment office or agency for hire, or where a fee is charged to either applicants for employment or for help, without first obtaining a license for the same from the state commissioner of labor and industrial inspection.\*\*\*"

It is apparent from the foregoing section that no person is entitled to open or maintain an employment office where their services are charged for without first obtaining a license from you. As we construe the Statute, it is immaterial whether the compensation received by the employment office for the service rendered be a fixed regis-

Mrs. Mary Edna Cruzen,

-2-

August 15, 1934.

tration fee or whether they charge a percentage of the salary of the applicant. In either event they are charging a fee for obtaining employment for the applicant and come within the express terms of the Statute.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

FWH:MS

CORPORATIONS: Relief Activities.

9-1  
August 30, 1934



Honorable Wallace Crossley  
Jefferson City  
Missouri

Dear Mr. Crossley:

- Receipt of your letter dated August 14, 1934 with inclosures, is acknowledged. Your letter is as follows:

"I should appreciate it very much if you would examine the enclosed articles of incorporation of the proposed Missouri Rural Rehabilitation Corporation and give us a written opinion whether these articles violate the laws of Missouri. These articles of incorporation are identical with those prescribed by the Federal Emergency Relief Administration for such corporations."

In the first subdivision of your articles of association it is stated that the proposed 'Missouri Rural Rehabilitation Corporation' is

"\* \* \* a benevolent and non-profit corporation."

The main purpose of the proposed corporation as stated in subdivision A of the third paragraph of the articles, is as follows:

"To rehabilitate individuals and families as self-sustaining human beings by enabling them to secure

subsistence and gainful employment from the soil, from coordinate and affiliated industries and enterprises and otherwise, in accordance with economic and social standards of good citizenship. "

Subdivision E of such third paragraph authorizes the proposed corporation to manufacture certain articles.

Subdivision I of the third paragraph proposes to authorize the corporation

"To engage and assist in any kind of charitable, educational, relief and health activities whatsoever."

Subdivision J of the third paragraph authorizes the corporation to receive grants of money and financial aid from specified sources.

The proposed articles of association do not state the exact amount of capital stock nor that the same or a part thereof has been paid in or subscribed. We presume that the capital is to be established from gifts and donations received. It is provided that upon adissolution of the corporation the balance of funds on hand shall become a part of the General Fund of the State of Missouri, subject to appropriation by the state legislature.

Under the title 'Corporations' and the heading 'Manufacturing and Business Companies,' Section 4940 Revised Statutes 1929, Article 7, Chapter 32, after specifying for what purposes a corporation may be created as a manufacturing and business company, the thirteenth subdivision of the above section provides:

"For any other purpose intended for pecuniary profit, or gain not otherwise especially provided for\* \* \* \*."

The business in which the proposed corporation desires to engage is not covered by any of the specified powers set out in Section 4940, so that the same would be covered by



the thirteenth subdivision of Section 4940 if covered at all by such Article 7.

We think it is clear that the proposed corporation is not entitled to be chartered under Article 7, Chapter 32, Revised Statutes Missouri 1929, because it is stated that the same is organized for benevolent and non-profit purposes.

Article 10 of Chapter 32, Revised Statutes Missouri 1929, in Section 4996 thereof, provides:

"Any number of persons not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes, may be consolidated and united into a corporation. Such articles of agreement may be organic regulations, or a constitution, or other form of association, and any corporate name, not already assumed by another corporation, may be chosen as the title of the corporation: Provided, always, that the purpose and scope of the association be clearly and fully set forth."

Section 4997 authorizes the incorporation of a society, company or association formed for the purposes set out in the last quoted section by the decree of the proper circuit court.

In reference to what associations may incorporate section 4999, in part, provides:

"Any association formed for benevolent purposes, including any purely charitable society, hospital, asylum, house of refuge, reformatory and eleemosynary institution, fraternal-beneficial associations, or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public,

Honorable Wallace Crossley

-4-

August 30, 1934

may become a body corporate and politic  
under this article\* \* \* \* \*."

We think the proposed 'Missouri Rural Rehabilitation Corporation' could be properly incorporated by the proper circuit court in this state under Article 10, Chapter 32, Revised Statutes Missouri 1929, and when so incorporated you would have power and authority to do the things set forth in your proposed articles of association.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General.

GL:LC

RELATING TO COUNTY WARRANTS:

- (1) WARRANTS ARE ACCEPTABLE IN PAYMENT OF TAXES.
- (2) COUNTY TREASURER SHOULD ACCEPT AND GIVE CREDIT TO COLLECTOR FOR ALL SUCH WARRANTS.
- (3) SECTION 9911 R.S. 1929 NOT REPEALED BY SECTION 22 LAWS OF MISSOURI, 1933, PAGE 351.

10-5

September 21st, 1934



Hon. A. J. Cypret  
Treasurer Oregon County  
Alton, Missouri

Dear Sir:

We acknowledge receipt of your letter of date September 10th in which you state and inquire as follows:

"We, have had here in this County a great deal of people paying taxes with county warrants since the warrants have not had ready sale. Taking in the way that the law prescribes that they may be used on taxes, now that we have the new budget working and the priority of payment on class one and two being set out. And the law says that this shall be "Sacredly Preserved" (Priority). I was wondering if you have an opinion or would give one at once as the time is not far off until we will be asked to take them.

We have had enormous lot of taxes paid by warrants and if it goes the same way it will delay the payment of the favored classes."

I.

Warrants are acceptable in payment of taxes when issued and received in payment of a tax during the year for which that tax was levied.

Section 9911 Revised Statutes 1929 provides as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal

tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year."

It appears from the foregoing section 9911 (Supra), that the warrants must be presented by the legal holder, and also be issued and received in payment of a tax during the year for which the tax was levied.

In view of the provisions of said section 9911 (Supra), it is the opinion of this department that county warrants are acceptable for taxes. It may be said further that the fact that a party presenting a warrant which is less in amount than the taxpayer owes to the fund on which the warrant is drawn, would not alter the case; he should be given credit for the amount of the warrant on that particular fund.

## II.

The county treasurer should accept and give credit to the collector for all county warrants accepted in payment of taxes in the monthly settlements of the collector.

Section 12140 Revised Statutes 1929, provides as follows:

"No county treasurer shall refuse payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current expenses of the county as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment: Provided, however, that nothing herein contained shall prevent the treasurer from receiving from the collector all scrips and warrants lawfully received by him in the payment of county tax: Provided further, before the treasurer shall receive such scrips and warrants, the collector shall make out a list of such scrips and warrants, under oath, specifying the number and amount thereof, the date when received and from whom received; and said list shall be filed and preserved by the treasurer."

It appears from said section 12140 (Supa) that it specifically provides that the treasurer is not prevented from receiving from the collector such warrants. It therefore follows as a matter of inference that the treasurer must accept the warrants and allow the collector proper credit in his monthly settlements.

### III.

Section 9911 Revised Statutes, 1929, was not repealed either directly or by implication by section 22 Laws of Missouri 1933, page 351.

Oregon County being a county of less than

-4- September 21st, 1934

50,000 inhabitants, sections one to eight inclusive, of what are known as the "Budget Law" are applicable to your county. A careful examination of sections One (1) to Eight (8) inclusive of Laws of Missouri, 1933, pages 340-6 fails to disclose that any provisions therein are in anywise in conflict with section 9911 (Supa).

Section 8, Laws of Missouri, page 346, there appears the following in parenthesis:

"This shall not apply to warrants lawfully issued for accounts due for prior years, lawfully payable out of funds for prior years on hand."

By reason of the foregoing provision, this department interprets the same to be the intention of the Legislature that county warrants used in payment of taxes are to occupy their same position.

Section 22 Laws of Missouri, 1933, page 351, provides as follows:

"All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed."

In conclusion we rule that no part of the 22 sections Laws of Missouri, 1933, page 340-351, either directly or by implication repealed the provisions provided in section 9911 (Supa) and that said section is now the law on that subject.

Yours very truly,

W. W. Barnes

Assistant Attorney General

APPROVED:

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Attorney General

SCHOOL DISTRICTS:-Under Sections 9197 and 9354, R. S. Mo. 1929, and  
TRANSPORTATION: Section 16, Laws of 1931, page 334, a two-thirds  
majority vote is required where the question is  
voted upon by the taxpayers of the district.

11-9  
October 2, 1934.

Mr. Chas. C. Crosswhite, Statistician,  
Department of Education,  
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"According to Sections 9197, 9354 and  
16, Laws of 1931, is a majority or a  
two-thirds vote of the tax-payers re-  
quired when incidental funds are to be  
used by a school district in providing  
transportation for high school pupils?"

You inquire whether under the above sections  
a majority or a two-thirds vote of the tax-payers is  
required in order to provide transportation for high  
school pupils. Section 9197, R. S. Mo. 1929, provides  
as follows:

"Whenever the board of directors  
of any school district or board of  
education of a consolidated district  
shall deem it advisable, or when  
they shall be requested by a petition  
of ten taxpayers of such district,  
to provide for the free transporta-  
tion to and from school, at the ex-  
pense of the district, of pupils liv-  
ing more than one-half mile from the  
school-house, for the whole or for  
part of the school year, said board  
of directors or board of education  
shall submit to the qualified voters  
of the district, who are taxpayers in  
such district, at an annual meeting  
or a special meeting, called and held  
for that purpose, the question of  
providing such transportation for  
the pupils of such school district:  
Provided, that when a special meet-  
ing is called for this purpose, a due  
notice of such meeting shall be given  
as provided for in section 9228. If



two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

Under Section 9197 it is specifically provided that it takes a two-thirds vote in favor of the board of directors transporting the pupils.

Section 9354, R. S. Mo. 1929, was amended by the laws of 1933, page 388, and now reads as follows:

"The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation:

Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 18 of an act of the 56th General Assembly, found on Page 344, Laws of Missouri, 1931. Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have all the seventh and eighth grade work done at the central high school building, provided, fifteen days' notice has been given that such vote will be taken. Such seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting."

Under Section 9354 above the fact is not stated whether the vote shall be a majority vote or a two-thirds vote. Section 9354 deals with city, town and consolidated schools. If section 9354 specifically provided that only a majority vote of the taxpayers was necessary in voting transportation, then all city, town and consolidated schools would be under that provision. Since, however, section 9354 does not provide whether the vote required be a majority or a two-thirds majority, then it appears to us that we must refer back to section 9197 above, which applies to all classes of schools, in order to determine this question.

There being no special provision determining this matter as applying to city, town and consolidated schools we are compelled to refer to the general section which applies to all classes of schools, and under the general section, to-wit, 9197, which applies to all classes of schools, a two-thirds vote is necessary. We therefore believe that under section 9354 a two-thirds vote is necessary to provide transportation, except where under the very provision of the act, the attendance falls below ten, then the school board is authorized to

close the school and provide transportation.

Laws of 1931, Section 16, page 343, provides as follows:

"The board of directors of each and every school district in this state that doesnot maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupil shall not be counted in determining the teaching units of the district maintaining the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final: Provided further, that when any school district makes provision for transporting any or all of the children of such district to a central school or schools and the method of transporting and the amount paid therefor is approved by the state superintendent

of schools, the amount paid in state funds for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district: Provided, the provision of this act regarding the payment of tuition and transportation shall apply if the students attend any school supported wholly or in part by state funds."

Section 16 above does not provide whether the vote necessary shall be a majority vote or a two-thirds vote. Since that section does not specifically provide as to which vote shall determine the question of transportation, we are compelled again to refer to the general section which applies to all classes of schools, which is section 9197, and under section 9197 a two-thirds majority is required. If it were not for section 9197, which deals with all classes of schools and provides a two-thirds majority, it might be said that under section 9354 and section 16 that a majority vote is all that is required. This would be on the theory that only a majority vote is required generally upon any proposition, except where the statute makes a provision to the contrary. However, where there is in existence a statute applying to all classes of schools which requires a two-thirds majority, and since the statutes dealing with particular schools are silent as to whether a majority or two-thirds majority is required, it appears to us that the matter must be governed by the statute applying to all classes of schools, which in this case requires a two-thirds majority.

Since section 9354 and section 16 are silent as to whether a majority or two-thirds majority is required, to hold that a simple majority only is required would be in effect to ignore the provisions of section 9197, which applies to all classes of schools. We believe, however, that full effect must be given to section 9197 which applies to all classes of schools, where the sections applying to particular classes are silent or contain nothing which conflicts therewith.

It is therefore the opinion of this Department that under sections 9197 and 9354, R. S. Mo. 1929, and section 16, Laws of Missouri 1931, page 334, that a two-thirds majority is required where the question of transportation is voted upon by the taxpayers of the district.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

Attorney General.

LABOR COMMISSIONER:-Under Section 13321, R. S. Mo. 1929, commissioner has right to require report of industrial accidents even though employers are also required to make report of accidents to Workmen's Compensation Commission.

October 17, 1934.

Mrs. Mary Edna Cruzen,  
Commissioner of Labor,  
Jefferson City, Missouri.



Dear Mrs. Cruzen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Has the Labor and Industrial Inspection Department the right to enforce section 13321 of the Missouri State Labor Laws in view of the fact that the Missouri Workmen's Compensation Commission is supplied with this information?"

You inquire whether or not your Department has a right to enforce Section 13321, R. S. Mo. 1929. That section reads as follows:

"All accidents in manufacturing, mechanical, mercantile or other establishments or places within this state where labor is employed which prevent the injured person or persons from returning to work within four days after the injury, or which result in death, shall be reported by the person in charge of such establishment or place to the commissioner of labor and industrial inspection or to one of the assistant or deputy inspectors provided for by this chapter, and also to the city or county physician, when there be such an officer, which notice may be given by mail."

Under the foregoing section all accidents are required to be reported to your Department where the injured person does not return to work within four days after the injury, or which result in death. You call our attention to the fact that there are certain requirements which require reporting of accidents to the Workmen's Compensation Commission. The section of the Workmen's Compensation Act which requires the reporting of accidents is No. 3332, which is as follows:

"Every employer in this state, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to an employe, notify the commission thereof, and shall, within one month, file with the commission under such rules and regulations and in such form and detail as the commission may require, a full and complete report of every injury or death to any employe for which the employer would be liable to furnish medical aid or compensation hereunder had he accepted this chapter, and every such employer shall also furnish the commission with such supplemental reports in regard thereto as the commission shall require. Every such employer and his insurer, and every injured employe, his dependents and every person entitled to any rights hereunder, and every other person, receiving from the commission any blank reports with direction to fill out the same shall cause the same to be promptly returned to the commission properly filled out and signed so as to answer fully and correctly to the best of his knowledge each question propounded therein and a good and sufficient reason shall be given for failure to answer any question. No information obtained under the provisions of this section shall be disclosed to persons other than the parties to compensation proceedings and their attorneys, save by order of the commission, or at a hearing of compensation proceeding, but such information may be used by the commission for statistical purposes. Every person who violates any of the provisions of this section, or who knowingly makes a false report or statement in writing to the commission, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment."

October 17, 1934.

Section 13221 contains a provision dealing with the safety and health of employes. It is the evident intent of the Legislature that the reports required under the above section shall be made so that your Department may have a record of the accidents and hazards of employes engaged in industries. It is very essential not only for statistical purposes, but also for the reason that they afford information regarding the compliance by employers with the requirements dealing with the safety and health of employes. This section is enacted under the broad police power of the State and has no connection with the private rights of the employer or employe.

Section 3332, however, is purely a statute dealing with the private rights and liabilities of the employe and employer. These reports are required to be made to the Workmen's Compensation Commission, which is both an administrative and a judicial body. The commission interprets, construes and applies the Workmen's Compensation Act and settles the rights of employes and employers growing out of industrial accidents. These reports have no connection whatever with the police power of the State, nor with your Department, and are, as a matter of fact, confidential between the parties to the compensation proceedings. The Statute expressly so provides.

One theory upon which reports are required to the Compensation Commission is that the Commission may, upon information received, advise the employe of his rights. It has even been held that a failure on the part of the employer to make report of accidents would toll the running of the Statute of Limitations. This section, therefore, simply deals with the rights and liabilities of the employes and employers and is not in conflict and has no connection with Section 13221, which requires the furnishing of reports to you as the Commissioner of Labor.

It is therefore the opinion of this Department that irrespective of Section 3332 above, that you, as Commissioner of Labor and Industrial Inspection, may require the reporting of accidents to you under the provisions of Section 13221.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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ROY McKITTRICK,  
Attorney General.



LABOR AND INDUSTRIAL INSPECTION: (1) Board of Permanent Seat of Government only required to furnish office space to Department of Labor and Industrial Inspection if same be available in State Capitol. (2) Rent for office space at Jefferson City not chargeable to appropriations made for Labor and Industrial Inspection.

12-10  
December 7, 1934.

Mrs. Mary Edna Cruzen, Commissioner  
Department of Labor and Industrial Inspection  
Jefferson City, Missouri.



Dear Mrs. Cruzen:

This department acknowledges your letter of November 27th, wherein you state as follows:

"I would like to have an opinion on the question of rent for suitable rooms for the Labor and Industrial Inspection Department during the period when the Legislature is in session.

"According to Section 13170 rooms must be furnished for the Labor and Industrial Department by the Permanent Seat of Government in the State Capitol. When we are required to move out for a period of time, who is held responsible for the payment of rent for the office rooms?"

Section 9156, R. S. Mo. 1929, provides in part as follows:

"It shall be unlawful during any session of the general assembly for any state official, board, commissioner, etc. \*\*\*\*, without the joint written consent of the presiding officers of the senate and house of representatives first had and obtained, to use, occupy, or otherwise usurp or hold any room, office or apartment in the capitol building, \*\*\*\*. And it shall be the duty of the commissioner of the permanent seat of government on or before the opening day

of each term or session of the general assembly to have all such committee rooms, offices and apartments cleared of all other occupants and open and ready for the use of the general assembly and of the several committees thereof, with all the furniture and fixtures belonging to said rooms restored thereto and in proper place therein. \*\*\*\*\*

By virtue of the above statute, your office would be moved by the Permanent Seat of Government.

Section 13170, R. S. Mo. 1929, provides in part as follows:

"The principal office of the commissioner of labor and industrial inspection shall be kept and maintained in Jefferson City Missouri, and it shall be the duty of the board of permanent seat of government to furnish suitable rooms therefor in the state capitol. \*\*\*\*\*"

You want to know who is held responsible for the payment of rent for the office rooms when you are required to move for the period that the Legislature is in session. To answer your inquiry, it calls for an interpretation of Section 13170, supra.

In the case of State v. Wurdeman, 295 Mo. 566, 246 S. W. 189, 1.c. 194, the Court said:

" \*\*\*\* Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute, it indicates a mandatory statute. \*\*\*\*\*"

In this statute we have, in addition to the word "shall", the word "duty". It is defined in "Words and Phrases" Judicially Defined, Volume 3, p. 2384, thus:

"One's duty is what one is bound or under obligation to do."

And in the case of Taylor v. White,  
(Texas) 113 S. W. 554, 1.c. 556, in the following man-  
ner:

"A duty is but an obligation to perform  
some act. \*\*\*\*\*"

In the case of Ash v. Chas. F. Noble  
Oil & Gas Company, 96 Okla. 211, 223 Pac. 1.c. 179,  
the Court, in defining the term "shall" said:

"'Shall' when used in connection with  
the duty to be observed or performed  
is used in an imperative sense, and  
when a right or benefit depends upon  
giving it a mandatory meaning it cannot  
be given a permissive meaning. Clark  
v. Patterson, 214 Ill. 539, 73 N. E.  
806, 105 Am. St. Rep. 127; Bay State St.  
Ry. Co. v. Woburn, 232 Mass. 201, 122  
N. E. 268."

By virtue of Section 13170, R. S. Mo.  
1929, supra, the Commissioner of Labor and Industrial  
Inspection is given the right to suitable rooms in the  
State Capitol, and it is made the duty or obligation  
of the Board of Permanent Seat of Government to furnish  
same. The term "shall" is used in connection with a  
"duty" to be observed or performed and is therefore used  
in an imperative sense, and cannot be given a permissive  
meaning.

However, the Board of Permanent Seat  
of Government, by virtue of Section 9156, R. S. Mo. 1929,  
supra, must also give ear to the following language:

"And it shall be the duty of the Commis-  
sioner of the Permanent Seat of Government  
on or before the opening day of each term  
or session of the general assembly to  
have all such committee rooms, offices and  
apartments cleared of all other occupants  
and open and ready for the use of the general  
assembly and of the several committees there-  
of \*\*\*\*\*"

The term "shall" is also used here in  
connection with a "duty" to be performed and therefore

is also used in an imperative sense.

Judge Walker held, in the case of Johnston v. Ragan, 265 Mo. 420, l.c. 435, 178 S. W. 159:

"Statutes are not to be construed so as to result in an absurdity or to impose unnecessary burdens."

We have seen that the Board of Permanent Seat of Government must provide suitable rooms in the State Capitol for the Department of Labor and Industrial Inspection, and are further directed to have all offices cleared for the General Assembly. To construe the term "shall" as being mandatory upon the Commissioner to furnish suitable rooms in the State Capitol when same are not available would result in an absurdity.

In the case of State v. Talty, 66 S. W. 361, l.c. 369, 166 Mo. 529, our Court in defining the term "shall" said:

"That the word 'shall' as generally used is mandatory may be conceded, but it is a cardinal rule that 'the intention of an act will prevail over the literal sense of its terms' (Suth. St. Const. Sec. 219), otherwise it might lead to absurd consequences, which could but be the result in this case if the statute be construed according to its strict letter."

We are, therefore, of the opinion that the intention of the Legislature was to make it mandatory upon the Board of Permanent Seat of Government to furnish suitable rooms for the Department of Labor and Industrial Inspection only if same were available. If rooms are not available, the duty of the Board is at an end for the duty only goes to furnishing of "suitable rooms therefore" in the State Capitol."

The Legislature made no provision in your appropriation for the paying of rent for office rooms. Laws of Missouri, 1933, page 80, sets out the funds appropriated to your department and it provides:

D. Operation:

General expenses, consisting of communication, printing and binding, travel, other general expense.....

Material and supplies: Consisting of stationery and office supplies..... \$7,590.00

Laws of Missouri, Extra Session (1933-34) page 10, sets out the funds appropriated to your Department and it provides:

D. Operation:

General expenses, consisting of communication, printing and binding, travel, other general expense..... \$5,000.00

If the Legislature intended rent to be paid for office rooms by the Department of Labor and Industrial Inspection it would have provided for such.

Article X, Section 19 of the Missouri Constitution provides that money is to be paid as appropriated and reads in part as follows:

"No money shall ever be paid out of the Treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; \*\*\*\*\*".

The Court, in the case of State ex rel. Bybee v. Hackmann, 207 S. W. 64, 1.c. 65; 276 Mo. 110, said:

"For it is fundamental that no officer in this State can pay out the money of the State, except pursuant to statutory authority authorizing and warranting such payment. Lamar Twp. v. Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1918 D. 740."

12/7/34

CONCLUSION.

In view of the above and foregoing, we are of the opinion that the Board of Permanent Seat of Government must furnish suitable rooms for the Department of Labor and Industrial Inspection if they are available, and if same cannot be obtained in the State Capitol the duty of the board is at an end.

The Legislature made no provision in your appropriation for the paying of rent for office rooms. If you wish to rent rooms in Jefferson City during the period the Legislature is in session, it will become a moral obligation upon the part of the Legislature to appropriate for the deficiency but there is no legal obligation imposing a duty upon them to do so

Respectfully submitted,

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WM. ORR SAWYERS

Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

MW/WOS-afj

COUNTY COURT: Right to employ assistant counsel.

12-27

December 21, 1934.



Hon. W. W. Crockett,  
Prosecuting-Attorney,  
New London, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion dated November 23, 1934, said request reading as follows:

"The personnel of our county court changes on January 1st, 1935. About thirty days ago the present court entered into a contract and made an order of record to procure the services of an attorney as special counsel to assist the prosecuting attorney to try to obtain a preference for the county as to funds amounting to above \$44,000.00 tied up in the State Bank of New London, now a closed institution and in the hands of the State Finance Department for purpose of liquidation. The agreement was to pay a per cent on the contingent basis to carry the proceedings thru the Circuit Court and thru appellate court, if necessary, and in the event of failure to obtain preference the attorney was to receive a stipulated sum for his expense and trouble. The last day for filing claims is December 12th, 1934, and I take it that if the Finance Department refuses to allow the claim at all then it will be at least sixty days from that date before suit can be brought and in the meantime the present court will have ended their terms and the new court will have been installed. If the Finance department allows the claim as a common claim, then I take it the circuit court would have jurisdiction and could hear the matter at any time thereafter and if the court decided not to allow



preference, then the county could appeal but it would seem that the appeal could hardly be completed before January 1st, and could not be heard in appellate court for a long time thereafter.

The question is, has the present court authority to hire special counsel in a county of this size, viz 10704, according to last census? 2nd. Can the present court hire a party to do something that will not be completed and perhaps not begun during their term of office? 3rd. Would the incoming court be bound to carry out the contract of the present court?"

The county court of a county is in charge of the property and management thereof in its respective county. Section 2078, R. S. Mo. 1929, sets forth this power as follows:

"The court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The control and management, above referred to, implies certain contractual powers, among them being, I believe, the right to employ additional counsel where the situation justifies the same. I can find no statutory prohibition to this course, or that the county court is in any different position, than a private individual seeking to contract. The county court is in the position of any other contracting individual, other than for what statutory limitations are placed upon said court.

A brief discussion of this proposition is contained in L. R. A. 1917D, page 253, which reads as follows:

"In Missouri the court seems to be in confusion upon the question. It was held in

Thrasher v. Greene County (1885) 87 Mo. 419, and in Thrasher v. Greene County (1891) 105 Mo. 244, 16 S. W. 955, that the county court may by statute employ attorneys to aid the prosecuting attorney in any civil business. In Butler v. Sullivan County (1891) 108 Mo. 630, 18 S. W. 1142, it was held that the county court might not employ special counsel to prosecute suits for taxes on railroad property, this being the duty of the prosecuting attorney, although the collector might appoint an assistant attorney with the approval of the county court, the court stating that the county court was not a general agent and had only statutory power, and that the statute referred to in the Thrasher Cases had been repealed. But in Reynolds v. Clark County (1901) 162 Mo. 680, 63 S. W. 382, the court, not referring to the Butler Case, although it was cited by counsel, held, on the authority of the Thrasher Cases, that the county had the power to employ unofficial counsel in a civil suit."

The Reynolds case (supra) and other cases herein-after cited, removes the doubt, as has been expressed in the above authority. The Reynolds case (supra) was a case in which the county was sued for \$50,000 on some coupons and interest. The county court contracted with Reynolds to defend the matter. Reynolds was successful in what court procedure was undertaken, and the county court, without consultation with Reynolds, compromised and settled the claim, and Reynolds sued for the balance of his attorney fee. The county court defended plaintiff's claim on the ground that the county court had no power to employ plaintiff as attorney in said matter.

The Court mentioned the Thrasher Cases (supra) and said:

"The county court, therefore, had the power to make the contract, which contract, when made, bound the county, and placed it on the same plane of liability and on the same basis as to incidents and consequences flowing from such liability, as other contracting parties are placed. Among such incidents and con-

sequences is this one: That if a party employs an attorney to bring or defend a suit, and such suit is brought or defended; such party cannot, while the suit is pending, dismiss the suit, if he is plaintiff, or compromise it, if defendant, and then refuse to pay his attorney as previously agreed upon. This view is announced by all the courts.

In the language of one of those cases, 'It would be most unjust that the defendant, by a compromise with the adverse party, should snatch from the plaintiff the fruits of his labor, and deprive him of the power of performing his contract.' (Hunt v. Test, 8 Ala. (N.S.) 713).

Furthermore, as the act of defendant prevented performance, it will be assumed that the service would have been performed as agreed upon. (McElhinney v. Kline, 6 Mo. App. 94).

Judgment was reversed and cause remanded with instructions to enter judgment for the amount of plaintiff's demand."

In the Case of State ex rel v. Butler County, the following comment is made by the court, 164 Mo. page 214, l. c. 219:

"There is something in the nature of the services of an attorney at law that renders a contract, calling for the performance of the same, peculiar. When the performance of the services has been entered upon and then cut off by the willful act of the client, and the services continued by another, it is not only often impossible to determine the value of the services up to the time of his dismissal, but also even the effect of the employment itself on the ultimate result of the case. And under such conditions it has been held that the attorney was entitled to recover the full contract price as if he had

December 21, 1934

performed all that he agreed to do."

In the case of *Morrow v. Pike County*, 189 Mo. (1905), page 610, the power of the county court was conceded to employ counsel. No attack was made upon any inherent or statutory lack of power of the county court to make a contract employing an assistant attorney.

In view of the case law I have above set forth, we are of the opinion that the county court has authority to hire assistant counsel to assist in the prosecution or defense of any substantial rights of the county; that the present county court has the right to enter into such a contract for attorney services, and that the same would be binding upon any future county court, if the contract is reduced to writing and proper orders are made and entered on the records of the court.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

HGW:MM

DOG TAX: OPERATION OF LOCAL OPTION LAW.

1227  
December 21, 1934.



Honorable W. W. Crockett,  
Attorney at Law,  
New London, Missouri.

Dear Sir:

This is to acknowledge receipt of your request for an opinion dated November 23, 1934, which reads as follows:

"At the November election the proposition to license dogs was submitted to the voters of this county and carried by a good majority, and the County Clerk has published the result of such election on that proposition, and same is now a law in this county.

When shall the officers of this county proceed to collect such license fees and when can metal plates, etc., as required by such law, be had, and what proportion of the yearly fee should be collected, if any?

It seems that the year would begin July 1st next.  
What is our status from the present until that date?"

This is purely a statutory proposition and we must be governed by Article 12 in its entirety, which begins with Section 12872, R. S. Mo. 1929, and includes Section 12881, R. S. Mo., 1929.

The law is operative from the time the publication is made, giving the result of the election. Section 12881, R. S. Mo., 1929 reads in part as follows:

"\* \* \* \* \* If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall become operative from the time such publication is made."

The process of issuing dog licenses and securing the required metal discs is fully set forth in Sections 12874 and 12876, R. S. Mo. 1929,

Honorable W. W. Crockett, 2.

12/21/34.

which must be done in cooperation with the office of the Secretary of State, and the County Clerk.

In conclusion, it is our opinion that the dog owners of your county are subject to a tax effective from the date of the publication of the results of the election. That the metal discs, license receipts and etc., must be secured from the Office of the Secretary of State.

Respectfully submitted,

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HARRY G. WALTHER, JR.,  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK,  
Attorney-General.

TAXATION: -County Court has no right to accept taxes in escrow from taxpayer to avoid penalties, where taxpayer, by suit seeks to avoid the taxes.

January 17, 1934.

FILED 20

Mr. Elliott M. Dampf,  
Prosecuting Attorney,  
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"A Cole County taxpayer, claiming exemption under a statute of this State, sought to enjoin the county collector from collecting the tax. The Circuit Court sustained the collector, and the case is now pending on appeal, in the Supreme Court.

On December 28 last, the same taxpayer, claiming the same exemption, offered to deposit the amount of the 1933 tax in escrow, the amount to be retained by the county in the event the Supreme Court decides the former case against the taxpayer; otherwise the amount to be returned to the taxpayer. The object of this offer and tender is to avoid the penalty of one per cent per month in the event the contention of the taxpayer should be sustained by the Supreme Court in the case now pending there.

How the County Court the right to accept this fund in escrow under the conditions above stated?

I am at a loss as to how to advise the County Court in this matter, and will be greatly obliged to you for your opinion."

You inquire whether a taxpayer who desires to litigate the validity of some taxes may pay the amount of the taxes in question in escrow and thereby avoid the payment of the penalty of interest. Section 9914, R. S. Mo. 1929, provides as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector, after



the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, of one per cent per month upon all taxes collected by him after the first day of January, as aforesaid; and in computing said additional tax or penalty, a fractional part of a month shall be counted as a whole month. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year; provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation. Whenever any collector of the revenue in the state fails or refuses to collect the penalty provided for in this section on state and county taxes, it shall be the duty of the state auditor and county clerk to charge such collectors with the amount of interest due thereon, as shown by the returns of the county clerk, and such collector shall be liable to the penalties as provided for in section 9928."

Section 9962, R. S. Mo. 1929, provides as follows:

"Any party interested in any tract of land or town lot may pay the taxes, interest and costs thereon, after the commencement of suit, and before sale, by paying to the collector the amount of such taxes and interest, and by payment to the circuit clerk of all costs thereon; and if execution has been issued, the same may be paid to the sheriff, who shall forthwith pay such taxes and interest to the proper collector, and the costs to whom the same are due."

Under Section 9914 above, a penalty of one per cent per month is added to all taxes not paid on the first day of

January 17, 1934.

January, except those persons who are absent from their home or engaged in military service. The section provides that whenever the collector refuses to collect the penalty, the collector himself shall be responsible for the penalties. Section 9962 provides that where a suit has been commenced to foreclose a tax lien on land, that before sale the interested party may stop the suit by paying the amount of the taxes and interest, plus costs. It is apparent from the two above sections that it is the intention of the Legislature that the interest must be paid, unless the taxes are paid on or before the first day of January, unless, as in very recent times, the interest and penalties have been waived by the Legislature. To hold, therefore, that a litigant may contest the right of the State of County to collect a tax and avoid the paying of the penalties, there must be some provision in the statute which authorizes such procedure. We not only do not find any provision which gives such a right to the litigant, but the policies expressed in the above section indicate that the only way the penalties may be escaped is by paying the taxes by the first day of January.

If the taxpayer desires to litigate the State's or County's right to collect taxes, then he must take the burden of having to pay the penalties along with every other taxpayer who neglects or refuses to pay his taxes when due. However, such litigants usually pay taxes under protest and sue to recover them back, but that is a matter about which the individual should consult his private attorney. There is certainly no provision that entitles him to pay the money in escrow, thereby avoiding the penalties.

It is therefore the opinion of this Department that the County Court has no right to accept taxes in escrow in order that persons seeking to invalidate the tax by suit may be relieved from paying the penalties.

Very truly yours,

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Assistant Attorney General

APPROVED:

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Attorney General.

COUNTY BUDGET LAW: )  
PROBATE JUDGE: )

County budget law governs payment of expenditures  
of probate court for supplies purchased.

January 18, 1934.



Hon. Elliott M. Dampf  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Mr. Dampf:

This office acknowledges receipt of your letter dated  
January 10th, 1934, as follows:

"We would appreciate your opinion, which has  
been requested by the Probate Judge of this  
County, as to whether the Session Acts of  
1933, page 340, relative to Political Sub-  
divisions, and providing for a county  
budget in certain counties, applies to the  
Probate Judge, and His court, and if it  
does away with Sections 2056, 2057 Revised  
Statutes of Missouri, 1929."

I.

PROBATE COURT.

Section 2045, R. S. Mo. 1929, provides:

"A probate court, which shall be a court of  
record, and consist of one judge, is here-  
by established in the city of St. Louis,  
and in every county in this state."

Section 11782, R. S. Mo. 1929, in part provides:

"The judges of probate courts, respectively,  
shall be allowed fees for their services  
as follows:  
(Then follows a list of fees such may charge.)"

And further,

"Provided further, that whenever, after deducting all reasonable and necessary expenses for clerk hire, the amount of fees collected in any one calendar year by or for any one probate judge in any county in this state, during his term of office, and irrespective of the date of accrual of such fees, shall exceed a sum equal to the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200.00 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county, then it shall be the duty of such probate judge to pay such excess less ten per cent. thereof, within thirty days after the expiration of such year, into the treasury of the county in which such probate judge holds office, for the benefit of the school fund of such county, etc."

The probate judge of Cole County receives no salary or compensation as such from the county for his services. His office is strictly on a fee basis which compensates him for his services. The fees paid to the probate judge are not for any function of government performed by him for the county. But he is not allowed to retain all the fees he collects if such exceeds "the annual compensation in the aggregate from all sources and for all duties by virtue of the office, except the \$1,200 allowed for expenses when holding circuit court in other counties, provided by law for a judge of the circuit court having jurisdiction in such county."

State ex rel. Jasper County v. Gass et al., 296 S. W. 431.

Macon County v. Williams, 224 S. W. 835.

## II.

### PROBATE JUDGE NOT A COUNTY OFFICER.

The Supreme Court of Missouri, en banc, in State ex rel. Buchanan County v. Imel, 242 Mo. 293, held that a probate judge was not a county officer. We quote therefrom, l. c. 300:

"The words 'county officers' have two well defined meanings. In their most general sense, they apply to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers 'by whom the county performs its usual political functions, its function of government.' (Sheboygan County v. Parker, 70 U. S. 93, 1. c. 96.)."

And further, pages 301-302:

"Judges of the probate court are not charged with the performance of any governmental functions of the counties for which they are elected; in fact, some of them do not have jurisdiction coextensive with the counties where their offices are held. Their functions are to administer the laws pertaining to estates of deceased persons, minors and persons of unsound mind.

From the context of said section 12 of article 9, supra, it will be seen that there is very little if any better reason for classifying probate judges as 'county officers' than for so designating judges of the circuit court when their circuits are composed of a single county.

After a careful review of said section 12 of article 9 of the Constitution of Missouri, we are fully convinced that it was not intended to embrace or include judges of probate courts; and that in holding that it does embrace those officers, the case of Henderson v. Koenig, supra, is erroneous, and the same is therefore overruled."

### III.

#### DUTY OF COUNTY TO FURNISH "NECESSARIES" TO PROBATE COURT.

Section 2056 R. S. Mo. 1929, provides:

"Every probate court shall have a seal of office, of some suitable device, the expense



of which, and the necessary expense incurred by said court for books, stationery, furniture, fuel and other necessities, shall be paid by the county."

Section 2057 R. S. Mo. 1929, provides:

"It shall be the duty of the county court, at the expense of the county, to provide for the judge of probate an office at the county seat, and in the city of St. Louis in such place as may be provided by the municipal assembly thereof, except in counties where such courts, for the transaction of probate business, are now held at a place other than the county seat; and in such counties he shall also keep an office at the places where courts are now held, in which places he shall keep all the books, records and papers pertaining to business there transacted, and the seal of said court."

The Supreme Court of Missouri in an early case (1883), *Gannon v. Lafayette County*, 79 Mo. 223, 1. c. 226, in construing above sections said:

"With respect to the other and only remaining question, section 1184 provides (and the law was the same when the furniture was purchased) that 'every probate court shall have a seal, \* \* the expense of which and the necessary expenses incurred by said court for books, stationery, furniture, etc., shall be paid by the county.' These necessary articles are to be procured by the probate judge, and he is not required first to get an order of the county court for their purchase. Whether the furniture in question was necessary for the office, was properly submitted to the jury, who found that it was."

In *Motley v. Pike County*, 233 Mo. 42, 1. c. 46, the court said:

"It was admitted that each charge in the account was reasonable. It is clear that under the

statute, the plaintiff is entitled to this item of the account under the head of 'other necessities.' The statute, section 4065, Revised Statutes 1909, reads: 'Every probate court shall have a seal of office, of some suitable device, the expense of which, and the necessary expense incurred by said court for books, stationery, furniture, fuel and other necessities, shall be paid by the county.'

Ewing v. Vernon County, 216 Mo. 681.

#### IV.

#### COUNTY BUDGET LAW.

Laws of Missouri, 1933, page 340, Senate Bill No. 154, Approved May 12, 1933, is the "County Budget Law." Note this contained in Section 1:

"This act may be cited and quoted as the county budget law."

Thus, when we refer to the county budget law in this opinion it should be understood to mean that law found at page 340, Laws of Missouri, 1933.

Section 1 of the county budget law provides in part as follows:

"All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive, of this act."

Cole County, according to the last federal decennial census has a population of 30,848 inhabitants.



Section 9 of said act reads as follows:

"In all counties in this state, now or hereafter having a population of more than 50,000 inhabitants, according to the last federal decennial census, the presiding judge of the county court shall be the budget officer of such county, or the county court in any such county may designate the county clerk as budget officer. The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20 inclusive of this Act shall apply to such Counties."

Therefore, the first 8 sections and Section 22 of said act pertain to your inquiry.

Section 22 provides as follows:

"All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed."

Section 1 has this provision:

"Whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this act regardless of the source from which derived. The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. Etc."

And further,

"The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall

be adequately provided according to the said classification and such priority shall be sacredly preserved."

It is thus seen that the county court is responsible to the preparing of a budget and to classify and pay expenditures in the order set out in Section 2 of the act. Section 2 of the act provides a classification of the proposed expenditures in the following order:

- Class 1: Insane pauper patients in state hospitals.
- Class 2: Expense of conducting circuit court and elections, jurors, witnesses, incidental court costs, judges and clerks of election and other expenses of election chargeable against the county.
- Class 3: Repair and upkeep of bridges.
- Class 4: Pay of salaries of officers and office expense.
- Class 5: Contingent and emergency expense.
- Class 6: The other expenses.

Section 3 of the county budget act provides in part as follows:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of salaries or any other expense for personal service of whatever kind during the current year etc."

And further,

"Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. Etc."

And further,

"No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. Etc."

Section 6 provides in part pertinent the following:

"Not later than the 15th day of January of each year, every officer who expects to claim pay for services or to receive supplies to be paid for from county funds shall submit to the county clerk the information hereinafter specified. (If state funds are received or expected to be received for all or any part of the expense such shall be considered as county funds for the purpose of this request.) Etc."

Section 8 provides in part pertinent the following:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. Etc."

One of the purposes of the budget law is to put the county on a cash basis. It provides, among other things, the county court shall classify proposed expenditures in a definite order (Secs. 1 and 2). Likewise, the county court shall show the estimated expenditures in the same manner (Sec. 5). It is the duty of the court to go over the estimates and revise and amend them to promote efficiency and economy (Sec. 8). And said court may (after hearing) alter or change

an estimate as public interest may require. And in order for the county court to have a knowledge of the need of the offices for money out of the county treasury for salaries and supplies, it is made the duty of these persons (officers) who will receive money for said purposes to supply this information to the county court (Secs. 3 and 6). Note this mandatory provision of Section 8:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

#### V.

#### CONCLUSION.

Thus, we conclude that while (1) the probate judge is not a county officer (2) the county must pay for "all necessities" used by the probate court; (3) neither may the county limit the probate judge to the purchase of "necessaries" for his office; (4) the probate court does not have to obtain an order from the county court to purchase articles of "necessaries"; and (5) the county budget act does not repeal Sections 2056 and 2057, *supra*.

Yet, we conclude, and it is our opinion, that the county budget law applies to the probate court as to the payment for supplies (articles of "necessaries"). True, the county court must pay for "necessaries" for the probate court but the budget act says in what manner, how and when moneys shall be paid for same. Thus the probate court occupies a dual status, (a) as to compensation, and (b) payment for supplies.

(a) As to compensation, the probate judge is not governed by the budget law (being on a fee basis and not a county officer).

(b) As to payment for supplies, the budget act applies (Secs. 3, 6 and 8).

Note we are using the word "payment." In other words, the practical effect is this: The "necessaries" may be purchased and must be paid by the county, but payment for same could not be made unless provision was made and included in the estimated expenditures. In other words, provision must be made in the budget law to care for

these purchases, and if no provision is included for their payment same could not be paid.

What we have attempted to do is to harmonize the sections of the budget act and those pertaining to the probate court.

The Supreme Court in *State v. Freeland*, 300 S. W. 675, having this to say:

"When different sections of the statutes bear on the subject it is a rule of construction that such sections must be harmonized if possible."

## VI.

### CONSTITUTIONALITY.

As to the constitutionality of the county budget law we do not express at this time our opinion. However, we are informed from press reports that the Circuit Court of Jackson County has declared said act unconstitutional because of matters contained therein which are not germane, or found in the title thereof. Further, this office on May 11th, 1933, by an official opinion addressed to His Excellency, the Governor, declared this:

"In so far as Sections 9 to 20 both inclusive, of the bill may seek to oust the county court of any jurisdiction to transact all of the business in the county, then such parts of the act in that respect would be of no effect.

It is well settled law in this state that a part of an Act may be declared unconstitutional and the remainder of the Act will take effect so long as the substance of the act is not destroyed in holding a part thereof unconstitutional.

*State ex rel. v. Becker*, supra, pg. 782 (cases cited),

*Mayes v. United Garment Workers*, 320 Mo. 10, 19."

Jan. 18, 1934.

Neither do we discuss or comment on the equities presented by this situation.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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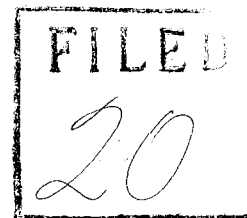
ROY McKITTRICK  
Attorney-General.

JLH:EG

ROAD DISTRICTS:-District organized under article 9 of chapter 42,  
may, under Section 8059, R. S. Mo. 1929, extend  
boundaries to twelve mile square.

2-1

January 30, 1934.



Mr. Elliott M. Dampf,  
Prosecuting Attorney,  
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which  
you inquire as follows:

"Will you please give me your opinion as  
to whether Special Road Districts have a  
right to extend their boundaries beyond  
the eight mile limit, where they are or-  
ganized (Under article 9, page 2259,  
Revised Statutes 1929, Sections 8024 and  
8059)."

Section 8024, R. S. Mo. 1929, provides as follows:

"Territory not exceeding eight miles square,  
wherein is located any city, town or vill-  
age containing less than one hundred thou-  
sand inhabitants, may be organized as  
hereinafter set forth into a special road  
district: Provided, however, the provi-  
sions of this section shall not apply to  
counties under township organization, and  
shall not apply to all counties in this  
state now containing or which may here-  
after contain 50,000 inhabitants or more  
and lying adjoining any city of this  
state containing 300,000 inhabitants or  
more."

Section 8059, R. S. Mo. 1929, provides that whenever  
the inhabitants of any special road district already formed  
under this article (article 9 of chapter 42) shall desire to  
extend the boundaries of such district and take in territory  
not included in the original district, they may do so by  
filing a petition with the County Court and calling an elec-  
tion of the inhabitants of the district. Upon a majority  
of the votes cast being in favor of the extension, the ex-  
tension may be had. The Section further provides:

\*\*\*\*\*Any special road district extended  
under the provisions of this section may  
be extended so that after such extension



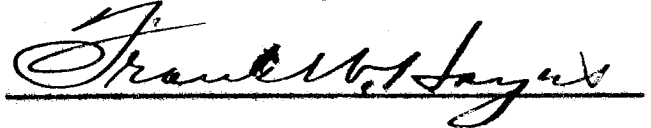
January 30, 1934.

it shall not be more than twelve miles square."

While it appears that under Section 8024, R. S. No. 1929, of article 9, upon the original organization the territory of the road district shall not exceed eight miles square, however, under section 8059, which is in the same article, the Legislature has provided that the boundaries of such road district, by following the proceedings outlined in said section, may be extended so that the district shall not be more than twelve miles square.

It is therefore our opinion that if the district is organized under article 9 of chapter 43, that after its organization it may later extend its boundaries so that after such extension it shall not be more than twelve miles square.

Very truly yours,



Assistant Attorney General.

APPROVED:

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Attorney General.

RWH:S

ROAD DISTRICTS:-Under Article X of Chapter 42, creation and dissolution of road district is under jurisdiction of the County Court, and a proceeding for change in the boundaries must be taken up through the Court.

February 20, 1934. 2-2

Mr. Elliott M. Dampf,  
Prosecuting Attorney,  
Jefferson City, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would appreciate your opinion as to whether it is lawful for Special Road District Number 1, to take in a part of Special Road District Number 16, without a vote of the people in District Number 16."

Article X of Chapter 42, R. S. Mo. 1929, deals with the organization of Special Road Districts. Section 8061 provides that the County Courts of counties not under township organization shall divide the territory of their respective counties into road districts. Section 8062 provides how the organization of such districts shall be effected, and provides for the filing of remonstrances in opposition to the formation of such districts. Section 8081 provides for the dissolution of road districts whenever such road district has no commissioners or has failed to elect commissioners at any regular election, or has failed to hold a special election to elect a commissioner, or where the district has ceased to perform functions as such. Section 8082 provides for the dissolution of districts whenever the owners of a majority of acres of the land within the district file a petition with the County Court.

We find no provision in this Chapter which authorizes one district to take over land or territory in another district. This Chapter provides for the organization and dissolution of districts by the County Court and if it were possible for the districts to voluntarily change their boundaries as to incorporate lands of other districts, it would be in conflict with the provisions of this Chapter. We find no express provision giving the authority to any district to take over a part of the territory incorporated in a district by the County Court.

We believe that a reading of this Chapter by

you will disclose that the organization and dissolution of districts is under the jurisdiction of the County Court. If the district desires to be dissolved and have all or a portion of its territory incorporated into an existing district, we believe that this Chapter must be complied with and that the matter is under the jurisdiction of the County Court.

In answer to your inquiry we do not find that there is any statutory authority under this Chapter to incorporate into any district territory formerly included in another district, unless under the order of the County Court, pursuant to the provisions of this Chapter.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

SPECIAL ROAD DISTRICTS:-Trustees have authority to collect debts due and district and to pay debts owing by the district, upon dissolution.

2-24  
February 22, 1934.



Mr. Elliott M. Dampf,  
Prosecuting Attorney,  
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Would appreciate your opinion as to whether in the dissolution of a special road district, the trustee named by the county court has the authority to pay labor bills with the money he receives through payment of the 1933 taxes.

Also, whether the county court must allow a bill rendered by the county assessor for making a transfer book of 956 transfers at 10¢ per name."

I

You inquire whether a trustee named by the county court has authority to pay labor bills of a dissolved road district with money received from 1933 taxes. Section 8083, R. S. Mo. 1929, provides as follows:

"No dissolution of such road district shall invalidate or affect any right accruing to such road district or to any person, or invalidate or affect any contract entered into or imposed on such road district."

Section 8084, R. S. Mo. 1929, provides as follows:

"Whenever the county court shall dissolve any such road district, the said county court shall appoint some competent person to act as trustee for the road district so dissolved, and such trustee, before entering upon the discharge of his duties, shall take and

subscribe an oath that he will faithfully discharge the duties of his office, and shall give bond with sufficient security to be approved by the court, to the use of such disincorporated road district, conditioned for the faithful discharge of his duty."

Section 8085, R. S. Mo. 1929, provides as follows:

"The trustee shall have power to prosecute and defend to final judgment all suits instituted by or against the road district, collect all moneys due the same, liquidate all lawful demands against the same, and for that purpose shall sell any property belonging to such road district, or so much thereof as may be necessary, and generally to do all acts requisite to bring to a speedy close all the affairs of the road district, and for that purpose, under the order and direction of the county court, to exercise all the powers given by law to said road district."

Section 8086, R. S. Mo. 1929, provides as follows:

"When the trustee shall have closed the affairs of the road district, and shall have paid all debts due by said road district, he shall pay over to the county treasurer all money remaining in his hands, and take receipt therefor, and deliver to the clerk of such county court all books, papers, records and deeds belonging to the dissolved road district."

Under the foregoing Sections, dissolution of the district shall not affect any right accruing to any person on account of any contract entered into by any district. Whenever the county court shall dissolve a district, it shall appoint some competent person to act as trustee, and the trustee's duties are to collect the money due the same and belonging to the district, and pay all the debts owing by the district, and the balance of the money shall be turned over to the county treasurer. We therefore conclude that the above statutes make it the duty of the trustee of the dissolved district to collect all funds due the district, taxes or otherwise, and pay all bills, including labor bills.

It is therefore our opinion that the trustee of a dissolved road district has the authority to pay labor

bills owed by the district with money which he receives through the payment of 1933 taxes.

II

You next inquire whether the county court must allow a bill rendered by the county assessor for making a transfer book. We do not find that the statute authorizes the payment of any fee for this service, and the general rule is that unless the officer claiming the fee can point out the statute which entitles him to the collection of the fee, no fee can be collected.

In Sanderson v. Pike County, 195 Mo. 590, 605, it is said:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it." (Citations omitted).

It is therefore our opinion that unless the statute gives to the assessor the right to collect for this service no fee is due him. We have been unable to find any such statutory authorization, and if you can point out any statute which deals with the subject we shall be glad to construe it.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

TAXATION:

County Collectors have no right to charge counties for indexing tax books.

COUNTY COLLECTORS:



March 12, 1934

Filed 20

Mr. Elliott M. Dampf,  
Prosecuting Attorney,  
Jefferson City, Missouri.

Dear Mr. Dampf:

We are acknowledging receipt of your letter in which you inquire as follows:

"On November 14, 1933, an opinion was written by your office answering the question of the indexing of tax books, which was written by Frank W. Hayes, Assistant, and approved by you.

It appears that in many of the counties of the state, indexing has been done by the Assessor or the collector. It also appears that a great many of our county courts desire this work to be done and that there is no statute making it the duty of the Collector or Assessor to index same.

In view of this situation we believe that the court would have the right to employ a party to perform this work, but before proceeding on same, may we kindly request your opinion in the matter?"

On November 14, 1933, this Department issued an opinion to Mr. William Settle, County Collector, Richmond, Missouri, to the effect that assessors and collectors could not collect additional compensation for indexing the tax books unless they could point out some statutory authority upon which to base the collection of the fee. There is no statute that authorizes the payment of such fee. At the time the foregoing opinion was written we considered the case of Boggs v. Caldwell County, 28 Mo. 586, now cited by Mr. Lauf, and concluded that that case would not be authority for the particular fee sought to be collected. In that case the Court, at page 588, says as follows:

"There can be no reasonable doubt, we think, that the county courts have the power to order an index to be made to



the books of recorded deeds, and to allow a reasonable compensation for the work out of the county funds. Although it is the duty of the recorders to keep up their indexes without any compensation from the county, and their compensation is provided by law to come from the persons having their deeds recorded, yet in the course of time it may happen that these books become unfit for use and have to be renewed. The county court is specially entrusted with the duty of seeing to the preservation of any property belonging to the county, and they necessarily have the right of appropriating a sufficient sum from the county treasurer to secure the proper execution of these duties."

In the foregoing case the county court ordered the indexes to the deed records to be renewed, or in other words, ordered the books rehabilitated, and the Court found that the county court had the right, under its general authority, to preserve the property belonging to the county. The situation in that case was similar to the county court appropriating money to repair the court house or other property of the county under its control and custody. The situation in that case, however, as we view it, is radically different from the situation presented by your inquiry. As we are informed, to index the tax books means that the collector places under the taxpayer's name on the personal tax book the various line numbers at which there appears real property in the real estate tax book assessed against the same individual. As an example, under the name of John Smith on a personal tax book would appear the numbers 500, 600 and 700 indicating that at those lines in the real estate tax book there appears certain pieces of real estate owned by John Smith and assessed in his name.

It is evident that the practice of indexing the tax books, which is followed in some counties, is a matter purely for the personal convenience of the collector in the collection of taxes. It is not a duty imposed upon him by statute, but is a method of keeping the records in his office and doing something more in the keeping of his records than is required by statute. No doubt, many collectors have adopted innovations for their own convenience in the collection of taxes and if collectors in these cases could charge for these additional methods which they adopt, then there is no logical reason why any other collector should not be paid for any unique practice which may appeal to him in the running of his office. While the salaries or fees of the collectors are fixed by law, yet if such collectors could increase their compensation by receiving pay for the adoption of these various new methods which they use for their own convenience, then the amount of compensation which

they might receive from the county would only be limited by the ingenuity for inventing some new method in the administration of their office.

The law is well settled in this State that public officers must be able to point out the statute authorizing them to collect fees from the public treasury. The rule is announced in State ex rel. v. Brown, 146 Mo. 401, 406, whereit is said:

"The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services."

Again in State ex rel. v. Adams, 172, Mo. 1, the Court says at page 7:

"In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed."

The policy of law is that the salaries and fees of public officials are definitely determined by law. When a person becomes a public officer he knows what compensation he is entitled to, and the county knows the extent of its liability to him. To hold that the collectors can increase their compensation by the adoption of a particular method of bookkeeping or a certain system in the keeping of their records would practically destroy the well-established principle, as set out in the foregoing cases. Such practice would enable all county officers, who have sympathetic county courts, to increase their compensation in an unlimited manner by doing things not required by the statute and which would be purely for the convenience of the officer elected to discharge the duties of the office. The limit of any officer's compensation on such a theory would be limited only by his ability to invent some new method or practice and the extent to which he could get the county court to cooperate with him in the payment of fees.

While we do not deny that the county court has the authority to expend county funds for the protection and preservation of county property, yet indexing the tax books

March 12, 1934

is not done for the purpose of preserving or protecting county property. The words, indexing the tax books, unless we are misinformed, has nothing to do with rehabilitating any books or records in the collector's office, as was the situation in the Boggs case above, but by indexing the tax books the collector simply adopts a method of keeping his records which, although it may impose some additional labor upon him, yet is done solely for the purpose of making more convenient for him the collection of the taxes, which is the duty of his office imposed upon him. We do not believe that the Boggs case above is authority for paying him for such services. In finding no statute which authorizes the payment of fees for this purpose and being of the opinion that the Boggs case should not be construed to authorize the collection of such additional compensation, we conclude that county collectors are not entitled to additional compensation for the adoption of some practice such as indexing the tax books, which is purely for their own convenience.

It is therefore the opinion of this Department that county collectors may not **charge** additional compensation for indexing the tax books, as the term is commonly understood.

Very truly yours,

FRANK W. HAYES  
Assistant Attorney General

APPROVED:

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Attorney General

FWH:S

**FEE BILLS:** When Constable is entitled to a fee bill and his right to mandamus when fee bill is refused.

4-9  
March 28, 1934.



Hon. Elliott M. Dampf  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter of February 5, 1934, requesting an opinion of this office which is as follows:

"Will you kindly give me your opinion on the following matter.

Section 11776, Revised Statutes 1929, states that the Justice of the Peace shall issue fee bills and Section 11809, Revised Statutes 1929, states that the Justice of the Peace may issue fee bills, therefore will you kindly advise me as to which section applies in issuing fee bills."

Chapter 84 R. S. Mo. 1929, entitled "Salaries and Fees" and Art. II, entitled "Fees, payment and disposition of," provides in Section 11776 as follows:

"The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided, and the clerks of the courts of record and the presiding officers of courts of inferior jurisdiction shall strictly examine the accounts of all fees accruing during the progress of any civil suit pending in their said courts, and shall correct the same if wrong in any manner, and shall thereupon enter the amount thereof upon their fee books, and the said clerk and the other officers before mentioned shall, after the term of the court at or before which the services were rendered, if required by the

party entitled to fees, certify a fee bill of such services and deliver the same to the sheriff or other officers of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same; and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution; and if any officer shall neglect or refuse to levy and collect such fees, or to pay over the money collected thereon to the person entitled thereto, within three months after such fee bill shall have been delivered to him, the court wherein such fees accrued shall, upon ten days' previous notice given to such officer, on motion, enter up judgment against him and his sureties for the amount of the fee bill, interest and costs thereon. All provisions of this section concerning the collection of fee bills shall also apply to fee bills issued by justices of the peace."

In the same chapter and Article, Section 11777 provides before itemizing allowable fees of Constables in the following language:

"Constables shall be allowed fees for their services as follows:" \* \* \* \*  
(We omit setting out the specified fees itemized.)

In the same chapter and Article, Section 11809 provides as follows:

"Justices of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable or proper officer, within twenty days after the same shall have been demanded by such officer, he may and shall levy such



fee bills on the goods and chattels of such persons, in the same manner and with like effect as on a fieri facias.

Section 1242 R. S. Mo. 1929 provides as follows:

"In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

Section 1269 R. S. Mo. 1929, provides as follows:

"In all cases where costs shall be awarded, either before or upon final judgment, execution shall be issued therefor forthwith by the clerk, unless otherwise ordered by the party in whose favor such costs shall be awarded."

Section 2311 R. S. Mo. 1929 provides as follows:

"Every citation issued under the preceding sections shall be directed to the party to be served therewith, and placed in the hands of the constable of the township in which the suit is pending, which shall be executed by him in any part of his county; and the time and manner of service shall be like that of a summons, for which he shall receive similar fees."

Section 2319 R. S. Mo. 1929, provides as follows:

"Before any execution shall be delivered, the justice shall state in his docket, and also on the back of the execution, an account of the debt, damages and costs, as in this section provided, and of the fees due to each person, and the rate of interest on the judgment, separately; and the officer receiving such execution shall indorse thereon the time of the receipt of the same; and the execution, from the time of delivery to the constable, shall be a lien on the goods, chattels and shares in stocks of the defendant found within the limits within which the constable or other officer can execute the

process, but not upon any property exempt by law from execution sale, or which shall be sold or pledged to an innocent purchaser before the levy of the writ. And every fee bill and writ of fieri facias issued by any justice shall have written or printed thereon a true statement of each and every item of all the taxable costs in the case, and over against each item so stated there shall be set the amount of money taxed thereunder, and when the same shall come to the hands of any officer authorized by law to enforce the collection thereof, he shall also itemize all the costs to be added thereto by him for his own services. Every justice of the peace issuing a fee bill or writ of fieri facias in violation of the provisions of this section, and any officer undertaking to collect money thereon without having himself complied with the provisions of this section concerning himself, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall forfeit his office. "

The parties litigant are amply protected from any injury which might grow out of fee bills in the hands of the Constable for Section 2330 R. S. Mo. 1929, provides as follows:

"Upon filing of a statement by the party injured against a constable and his sureties, jointly or severally, stating any of the following causes of action: First, that the constable has failed to return an execution or fee bill according to the command thereof; second, that he has made a false return thereof; third, that he has failed to have money by him collected on execution or fee bill before the justice on the return day thereof, ready to be paid to the persons entitled thereto, or to have receipts therefor; fourth, that he has failed to use diligence in the service of an execution or fee bill, or to institute suit on a demand placed in his hands for suit, and for which he has given his receipt, whereby the complainant has been damaged; or fifth, that he has failed to pay or deliver, upon demand of the party entitled thereto, money received by him on judgment or on demand placed in his hands for collection, and for which



he has given his receipt, or money or property received in pursuance of any of the provisions of this article, and stating the facts constituting such default or negligence, the justice shall issue a summons against the defendants named in the statement."

Missouri Constitution, Section 37, Article VI provides  
as follows:

"In each county there shall be appointed or elected, as many justices of the peace as the public good may require, whose powers, duties, and duration in office shall be regulated by law."

Missouri Constitution, Article II, Section 10, provides  
as follows:

"The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

Missouri Constitution, Article VI, Section 23, provides  
as follows:

"The circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits."

It was said in State ex rel. v. Ashbrook, 40 Mo. App.  
64, 1. c. 66:

"The contention of the defendants on this appeal is that, after the party, in whose favor a judgment is rendered, acknowledges satisfaction of it, it cannot be the foundation of an execution, even for the costs which are due the officers of the court. We do not take this view. At common law litigation was not conducted on a credit system, as with us, but the plaintiff purchased his writ, and each party paid his costs step by step as the services were procured and as the

cause proceeded. At the end of the litigation the successful party recovered his costs-- that is, the costs which he had paid out. The idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation, in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. Roberts v. Roberts, 6 Dowl. 556; Anon., 1 Wils. 130.

"But with us the costs are not ordinarily paid step by step, as each party demands of the proper officer of the court the rendition of some particular service; but they generally accumulate until the litigation is finally ended, and then they are recovered nominally by the successful party, but really by the officer of the court to whom they are due. Trail v. Somerville, 22 Mo. App. 308, 312. We still keep up the ancient form, so far that according to the judgment entry, the costs are recovered by the successful party, and the execution runs in the same way, so as to conform to the judgment; but they are never, in fact, collected by him, nor paid over to him. According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due. This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. Garrett v. Cramer, 14 Mo. App. 401. The party in whose name the costs are recovered is, in respect of them, at most, a trustee of a dry trust--so dry that he is not allowed to handle any of the trust fund. His name in the judgment

and execution is a mere naked name of record.  
The use of it by the officers of the court, in  
securing their dues, saddles him with no re-  
sponsibility and endangers his rights in no  
 way. As this portion of the judgment nominally  
 recovered by him belongs to others, and not to  
 him, he cannot satisfy it, or bargain it away  
 with the other party to the record without their  
 consent. He can waive his own rights, but he  
 cannot waive the rights of others."

In the case of *Watkins v. McDonald* 70 Mo. App. 357, 1. c.  
 362, the court said:

"It has been repeatedly held that costs of  
 suit under our practice can be allowed, taxed,  
 or collected, only by statutory warrant.\* \* \*  
 They are divisible into two kinds: First,  
 those within the purview of Section 4980 Re-  
 vised Statutes, 1889, (Nos. Sec. 11776 R. S. Mo.  
 1929, supra.) in relation to the issuance of  
 fee bills accruing during the progress of the  
 litigation. Secondly, those which are allowable  
 by the court under the general statutes award-  
 ing costs to 'the party prevailing' and providing  
 for the issuance of execution therefor. R. S.  
 1889, Sec. 2920-2946. (Now R. S. Mo. 1929 Sec.  
 1242-1269 supra) (All Parenthesis ours)"

Thus we see that in Missouri, under the provisions of  
 statutory law which have been on the books a long time, that costs  
 of a suit are recoverable by two methods, either by fee bill allowed  
 the officer or by execution allowed the party prevailing in the suit.

In the case of *City of Carterville v. Cardwell*, 153 Mo.  
 App. 32, 1. c. 37, the court said:

"As between a party to a suit and the officer  
 or witness, the charges allowed are usually  
 denominated fees; but as between the parties  
 to the suit, these charges are usually called  
 costs. The word costs when used in relation to  
 the expenses of legal proceedings, means the  
 sum prescribed by law as charges for the services  
 enumerated in the fee bill."

Thus we see that costs of a case would necessarily include the items of a fee bill due the constable, in a proceeding before a Justice of the Peace.

In the case of Hoover v. The Mo. Pac. Ry. Co. 115 Mo. 77, 1. c. 81, the court said:

"The general rule that none but the parties to a suit will be allowed to interpose in its control obtains in this state as well as in other jurisdictions.\* \* \* \*

"The fact that they (officers) have earned their fees, which have been taxed as costs, does not entitle them to interfere in the settlements of other stipulations of the parties. Their claim is based upon the fact that their services have been taxed as costs, but the judgment for these costs was not rendered in their favor.\* \* \* \*

"It will thus be seen that the only judgment for costs authorized by these statutes is in favor of one of the parties to the suit. No provision is made by law for any such judgment in favor of any clerk or other officer of the court, or any of the witnesses attending thereon. The remedy provided for the collection of their fees is a fee bill. They have therefore no right to intermeddle with the parties in their control of the suit."

The statutory law that the above case was decided upon is identical with the statutory law existing today. Thus we see that a constable has no right to control any judgment for costs in a suit because he is not a party to the suit. He has no right to order an execution on the judgment of the court. Does this leave the constable entitled to fees without a remedy? We think not.

As was said in Beedle v. Mead, 81 Mo. 297, 1. c. 309:

"To place the command of an execution for costs, which the plaintiff has never paid, entirely at his disposal, would result in a possible defeat of the undoubted lien of officers for costs.\* \* \* \*

"If the party can refuse execution when necessary to collect costs of court, then the officer would be compelled to resort to equity for enforcement

of their lien. When the costs cannot be collected on fee-bill, and the party has refused or failed to pay the costs, presumably covered by the judgment, the officers of the court are entitled to process by execution for their costs, even though the plaintiff may refuse to order one."

It was said in *Manewal v. Proctor*, 112 Mo. App. 315

l. c. 319:

"We have no doubt that a referee is an officer of the court appointed to perform certain work and that compensation for that work may be taxed as costs in the case. Neither do we see any good reason why he should not have the right to a fee bill to collect his costs the same as other officers have, instead of having to wait for final judgment. But the statutes have made no provision in his favor and, hence, he does not enjoy the remedy which is available to the officers named in the statutes."

In the case at bar the constable is one of these officers named in the statutes entitled to enjoy the remedy to which the court above refers.

Again *Farris v. Smithpeter*, 180 Mo. App. 466 l. c. 471, the court said:

"A fee bill does not need a judgment for its basis but it does need a proper taxation of costs."

Section 1271 R. S. Mo. 1929, provides as follows:

"Every fee bill and every writ of feri facias issued by any justice of the peace, or issuing out of any court of record in this state, shall have written or printed thereon a true statement of each and every item of all the taxable costs in the case, and over against each item so stated there shall be set the amount of money taxed thereunder; and when the same shall come to the hands of any officer authorized by law to enforce the collection thereof, he shall also itemize

all the costs to be added thereto by him for his own services."

Section 1240 R. S. Mo. 1929, provides as follows:

"If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who as well as all other officers of the court, shall perform their duties in such suit without fee or reward, but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court."

In the case of Wilson v. Geitz, 75 Mo. App. 11 L. C. 13, the court said:

"It is insisted that no fee bills were issuable in this case because plaintiff prosecuted his action in forma pauperis and failed to recover judgment. To support this contention appellant invokes Section 2918 of the Revised Statutes of 1889. (Not Section 1240 R. S. Mo. 1929)\* \* \* It was not the intention of the legislature in this provision to relieve the defendant from any liability for costs created by him on account of services for which a fee bill might issue under section 4980 of the Revised Statutes of 1889. (Now Section 11776 R. S. Mo. 1929.)"

In the case of State ex rel. v. McCracken, 60 Mo. App. 650 L. C. 653, the court said:

"The first contention is that mandamus will not lie in a case of this nature. This point must be ruled against the appellant.\* \* \* \* \*  
"that the justice had therein no judicial discretion, but there devolved on said officer the duty to perform an act purely ministerial in its



nature, and, to secure the performance thereof, mandamus would lie.\* \* \*

"Then section 5007 provides that 'the justice of the peace may issue fee bills for all services rendered in their courts, and if the person chargeable shall neglect or refuse to pay the amount thereof to the constable, or proper officer within twenty days after the same shall have been demanded by such officer, he may and shall levy such fee bills on the goods and chattels of such person, in the same manner and with like effect as on a fieri facias.'\* \* \*

"He is entitled to enforce the collection of such fees in the manner pointed out by statute\* \* \*

In the case of *Brownfield v. Thompson*, 96 Mo. App. 340, 1. c. 342, the court said:

"A justice's court is not only a court of limited jurisdiction, but its powers are limited within its jurisdiction. It can only do such things where it has jurisdiction as the Legislature has provided it may. The manner of exercising its jurisdiction is limited by the same law that created it.\* \* \* The Legislature has defined the jurisdiction of justices of the peace and has provided in a very careful and specific manner their duties and their mode of procedure."

In the case of *In Re Wallace*, 19 S. W. (2d), 625, the court said:

"It will be noted that the word 'may' is used in section 681 in conferring on the courts the power to remove or suspend attorneys. The power conferred is for protection of the bench, the bar, and the public. For the reason the word 'may' as used is mandatory."

Again in *State v. Bevins*, 43 S. W. 432, 1. c. 434, the Court said:

"It will be noticed that section 3703 says that the jury 'may' assess and declare the punishment and the court 'shall' render judgment accordingly,



'except as hereinafter provided.' The word 'may' is interpreted to mean 'shall' when referring 'to a "power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner." '

"Any attorney\* \* \* \* guilty of any felony\* \* \* \* may be removed or suspended from practice\* \* \* "

The Court said in State ex rel. Jones v. Laughlin, 73 Mo., 443, 1. c. 449:

"The proper rule of construction in cases of this sort, as we understand it, is that may is to be held as meaning shall whenever the statute requiring construction relates to a power conferred on public officers, concerning the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner for the sake of justice and the public good. \* \* \* No argument is necessary to show that the rule of construction mentioned is applicable here, since the matter under consideration, the suspension or removal of an attorney for felony or infamous crime or professional misconduct, obviously concerns justice and the public good."

Corpus Juris on Mandamus Vol. 38, p. 617, Sec. 100 citing Mo. cases provides:

"In conformity to general rules already stated, mandamus lies to compel a justice to perform ministerial duties."

#### CONCLUSION.

It is the opinion of this office that under the provisions of Section 10809 R. S. Mo. 1929 which provides: "Justices of the peace may issue fee bills," the phrase "may issue fee bills." is to be interpreted as a statutory command upon all justices of the peace, commanding them to perform a ministerial act wherein no judgment or discretion must be exercised by the court. The word "may" in this section can only reasonably be interpreted as "shall", for as was indicated in the Bevins case, it refers to a power given to a justice of the peace which concerns the administration of justice without sale or delay, and the claim of a Constable is de jure.

The legislature said in Section 11776 R. S. Mo. 1929, that: "The Several officers hereinafter named,\* \* \* shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided," and then immediately thereafter provided in Section 11777 R. S. Mo. 1929 that: "Constables shall be allowed fees for their services", itemizing each particular fee for each particular service. If the legislature had intended for the justice of the peace any right to adjudge the allowance or amount of fee for a particular service on the part of the constable, they would not have expressed themselves to the contrary with such particularity as they did express themselves in these two sections of law allowing fees.

It is our opinion that a Justice of the Peace must issue fee bills to a constable who has requested a fee bill for services specifically itemized in this statute, and in the amount specified for each service. After the service is performed the constable has a beneficial interest in the case in the amount of his statutory fee, which continues as a beneficial interest until it be paid. The fact that under section 1242, R. S. Mo. 1929, the party to the suit prevailing shall recover costs, and even though costs have been held in the Cardwell case to include all the items authorized in a fee bill, does not mean that the Constable must look to the prevailing party for an execution as his only action, in order that his fees will be satisfied. The McDonald case expressly holds that the Constable can proceed independent of the parties litigant to collect his fees by fee-bill, and the Ashbrook case shows us that even where a judgment is satisfied in a Justice Court, still a fee bill should properly be issued to compensate the constable for his beneficial interest in the fees of a case.

In Beedle v. Mead we see that it would defeat the "Undoubted lien of officers for costs" where only a party to the suit can command an execution for costs. Even where a plaintiff sues as a poor person under Section 1240 R. S. Mo. 1929, the court held in the Geitz case that the Legislature did not intend to relieve the defendant for paying costs created by him for which a fee bill might issue under the provisions of 11776 R. S. Mo. 1929.

The emoluments of an office are deserving of as much protection as the honor of office, in the office holder. In fact, a public office would usually be an empty honor, without the emoluments, and since our code of law provides for a constable as an officer of the court, prescribes certain mandatory duties of him, requires a

penal bond of him for the faithful performance of his duties, it would be a strained construction of law that had to be twisted so that this official is not protected in his fees which the legislature said "shall be allowed". Such a strained construction would not be an incentive to good government or efficient courts, for the Constable is the right arm of justice of peace court.

In many instances it is not possible for a constable to collect his prescribed fees, which are due and owing, except by a fee bill. True the power to issue a fee bill rests with the Justice of the Peace. Are we to say that this is an arbitrary power resting in the justice? To so hold would nullify all the other laws allowing fees. In the Smithpeter case we learn that a fee bill does not need a judgment for its basis but needs only a proper taxation of costs. We say that costs are properly taxed when the justice complies with Section 2319 R. S. Mo. 1929, and states on his docket and on the back of the execution all fees due to each person, and when the fee bill contains in writing a true statement of each and every item of all taxable costs in the case, and over against each item of taxable costs the amount of money taxed thereunder, there is a proper taxation of costs as provided by law. This duty on the justice to properly tax costs is mandatory under the statute.

The Thompson case holds that a justice court is of limited jurisdiction and that its powers are even limited within its jurisdiction. A justice of the peace has no power beyond the statutes and is limited to act only within the statutes, since the Legislature limited the justices' powers while considering fees, and provided that certain fees shall be allowed and taxed by him. It follows that fees allowed and taxed and according to the mandates of law must contain precisely the same data on the docket in writing as would properly be evidenced by a fee bill in writing, or the taxing of same in any other manner on the docket does not follow the Statute. When the fees were ordered taxed the Legislature intended a fee bill to issue, and under legal procedure it takes no more effort to make the entries on a fee bill than on the docket and in fact can be done by the same stroke with the aid of a little carbon paper. A fee bill must issue before the Constable on his own motion can establish his lien for fees. The only statutory method of taxing cost is by fee-bill. That the officers may secure their allowable fees is the very purpose that the Legislature had in mind when they stated the law allowing the taxing fees. It was not intended by the Legislature to leave the officers only partially secure in their fees. This preliminary statutory detail is of no use or avail to the officers

unless a fee bill be simultaneously issued, at the same time as the mandatory docket entries are made. There is no sense in a law that was made to secure officers in their fees, providing for allowing and taxing same, where the officer may be stopped short of an actual collection of his fee simply because a justice of the peace construes the phrase "may issue fee-bills" to mean that he may use arbitrary discretion, as a consequence of which the Constable stands perchance to loose his fees in spite of the other statutes to the contrary, and because a justice might choose to act arbitrarily in allowing fees, taxing costs or issuing fee bills to him. The Justice must issue fee bills for costs, when requested by the Constable, for that was the very purpose (to secure the officer in his fees) the Legislature had in mind when they made it mandatory on the court to allow and tax fees on the docket, and "may" in Section 11809 means "shall".

It is our opinion where a Justice of the Peace refuses to issue fee bills when commanded by the Constable, mandamus should be issued out of the Circuit Court, which court, under the Constitution, has the supervisory control over courts of inferior and limited jurisdiction, such as justice courts, and jurisdiction over justices of the peace in the performance of ministerial acts.

Respectfully submitted,

WM. ORR SAWYERS,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

WOS:H

RELATING TO POWER OF CITIES OF THE THIRD CLASS TO  
LEVY A LICENSE TAX ON BARBER SHOPS, BEAUTY PARTLORS, ETC.

5-10  
May 9, 1934



Dr. William L. Davis  
Mayor of Nevada  
Nevada, Missouri

Dear Doctor:

We acknowledge your letter of date May 1st, 1935, in which you inquire as follows:

"I very much desire your opinion regarding power of the City to assess and collect City Occupation License Tax on Barber Shops and Beauty Shops. If Beauty Shops are classed as professions, possibly they could not be taxed locally.

Thanking you very much, I am...."

I.

Cities of the third class have power and authority to levy a license tax on barbers, barbershops, hair dressers, hair dressing shops and beauty shops.

Section 6840 Revised Statutes of Missouri, relating to cities of the third class, provides in part as follows:

"The council shall have power and authority to levy and collect a license tax on ..... barbers, barbershops, hair dressers, hair dressing shops, whether conducted in connection with other businesses or separate, and beauty parlors...."

The above statute enumerates the kinds of businesses, or the callings, vocations or pursuits which may be taxed, and in as much as barbers, barber-shops, hair dressers, hair dressing shops and beauty parlors are enumerated in the statute, from which the power is derived to tax, it follows that the city councils of cities of the third class may by ordinance levy a license tax on such businesses, callings, vocations or pursuits.

If such were not enumerated in the statute, then the city could not tax them.



Mr. William L. Davis

-2-

May 9, 1934

In *City of Fulton v. Craighhead*, 164 M. A. 1. c. 91, the court speaking through Judge Ellison said in part as follows:

"The statute (section 9253) enumerating the kinds of business, or the callings, vocations or pursuits, which may be taxed, does not name plumbing as one of them. Nor is there anything in any other statute from which the power is either fairly or necessarily implied. (*City of Independence v. Cleveland*, 167 Mo. 384.) Therefore the city of Fulton must look to the Legislature, instead of the courts, for the requisite power."

In view of the foregoing statute and decision, we hold that a city of the third class has the power and authority to levy a license tax on barbers, barber shops, hair dressers, hair dressing shops and beauty parlors.

Respectfully submitted,

W. W. Barnes

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Assistant Attorney General

APPROVED:

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Attorney-General

CEMETERIES.

City of the fourth class may own a public cemetery and support same from general revenue of the city.

5-14  
May 11, 1934.



Senator Thomas J. Daggs  
Kahoka, Missouri

Dear Senator Daggs:

This is to acknowledge your request for an opinion of recent date concerning the following:

May a city of the fourth class maintain, own and operate a cemetery, levying and collecting taxes to do the same?

I.

In Mount v. Yount, 281 S. W. 119, 1. c. 120, the Springfield Court of Appeals said:

"There are but two classes of cemeteries, public and private."

And further, page 121,

"The Sikeston Cemetery is either public or private. It cannot be both. It is admitted to be public, and in addition the statute (section 8491) only authorizes the city to own a public cemetery."

Corpus Juris, Vol. 11, page 51, in part says this:

"The power existing in the Legislature to regulate the burial of the dead may be delegated by the legislature to municipalities. And under general powers as to



public safety, welfare, health, etc., or under an express grant of power for the purpose, a municipality may regulate burials and burial places within its limits. Such power, however, must not be exercised in an arbitrary or unreasonable manner, or in such manner as to be discriminatory or creative of a monopoly. Etc."

Article 8, Chapter 38, R. S. Mo. 1929, are laws that pertain to cities of the fourth class, and Section 7040 of the same article and chapter provides:

"The board of aldermen shall have power to purchase, receive, and to hold real estate, as hereinbefore mentioned, for public cemeteries, either within or without the city, within a distance of three miles thereof, and the city and its officers shall have jurisdiction over the said cemeteries wherever located: Provided, that no such cemetery shall exceed eighty acres in one body. The board of aldermen shall provide for the survey, platting, grading, fencing, ornamenting and improving of all the cemetery ground, and the avenues leading thereto, owned by the city, and may construct walks and protect ornamental trees, and provide for paying the expenses therefor. The board of aldermen may make rules and pass ordinances imposing penalties and fines, regulating, protecting and governing city cemeteries, the owners of lots therein, visitors thereto, and punish trespassers therein, and the officers of such city shall have as full jurisdiction and power in the enforcing of such rules and ordinances as though they related to the city itself."

It will be noted that the statute says "and provide for paying the expenses therefor" and "shall have as full jurisdiction and power in the enforcing of such rules and ordinances as though they related to the city itself." Thus, the board of aldermen

have the power to purchase, receive, and to hold real estate and provide for paying the expenses therefor, and to make rules and ordinances.

Section 7041, of the same article and chapter, provides as follows:

"The cemetery lots shall be conveyed by certificates, signed by the mayor, countersigned by the clerk, under the seal of the city, specifying that the purchaser to whom the same is issued is the owner of the lot described therein by numbers, etc."

Section 14068, R. S. Mo. 1929, provides as follows:

"Any town, city or village in the state of Missouri may purchase, receive and hold real estate within or outside such city, town or village for the burial of the dead, and may lease, sell or otherwise dispose of the same. And the council of said cities, towns and villages may make rules and pass ordinances imposing penalties and fines not exceeding one hundred dollars, regulating, protecting and governing cemeteries outside of said cities, towns and villages, the owners of lots therein, visitors thereto, and punishing trespassers thereon, to the extent as though such cemeteries were inside the corporate limits of such cities, towns and villages; and the officers of said cities, towns and villages shall have as full jurisdiction and power in the enforcing of said rules and ordinances as though they related to such city, town or village itself."

Therefore, from the above, it is our opinion that a city of the fourth class may own, maintain, regulate and operate a cemetery.

II.

The next question for determination is: How and from what source, if any, may revenue be taken to effect the purposes of ownership?

In State ex rel. v. City of St. Louis, 216 Mo. 47, the Supreme Court, en banc, l. c. 91, said the following:

"\* \* \* \*, and that municipal corporations were only authorized to levy and collect taxes for municipal purposes, and municipal enterprises should be conducted and controlled in fact by such municipalities by and through their proper officers, \* \* \* \* \*."

Thus, we look to the statute governing cities of the fourth class relative to tax matters. However, before we do that, we call attention to Section 10, Article X, of the Constitution of Missouri, which provides:

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Section 6948 R. S. Mo. 1929, provides in part as follows:

"If such report shows that the city has less than 10,000 inhabitants, the city council may levy on all subjects and objects of taxation for city purposes not to exceed fifty cents on the one hundred dollars valuation. Should the population be one thousand or less, said rate of levy shall not exceed twenty-five cents on one hundred dollars valuation."

The foregoing are maximum rates which may be levied in said cities and towns. Provided, however, the board of aldermen shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced, mathematically, by the rate or levy ordered in 1920, and in no subsequent year may any such board of aldermen or any officers or officer acting therefor, order a rate of tax levy that will produce, mathematically, more than ten per cent in excess of taxes levied for the previous year."

Section 7001, R. S. Mo. 1929, provides in part as follows:

"The board of aldermen shall, from time to time, provide by ordinance for the levy and collection of all taxes, licenses, wharfage and other duties not herein enumerated, etc."

Section 7047, R. S. Mo. 1929, provides in part as follows:

"The cities coming under the provisions of this article, in their corporate capacities are authorized and empowered to enact ordinances for the following purposes in addition to the other powers granted by law: First. To levy and collect taxes for general revenue purposes on all mixed personal and real property within the limits of said city, taxable according to the laws of this state. Etc. "

Nowhere do we find any provision of statute permitting a city of the fourth class to levy a tax for the use and benefit

May 11, 1934.

of a publicly or city owned cemetery. Thus, the expense of maintaining, operating or regulating a cemetery must be borne from the general revenue of the city, and such is our opinion.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

COUNTY BOUNDARIES - Boundary line of Cole and Osage Counties.

May 12th, 1934.

5-14



Honorable Elliott M. Dampf  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Sir:

We have your request of April 20th, 1934 for  
an opinion upon the following facts:

"Does accreted land at the mouth of  
the Osage River belong in Cole County  
where the main channel of the Osage  
River flows between this land and  
Osage County. Section 11946 and Section  
11978 set the boundary of Cole and Osage  
Counties in the middle of the main chan-  
nel of the Osage River.

An attempt was made some years ago to  
make the main channel of the Osage River  
flow through the upper end of this tract  
(as shown by Federal plat) which was  
unsuccessful. A levee has been built  
by the Government along this strip, and  
at the present time, no water whatsoever  
flows through this slough, and a road  
has been built on top of the levee.  
This property has been taxed by Osage  
County in the past years, but has been  
assessed by Cole County for the year 1933.

Therefore will you kindly give me your  
opinion as to whether the boundary line  
as set out in the above sections are to  
be used in determining to which county  
the above tract belongs."

#2 - Honorable Elliott M. Dampf

We assume from your letter that the land in question lies north and west of the main channel of the Osage River, and south of the main channel of the Missouri River. The boundary line of Cole and Osage Counties, immediately south of the Missouri River, is fixed at the middle of the main channel of the Osage River.- Sections 11946 and 11978, Revised Statutes of Missouri, 1929. These boundary lines were created by acts of the Legislature, and such boundary lines are fully recognized by the Constitution of Missouri, Article IX, Section 1. The sudden changing of the bed of a boundary river stream does not change the boundary of the county. A river which suddenly abandons its course and seeks new channels, whether from natural causes or from artificial and man-made channels, causes no changes in the boundary between the counties where the boundary line is fixed at the middle of a main channel of a river. *Randolph v. Moberly Hunting and Fishing Club*, 15 S. W. (2d) 834.

It is, therefore, the opinion of this office that the tract of land in question lies within the boundaries of Cole County, as defined by statute (Section 11946), and recognized by the Constitution of Missouri, and that the land for all purposes is Cole County territory.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General

FER:FE



NURSERIES: Municipally owned nurseries subject to inspection under Mo. Plant Act; municipally owned nurseries subject to pay inspection fees.

5-23

May 21, 1934.



Mr. J. Carl Dawson,  
State Plant Officer,  
Department of Agriculture,  
Jefferson City, Mo.

Dear Sir:

This department acknowledges receipt of your letter of May 9, 1934, which for the purpose of the record, is herewith quoted in full:

"From time to time during the last few years the question has been raised as to whether or not municipally-owned nurseries are required to be inspected under the Missouri Plant Act, Chapter 86, Article 3, R.S. 1929, and as to whether or not we had a legal right to charge fees for this work. Such nurseries move stock to all parts of the municipality and may trade stock with other municipalities and commercial nurseries.

"I have already consulted Assistant Attorney General Oliver W. Nolen and have familiarized him with the facts. I would be very grateful if you could refer this opinion to him.

"A letter received by this Department regarding this matter is attached. Please return same with the opinion."

Your letter presents two questions, namely: (1) whether or not municipally owned nurseries are within the jurisdiction of the Missouri Plant Law; and (2) can the fees for inspection be exacted from a municipally owned nursery under Sec. 12376, R.S. Mo. 1929.

I.

Municipally owned nurseries are  
subject to inspection under the  
Missouri Plant Act.

Sec. 12369, R.S. Mo. 1929 is as follows:

"The Missouri State Board of Agriculture is hereby authorized to administer the provisions of this article. It shall have authority to make such regulations and promulgate and enforce such quarantines as may in its judgment be necessary for the protection of all plants growing in the State of Missouri. In the administration of the provisions of this article, the board is authorized and empowered to cooperate with every state department, agency, commission and institution, and also particularly with the United States department of agriculture in so far as such cooperation may be beneficially in carrying out the provisions of this article."

In the above section you will note the phrase "as may in its judgment be necessary for the protection of all plants growing in the State of Missouri". There is no statute exempting any firm, corporation or association from the provisions of the Act.

Under Sec. 12368, R.S. Mo. 1929, sub-division (d), the following definition is given of "persons":

"Individuals, associations, partnerships and corporations. Words used in this article shall be construed to import either the plural or the singular, as the case demands."

The principal section in controversy is Sec. 12376, R.S. Mo. 1929, which is as follows:

"It shall be unlawful for any person to sell, give away, carry, ship, or deliver for carriage or shipment, within this state, any plants or plant products listed, as required by section 12372, in the rules and regulations made pursuant to this article, unless such plants or plant products have been officially inspected and a certificate issued by an inspector of the board stating that the said plants or plant

products have been inspected and found free from insect pests and diseases, and any other facts provided for in the rules and regulations made pursuant to this article. For the issuance of such certificate, the board may require the payment of a reasonable fee to cover the expense of such inspection and certification: Provided, however, that if such plants or plant products were brought into this state in compliance with the requirements of section 12375, the certificate required by that section may be accepted in lieu of the inspection and certificate required by this section, in such cases as shall be provided for in the rules and regulations made pursuant to this article. If it shall be found at any time that a certificate of inspection, issued or accepted pursuant to the provisions of this section, is being used in connection with plants and plant products which are infested or infected with insect pests or diseases, its further use may be prohibited, subject to such inspection and other disposition of the plants and plant products involved as may be provided for by the board. All moneys collected by the board under this section or under section 12374 or 12381 shall be retained by the board as a fund for necessary traveling, postage, equipment, and other proper expenses incident to the duties and activities of the board and its employees. Bi-annually a detailed and itemized statement of all receipts and disbursements of said fund shall be submitted by said board to the general assembly on or before the third Monday of the session."

The Park Department of Kansas City, according to the enclosed letter, does not sell, give away, ship or deliver, for carriage or shipment within this state, any plants or plant products listed as required by Sec. 372, but the statute also uses the verb "carry" in addition. By the statements in the enclosed letter we are led to believe that this nursery transplants or "carries" its products to the various parks in the city, and regardless of the fact that it is not conducted for profit, it is the opinion of this department that it was the intention of the Legislature in passing the Missouri Plant Act to protect all plants and plant products in the State of Missouri from pests and diseases regardless of where or how located. Under Sec. 12373, the Board has power to make the

rules, and we think its powers are comprehensive enough to include the nursery in the East Park District of Kansas City.

II.

Municipally owned nurseries are  
subject to pay inspection fees

Having held in the preceding question that municipally owned nurseries are subject to the provisions of the Missouri Plant Act under Sec. 12376, supra, they would consequently be subject to inspection and the usual fee could be charged therefor.

We think we are not unreasonable in concluding that the Legislature intended the Act for the protection of all plants and plant products of the State and recognized that diseases and pests can infest municipally owned, as well as private or commercially owned nurseries, and that municipally owned nurseries should be protected, as well as all others.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK

OWN:AH

ELECTIONS, PRIMARY: Declaration of candidate must be filed  
60 days prior to primary.

6/7  
June 9, 1934.

Hon. Elliott M. Dampf  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri



Dear Mr. Dampf:

We acknowledge receipt of your letter of June 9th, 1934, which letter is as follows:

"Will you kindly give me your opinion as to whether a candidate is properly filed under the following condition:

Payment of the Five Dollar (\$5.00) fee was paid to the Treasurer of the County Committee and then filed with the County Clerk on the 8th day of June, 1934, but no Declaration was or has been filed at the present time."

This Department has previously rendered an opinion in which we stated that it would be necessary for all candidates to have their declarations filed with the proper officials on or before midnight, June 8th, 1934, for the Primary to be held August 7th, 1934.

Your letter states that the \$5.00 filing fee was paid to the Treasurer of the County Committee and then filed with the County Clerk on June 8th, 1934, but no declaration was filed or has been filed at the present time; your letter being dated June 9th, 1934.

We are herewith setting forth Section 10257, R. S. Mo. 1929, which provides as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

I, the undersigned, a resident and qualified elector of the(\_\_\_\_\_) precinct of the town of \_\_\_\_\_), or (the \_\_\_\_\_ precinct of the \_\_\_\_\_ ward of the city of \_\_\_\_\_), county of \_\_\_\_\_ and state of Missouri, do announce myself a candidate for the office of \_\_\_\_\_ on the \_\_\_\_\_ ticket, to be voted for at the primary election to be held on the first Tuesday in August, \_\_\_\_\_, and I further declare that if nominated and elected to such office I will qualify.  
(Signed) \_\_\_\_\_."

The declaration, in substantially the above form, must be filed with the proper officials before midnight, June 8th, 1934, for the candidate to have his name printed on the official primary ballot. This section is mandatory and it is, therefore, our opinion that unless such declaration was filed with

Hon. Elliott M. Dampf

-3-

June 9, 1934.

the proper officials before midnight, Friday, June 8th, 1934, he or she is not entitled to have his or her name printed on the official primary ballot.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG



MOTOR VEHICLES - Private use of motor vehicle operating under dealer license plates unwarranted and in violation of the law.

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June 26th, 1934.

6-28



Honorable Elliott M. Dampf  
Prosecuting Attorney  
Cole County  
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"Is it necessary for a person to purchase a license for a motor vehicle where he is a salesman for a motor company and has the car in his possession and uses same both as a demonstrator and for his private use. A loan was made upon the car by a finance company under the demonstrator plan in the name of the salesman and guaranteed by the motor company and the payments on the car made by the company. At the present time the car is being operated with dealer plates.

Also, if a stockholder in a corporation must have a motor operators license when he is employed by the said corporation as a salesman."

I.

Section 7764, R. S. Mo. 1929 provides for the registration of manufacturers and dealers. This section provides in part as follows:

June 26th, 1934.

"(a) All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the commissioner for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain: (1) a brief description of each type of motor vehicle manufactured or dealt in, including character of the motive power, amount thereof, stated in figures of horsepower, and (2) the name and business address of such manufacturer or dealer; (3) the weight and rated live load capacity of commercial motor vehicles.

\* \* \* \* \*

(c) Display of duplicate number plates: Such duplicate number plates may be displayed on any motor vehicle used in the business of the manufacturer or dealer, but shall not be displayed on any motor vehicle or trailer used for the private purposes of any such manufacturer, dealer or their employees, or on any motor vehicle or trailer hired or loaned to others.

(d) The commissioner of motor vehicles shall use all due diligence to ascertain whether applicant is a dealer in fact, and he may regulate the number of plates furnished each dealer."

From the facts as stated in your letter, it is apparent that a motor vehicle is being used by a salesman for a motor company as a demonstrator and for his own per-

Honorable Elliott M. Dampf -3-

June 26th, 1934.

sonal use and is being operated under dealer license plates, as provided in Section 7764, supra. Under sub-section C of this section, the private use of such a motor vehicle is prohibited and in direct violation of the law. This is made more apparent by sub-section D, wherein it is provided that the commissioner shall use all due diligence to ascertain whether the applicant is a dealer in fact, thereby expressing the intention of the Legislature that these motor vehicles should be operated under these license plates only for business purposes.

Sub-section D of Section 7786, R. S. Mo. 1929, provides:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

We conclude, therefore, that the private use of a motor vehicle operated under dealer license plates, as provided in Section 7764, supra, is in direct violation of the law and that the manufacturer, dealer or employee operating such motor vehicle for his private use may be, under sub-section D of Section 7786, prosecuted as provided therein.

As to your second question, we are enclosing an opinion of this department to the Honorable Al J. Stack, Assistant Prosecuting Attorney, St. Louis County, Clayton, Missouri, which we believe fully covers your problem.

Respectfully submitted,

APPROVED:

ROY McKITTRICK  
Attorney General

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General

JWH:FE

COUNTY CLERK: Must publish title to office for primary election.

7-18  
July 17, 1934



Hon. Frank H. Davidson,  
County Clerk,  
Harrisonville, Missouri.

Dear Sir:

This Department is in receipt of your request for an opinion as to the following state of facts:

"In the County Clerks publication of Primary election notice under section 10262 R. S. 1929, is it necessary to leave blank spaces in the publication, where no one has filed for office on any given ticket, or is it sufficient to only print the names and addresses of the candidates that have filed, and the office for which they have filed declaration papers?

"To be more explicit:- In our county no one has filed for a county office on the Republican ticket.

"In the publication of the Republican ticket in the paper is it necessary to leave blank spaces for the offices for which no candidate has filed?"

Section 10262, Revised Statutes of Missouri 1929 provides:

"Such clerks shall, upon receipt thereof, publish, under the proper party designation, the title of each office, the names and addresses of all persons who shall have filed declaration papers, giving the name and address of each, the date of the primary, the hours during which the polls will be opened, and that the primary will be held at the regular polling places in each precinct. It shall be the duty of the county clerk to publish such notice for three consecutive weeks next prior to said primary."

July 17, 1934

It has been sometimes said that certain provisions of the election laws are mandatory and others are directory. Strictly speaking, however, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within their purview.

Section 10262 expressly requires the county clerk to publish under the proper party designation, the title of each office and it is our opinion that this mandatory provision of the statute must be fulfilled by the county clerk.

In the case of Rollins v. McKinney, 157 Mo. l.c. 665, the Court said:

"The statutory ballot for that office was a blank space on the Republican ticket, under the title of the office, in which the elector might write the name of his choice for that office, and by which he was advised of the fact that there was no nominee of that party for that office at that election."

From the foregoing it is the opinion of this Department that it is the duty of the county clerk to publish under the proper party designation the title of each office even though for some particular office there be no one who has legally filed declaration papers.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

JWH /mh

OFFICERS - JUSTICES OF THE PEACE - COUNTY COURT -! County Court has the right to declare the office of Justice of the Peace vacant upon finding certain facts.

8-13  
August 2, 1934

Honorable Elliott M. Dampf  
Prosecuting Attorney Cole County  
Jefferson City, Missouri



Dear Mr. Dampf:

Your letter requesting an opinion is as follows:

"Will you kindly give me your opinion on the construction of Section 2164, Revised Statutes of Missouri, 1929, applying to the following facts:

Upon the death of a Justice of the Peace in and for Jefferson Township, Cole County, Missouri, the County Court of Cole County made an appointment to fill the vacancy to the office. The person so appointed qualified, but has failed and refused to establish an office for the transaction of the business of a Justice of the Peace in Jefferson Township, Cole County, Missouri, or to perform the duties of a Justice of the Peace. Said appointee, while still maintaining his legal residence in Cole County, Missouri, has accepted a position with the United States Geodetic Survey and is working outside the State of Missouri. He has refused to resign the office of Justice of the Peace.

Therefore, would it be possible for the County Court of Cole County, Missouri, to declare the office vacant and obtain custody of the books as provided in the aforesaid section. "

Missouri Constitution, Article VI, Section 37, provides:

"In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

Missouri Constitution, Article XIV, Section 7, provides:

"The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of wilful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Section 11202 R. S. Mo. 1929 provides as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Section 11207 R. S. Mo. 1929 provides as follows:



"If any official against whom a proceeding has been filed, as provided for in this article, shall be found guilty of failing personally to devote his time to the performance of the duties of such office, or of any willful, corrupt or fraudulent violation or neglect of official duty, or of knowingly or willfully failing or refusing to do or perform any official act or duty which by law it is made his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, the court shall render judgment removing him from such office, and he shall not be elected or appointed to fill the vacancy thereby created, but the same shall be filled as provided by law for filling vacancies in other cases. All actions and proceedings under this article shall be in the nature of civil actions, and tried as such."

Section 2164 R. S. Mo. 1929 provides as follows:

"Whenever a justice of the peace shall resign, move out of the township or be otherwise disqualified, he shall immediately thereafter deliver to the clerk of the county court, or, if in the city of St. Louis, the city register, all dockets, records, books, papers and documents appertaining to his office, or relating to any suit, matter or controversy committed to him in his official capacity: PROVIDED FURTHER, that when a justice of the peace dies it shall be the duty of the clerk of the county court, or, if in the city of St. Louis, of the city register, on the affidavit of any person having any interest in such dockets, records, books, papers and documents, stating the nature of such interest, and that such justice of the peace is dead, being filed with such clerk of the county

court, or such city register if in the city of St. Louis, to issue an order, in writing, to the sheriff, directing him to immediately take into his custody all such dockets, papers, books, records and documents and deliver the same, without delay, to the clerk of the county court, or, if in the city of St. Louis, to the city register; and for such services the sheriff shall receive the same compensation as he is allowed by law for serving process, to be paid out of the county contingent fund, or, if in the city of St. Louis, out of any moneys in the municipal revenue fund not otherwise appropriated."

From the facts stated in your letter, Section 2164, supra, can be invoked to recover possession of the books. The clerk of the county court should demand the same of him, and, upon refusal, he could institute a possessory action against him. This is not the exact remedy which you desire, according to your letter. You are more interested in vacating the office by legal process, but it must be remembered that even if the office is judicially vacated, a possessory action for the tokens of office may become necessary.

In the case of *State ex inf. Gentry v. Toliver*, 315 Mo. 737, 1.c. 746, 287 S. W. 312, the Supreme Court said:

"Relator contends that, in making appointments of county employees, officers and agents, the county court acts ministerially and not judicially. This may be true where no finding of facts on the part of the county court, upon which its very power to make the appointment depends, has to be made. If a duly elected, regular justice of the peace should die or resign, the county court would not be required to ascertain anything, other than that a vacancy had occurred, to authorize it to fill such vacancy by appointment. (Sec. 2692, R. S. 1919.) The making

of an appointment in such case would involve no finding of facts giving the county court the power to make the appointment. The statute itself confers such power and requires no finding of facts authorizing the exercise of the power.

None of the cases cited by relator, wherein it is held that in making the appointment the court or officer acts ministerially, is a case wherein the very right to make the appointment depends upon the finding of the existence of a state of facts giving the court or officer the power to make the appointment. Such cases are thus distinguished from the case at bar and need not be separately considered. \* \* \* \* \*

It is not necessary to lengthen this opinion further in the consideration of cases. We hold that the act of making the appointment of respondent necessarily involved a finding by the county court that such a state of facts existed as to authorize it to appoint an additional justice of the peace, including the finding that two additional justices of the peace had not already been appointed, or, if they had previously been appointed, that both were not qualified and acting at the time. Such finding had the force and effect of a judgment and cannot be attacked in this proceeding, wherein fraud is neither alleged nor sought to be proven."

Thus we see that where the county court is required to find, as a fact, that the Justice has "moved out of the township" they are acting judicially in any court order made pursuant thereto.

Machem on "Public Officers", Section 438, provides:

"Where the law thus requires the officer to reside within the district which he

August 2, 1934

represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.

But a mere temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect."

In the case of State ex rel. Attorney General v. Sanderson 280 Mo. 258, 217 S. W. 60, the court states:

"\* \* \* \* the policy of the State is, that a duly elected or appointed official shall not be deprived of his position except for remissions in the performance of the duties of the office, or conviction of some crime which demonstrates he is unworthy to hold a position of honor or trust. Not only is said policy to be gleaned from statutory enactments but this court has decided that if an official possesses the requisite qualifications for his position, he can be removed from it only for misconduct connected with the performance of the duties of the office, except when some transgression apart from those duties is made by statute cause for removal; and that rule is general.\* \* \* \* \*"

We have seen that the Constitution and no less than three statutes pursuant thereto, could be invoked in vacating said office of Justice of the Peace.

#### CONCLUSION.

It is the opinion of this office that the county court, under provisions of Section 2164, supra, after making a

Honorable Elliott M. Dampf

-7-

August 2, 1934

finding of fact, which should be made of record, of the facts as given in your letter and particularly a finding that said Justice has moved out of the township, then it is within their jurisdiction and judicial power to enter a judgment of record, based upon said finding, that the office is vacant, and then they can proceed to fill the vacancy as provided by law.

Under the provisions of Section 11202 and Section 11207, supra, quo warranto proceedings are available, but so long as Section 2164, supra, is available, quo warranto is not a necessary remedy.

Respectfully submitted,

Wm. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H

Department of Agriculture  
State Plant Officer

Reciprocal arrangement between states whereby filing fees for Nursery Permit Certificates are to be the same in one state as are charged by the other state for similar certificates is permissible under Article 3, Chapter 87, of Revised Statutes of Missouri, 1929.

8-13  
August 2nd, 1934.



Mr. J. Carl Dawson,  
State Plant Officer,  
Department of Agriculture,  
Jefferson City, Missouri.

Dear Sir:-

We have your letter of June 27, 1934, in which is contained a request for an opinion as follows:

"It has been the practice in the past for a number of state plant inspection departments, including Missouri, to issue a certificate under the plant law known as a 'Nursery Permit Certificate'. This certificate is issued to nurserymen not residing or growing nursery stock in the State of Missouri. Upon their filing a copy of their state inspection certificate and the enclosed affidavit properly filled out and paying a filing fee of \$5.00, they are issued this Nursery Permit Certificate. When this certificate has been obtained by the nurseryman he is then allowed to ship his nursery stock into this State. If the certificate has not been obtained it is the practice to have any shipments found moving through express or freight returned to the shipper who does not possess the said certificate.

"Several states are now making an effort to place a reciprocal regulation into effect as to the fee on this certificate whereby nurserymen in outside states are charged a fee for filing that is identical with the fee charged by that state to local nurserymen obtaining a similar certificate from that state. Nurserymen in states charging no fee are, of course, charged no fee for filing their State inspection certificate and obtaining the Permit Certificate.

"I would appreciate your opinion as to whether this regulation as it now stands is legal under the Missouri Plant Act, Chapter 87, Article 3, Sections 12,367 to 12,384, R.S. Mo. 1929, and if a reciprocal regulation as stated in the preceding paragraph would be lawful.

Yours very truly,

(Signed) J. Carl Dawson, Plant Officer."



J. Carl Dawson--#2

August 2nd, 1934.

Section 12369, Article 3, Chapter 87, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 12369. BOARD OF AGRICULTURE TO ADMINISTER PROVISIONS OF LAW.-- The Missouri state board of agriculture is hereby authorized to administer the provisions of this article. It shall have authority to make such regulations and promulgate and enforce such quarantines as may in its judgment be necessary for the protection of all plants growing in the state of Missouri. In the administration of the provisions of this article, the board is authorized and empowered to co-operate with every state department, agency, commission and institution, and also particularly with the United States department of agriculture in so far as such co-operation may be beneficial in carrying out the provisions of this article."

Section 12373, Article 3, Chapter 87, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 12373. BOARD TO MAKE RULES AND REGULATIONS.--- The Board shall, from time to time, make rules and regulations for carrying out the provisions and requirements of this article, including rules and regulations under which its inspectors and other employes shall (a) inspect places, plants and plant products, and things and substances used or connected therewith."

In Section 12348 as re-enacted, Laws 1933, page 167, it is provided, among other things, that whenever any law refers to the Board of Agriculture, it shall be construed as referring to and meaning the State Department of Agriculture and the Commissioner of Agriculture.

Section 12371, Article 3, Chapter 87, Revised Statutes of Missouri, 1929, as re-enacted in Laws 1933, page 170-171, provides as follows:

"Sec. 12371. ASSIGNING DUTIES.--COOPERATION--FEES. For the purpose of carrying out the provisions of this Article the commissioner of agriculture may assign such duties to his employees as he may require and incur such expense as may be necessary, within the limits of appropriations made by law. Such commissioner shall cooperate with other departments, boards and officers of this state and of the United States as far as practicable. Provided, that the Commissioner of Agriculture shall prescribe the fees to be charged and collected from those inspected, and he shall cause such fees to be paid into a fund known as the Plant fund."



J. Carl Dawson--#3

August 2nd, 1934.

From a reading of the above quoted applicable sections, it will be seen that the Commissioner and Department of Agriculture are given considerably broad discretionary powers in the matter of inspections and fees therefor. In view of this we find nothing in the present regulation referred to in your letter that militates against any of the provisions of The Missouri Plant Law (Sections 12367-12384, Revised Statutes of Missouri, 1929). The procedure, as a matter of fact, seems to follow, at least in practical operation, that provided in Section 12375.

With reference to the possibility of the reciprocal regulation between the various states, we are of the opinion that such is lawful. It will be noticed, in this connection, that in Section 12369, as well as in Section 12371, the Commissioner is empowered to cooperate with the departments of other states. Furthermore, Section 12371 provides that the Commissioner shall prescribe inspection fees. This being so, he is empowered to use the reciprocal basis as a measure. The discretion granted the Commissioner and the legislative intent of cooperation with departments of other states seems ample authority for the reciprocal regulation.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

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Attorney-General.

COUNTY COURT: Amount of levies for county purposes and road funds discretionary; 10% limitation under Section 9873, R. S. 1929, applies to road tax.

8-30

August 29, 1934.



Hon. S. P. Dalton  
Prosecuting Attorney  
Cape Girardeau County  
Cape Girardeau, Missouri

Dear Mr. Dalton:

We are in receipt of your recent letter with a request for an opinion, which letter is as follows:

"I would like to have your opinion on the following proposition.

This county now levies a tax of 34¢ on the \$100.00 valuation under Section 9873 R. S. Mo. 1929, for county purposes and 14¢ on the \$100.00 valuation under Section 7890 R. S. Mo. 1929, for road purposes and 10¢ on the \$100.00 valuation under Section 7891 R. S. Mo. 1929, as a special road tax.

In this county a large part of the valuation of the county lies in special road districts and under the ruling of the Supreme Court in the case of State ex rel vs. Holman, 264 S. W. 908, 305 Mo. 195, the special road districts are entitled to the money collected under the last two levies from property within their respective districts.

Section 9874, R. S. Mo. 1929, (now Amended Laws, 1933, page 351) provides for the county court to appropriate and subdivide the revenues collected for the various purposes, including provision for roads and bridges, but with

the special road district taking most of the money, the amount for general use over the larger territory of the county is more or less limited.

What we would like to know is whether or not the county court by decreasing the amount of the levy for road purposes under Section 7890 and increasing the amount for general county purposes under Section 9873, may legally deprive the special road districts of the county of part of the taxes which they are now getting from the road tax and special road tax as collected in their respective districts, and place such funds under the control of the county court where it may be appropriated for road purposes generally in the entire county and under the direction of the county court.

In other words, can the county court by reducing the amount of the levy under Section 7890 and increasing the amount of the levy under Section 9873 so that the total levy is the same, deprive the special road districts of that much of the tax money and leave the funds available for the county court to appropriate same for road purposes so that they may be available for roads in any portion of the county, and leave such funds under the control of the county court under Section 7894 (should be 9874) R. S. Mo. 1929?

I would like also to have your opinion on the proposition as to whether or not the limitation as to 'ten per cent' increase on levy over the previous year, as provided in Section 9873, would apply in such case to the increased levy under Section 9873 or only to the total levy under both sections, which would remain the same if the decrease under one section was equal to the increase under the other."

We are herewith setting forth the statutes which are applicable to the questions submitted in your request for an opinion.

Section 7890, R. S. Mo. 1929, provides as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

Section 9873, R. S. Mo. 1929, provides as follows:

"For county purposes the annual tax on property not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof shall not in any county in this state exceed the rates herein specified: In counties having six million dollars or less said rate shall not exceed fifty cents on the one hundred dollars valuation; in counties having over six million dollars and less than ten million dollars said rate shall not exceed forty cents on the one hundred dollars valuation; in counties having ten million dollars and not exceeding thirty million dollars said rate shall not exceed fifty cents on the one hundred dollars valuation, and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the one hundred dollars valuation. The foregoing are maximum rates which may be levied in said counties. Provided, however, the county court shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall

produce more than ten per cent in excess of the amount produced mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any county court or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year. Provided further, that the qualified voters of any county, by a majority vote shall have power to fix any additional rate higher than above provided for within the limits prescribed by the Constitution at a general election or a special election called for that purpose. County courts are hereby empowered to call and conduct a special election under the laws governing such elections, as herein contemplated, or submit a proposition for increase of levy, when in the opinion of such court necessity therefor arises, and shall submit any such proposition at either special or regular election when petitioned therefor by taxpaying citizens equaling in number one per cent or more of the qualified voters of the county, and the proposition shall be as follows on the ballot: 'For a levy for county purposes of . . . . . on the hundred dollars valuation'--and--'against a levy for county purposes of . . . . . on the hundred dollars valuation,' provided, that the limitations contained in lines fourteen to twenty-one herein shall not apply to any county containing or which shall hereafter contain not less than twelve thousand inhabitants nor more than sixteen thousand inhabitants and in which any part of the courthouse therein may have been or shall be destroyed or damaged by fire or other cause when it shall become necessary to make a higher levy for the purpose of restoring or replacing such destroyed parts or altering or repairing such courthouse or to preserve same or any part thereof from

waste or damage. And in all such cases the county court shall make an estimate of the sum necessary to be raised therefor for the current year and may levy such additional rate of tax within the limits of the Constitution as will mathematically produce such sum. All taxes collected under such additional levy shall be placed in a fund to be known as the 'courthouse fund' and no part of such fund shall be diverted or used for any other purpose than the purposes aforesaid."

I.

The statute places upon the county court the duty of ascertaining the necessary levies to be made for "county purposes" under Section 9873, supra, and the amount of the levy under Section 7890, supra, and the amount of these levies is discretionary with the county court based on their knowledge of the conditions and need for revenue for the various purposes. This power of levying taxes has been lodged in the county court and so long as the levies do not exceed the constitutional limits they cannot be disturbed except where there has been a clear abuse of this discretionary power.

In the case of *State ex rel. Johnson v. St. Louis & S. F. R. Co.*, 10 S. W. (2d) 918, 1. c. 921, the Supreme Court had this to say on the question:

"The power to levy a tax for county purposes is a power delegated to the county court, is legislative in character, and in the exercise of that power the county court has a large discretion. All of the cases so hold. *Decker v. Diemer*, 229 Mo. 296, 129 S. W. 936; *State ex rel. Johnson v. St. Louis-San Francisco Railway*, 315 Mo. 430, 286 S. W. 360; *People v. C. & A. Ry. Co.*, 289 Ill. 282, 124 N. E. 658; *People v. Sandberg Co.*, 277 Ill. 567, 115 N. E. 741; *People ex rel. Bear v. Illinois Central R. R. Co.* 266 Ill. 126, 107 N. E. 223; *Cooley, Taxation* (4th Ed.) Sections 1031, 1032. The authorities cited for appellant, and others, are to the effect that courts rarely interfere with the exercise of this discretionary power, and do so only when there is clear evidence of an abuse of discretion."



It is our opinion that the county court may raise or lower the levies under Section 9873, supra, for county purposes and the levy for road taxes under Section 7890, supra, as the exigencies of the case may demand, subject only to the limits fixed by the Constitution and where the levies do not clearly abuse their discretionary power.

## II.

As to the question asked in the last paragraph of your letter of request, it is answered in the case of *State ex rel. Covington v. Wabash Ry. Co.*, 3 S. W. (2d) 378, in which the court said (l. c. 379):

"Now a levy for road purposes under section 10682, R. S. Mo. 1919, as amended by Laws Mo. 1921 (Extra Session), p. 172, is one which a county court may make on its own initiative without invoking outside aid, consent, or authority, and, furthermore, 'the payment of all necessary expenses for the building of bridges and repairing of roads,' etc., is one of the objects and purposes for which a county court may exercise its general power to raise revenue by taxation, within the limits set by section 11, art. 10, of the Constitution (section 12866, R. S. Mo. 1919). We are therefore of the opinion that the levy for road purposes under amended section 10682 in the instant case was a levy for county purposes within the meaning of the re-enacted section 12865, and that as a matter of construction the 10 per cent. restriction applies."

It is, therefore, our opinion that the 10 per cent. limitation in the first proviso of Section 9873, supra, applies to Section 7890, supra, and the county court is not authorized to make a levy under the two sections last above mentioned that will produce mathematically more than 10 per cent. in



Hon. S. P. Dalton

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August 29, 1934.

excess of the taxes levied for the previous year.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

STATE HIGHWAY PATROL: Patrolman cannot arrest party suspected of possessing intoxicating liquor or seize the liquor;

Patrolman has equal powers with any peace officer except power to execute civil process and right of search and seizure

Patrolman is not subject to suit for false arrest.

September 1, 1934.



Honorable Elliott M. Dampf,  
Prosecuting Attorney,  
Cole County,  
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 30, 1934 containing questions on which you desire the official opinion of this office. The facts are:

"A highway patrolman stops a car on the highway upon the theory that there has been a misuse of a license plate. Finding no violation of the law in that respect, he proceeds to search the car, without writ or warrant. Finding packages he believes to contain alcohol, he takes the driver of the car before the county sheriff, who proceeds to make the arrest."

We shall attempt to analyze and answer your questions separately:

QUESTION I

"Was that a legal procedure under the Highway Patrol Law, especially in view of the provisions of Section 16 of that Act?"

The duties of the Highway Patrol are set forth in Section 12, page 234, Laws of Missouri 1931 and are as follows:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the

highways; to enforce and prevent thereon the violation of the laws relating to the size, weight and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

Under Section 13 of the same page entitled "Officers of State of Missouri" the members of the Highway Patrol appear to have equal and concurrent powers with the peace officers of the county. Said section provides:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

The Highway patrolmen may have general powers and may have equal powers, save and except one restriction, which is contained in Section 16 of the Act creating the Highway Patrol (Laws of Missouri 1931, page 235), which is as follows:

"The members of the patrol shall not have the right or power of search nor shall they have the right or power of seizure except to take from any person under arrest or about to be arrested deadly or dangerous weapons in the possession of such person."

You state in your letter that a highway patrolman "stops a car on the highway upon the theory that there has been a misuse of a license plate." We assume that he had information in advance or had reasonable grounds for suspecting the driver of the car of violating the law with respect to auto licenses. The patrolman was, therefore, within his duties under Section 12, supra, insofar as stopping the car and making the arrest is concerned. As to the legality of the arrest, we shall treat the same in another paragraph of this opinion.

You further state that "he proceeds to search the car without writ or warrant". This, we hold, he has no authority to do under Section 16, supra. By the plain wording of the statute it was evidently the intention of the Legislature to restrict the power of the patrolmen, first, as to search; and second, as to seizure of anything except, after a person has been arrested or is about to be arrested, a deadly or dangerous weapon. The power of search and seizure is common to peace officers, but is restricted and taken away from highway patrolmen.

The situation now is that the patrolman has arrested the supposed offender, made a search, and believing that he has found alcohol, takes the driver of the car before the sheriff who proceeds to make the arrest. You do not state that the sheriff ever made any search and seizure himself, and referring again to Section 16, the evidence could not be used, and a motion to suppress would undoubtedly be sustained.

In order to clarify this question and to fit a state of facts which might arise in the future, we take the liberty to make this suggestion: If the patrolman had arrested the supposed offender in the manner in which he did on a charge of violating a license section and had been informed in advance that the party was in the habit of violating the Prohibition laws and there was strong evidence to support such a reputation, he could then refrain from search or seizure, take the offender to the sheriff or call the sheriff to the offender, inform the sheriff of his reasons to believe that intoxicating liquor was in the car, along with any other evidence he may possess, and the sheriff could then make the search of the car and seize whatever liquor of an intoxicating nature which might be

found therein. In our opinion, that evidence would be sufficient for prosecution. We base this conclusion on the case of State v. Davis, 329 Mo., 1.c. 747, wherein the Court said:

"The defendant also complains of the action of the trial court in overruling his motion to suppress the State's evidence, by which he challenged the legality of the search of the automobile and the seizure of the liquor found therein.

The sheriff and his deputy were the only witnesses offered in support of the motion, and their testimony in that connection was substantially the same as the testimony given by them at the trial of the case, as to the arrest of the defendant, the search of the automobile and the seizure of the liquor found in the automobile. But, in connection with the motion, the sheriff further testified that he had seen the defendant in Troy on two occasions prior to the occasion in question; that he was reliably informed that the defendant had been stopping his car in the alley behind the barber shop and peddling whiskey in Troy; that, about four o'clock in the afternoon of January 31, 1931, he was informed by a reliable business man of Troy that the defendant would be in the alley behind the barber shop about 8:30 o'clock that night and would have whiskey in his possession; and that he recognized the defendant as soon as he stepped out of the automobile at the mouth of the alley that night. Under such circumstances, the sheriff had reasonable grounds to believe that the defendant was committing a felony; and so believing, the sheriff was authorized to arrest the defendant without a warrant, and, as incidents to the arrest, to search the automobile without a search warrant and to seize the liquor found therein. (State v. Harlow (Mo. Sup.) 327 Mo. 231, 37 S.W. (2d) 419; State v. Howard, supra; State v. Williams (Mo. Sup.), 14 S.W. (2d) 434; State v. Bailey, 320 Mo. 271, 8 S.W. (2d) 57). The motion to suppress the State's evidence was properly overruled."

#### Conclusion

In view of the statute limiting the power and right of a highway patrolman to search and seize, we are of the opinion that

the evidence could not be used in the prosecution of the supposed offender; that the procedure of the Highway patrolman was legal except as to the feature of his searching even though the facts do not reveal that he actually seized the package containing the alcohol. We are of the further opinion that the patrolman has the power, and was within his rights, in arresting the supposed liquor law violator, but he should refrain from search and seizure. He should follow the course as outlined above and turn over the supposed offender to a recognized peace officer in order that the search might be legally made.

#### QUESTION II

"Does a highway patrolman have all the powers of a sheriff, and if not, to what extent is his power limited, taking the act as a whole?"

We again call your attention to Section 13 of the Act creating the Highway Patrol, supra, and more particularly to the following words:

"The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order of process any person detected by him in the act of violating any law of the state."

#### Conclusion

It is the opinion of this department that, with the exception of the power and right to execute civil process, and the restriction as contained in Section 16 denying the patrolmen the right and power of search and seizure with the exception of deadly and dangerous weapons, a highway patrolman has equal, concurrent, and the same power as any sheriff or peace officer of the State.

#### QUESTION III

"Was the taking into custody by the patrolman a false arrest in the circumstances above stated?"

Referring again to Section 12 of the State Highway Patrol Act, Laws of Missouri 1931, page 234, we find that it contains the following:



"To enforce thereon the laws of this state relating to the operation and use of vehicles on the highways"

and,

"It shall be the duty of the Patrol to cooperate with the Secretary of State and the Motor Vehicle Commissioner in the collection of motor vehicle registration fees."

This puts the Highway patrolman within his rights to stop automobiles on the highway and determine whether or not there has been a violation of the laws relating to licenses, if he has reasonable grounds to suspect anyone of violating the same.

In the instant case we assume that for the purpose of this opinion he did have reasonable grounds to suspect the offender of violating the license law. We would presume that he is not in the habit of stopping automobiles promiscuously and irritating the public generally. Proceeding on that assumption, we quote from the decision in the case of *Hanser v. Bieber*, 271 Mo. 326, relative to probable cause:

"The statute (Sec. 9805, R.S. 1909) authorizing police officers of St. Louis to 'prevent crimes and arrest offenders' does not in all cases make lawful the arrest by such officer without a warrant. To make lawful an arrest for a misdemeanor not committed in his presence, the officer must have reasonable grounds to suspect that the offense has been committed. The existence of such reasonable grounds rests upon the facts in each particular case, and their force and sufficiency must be determined by the officer before he acts, and they **must** be sufficient to establish a substantial belief in his mind that an offense has been committed. If the facts afford no basis for such reasonable suspicion, and the officer by due diligence could have ascertained that the plaintiff, at the time the officer arrested him and defendants capriciously charged him with disturbing the peace, was in an orderly discharge of his duties, the trial court should submit the issue of false imprisonment to the jury."



We quote from Judge Bond's dissenting opinion, not for its legal value, but because it contains facts which might readily be applied to the instant case. It was held:

"If the arrest was lawful there can be no recovery of damages for false imprisonment, even though made without a warrant; and an unlawful arrest may be justified by the ultimate conviction of the party of the crime for which he was taken into custody; and even though the conviction be reversed upon appeal, a police officer in St. Louis who has reasonable grounds to suspect that a misdemeanor has been committed may arrest the suspected party without a warrant; and evidence adduced by plaintiff tending to prove that an altercation between himself and defendants occurred, that a police officer was called in and a complaint made to him of a breach of the peace, and that upon an assurance by defendants that they would prosecute the charge, the plaintiff was taken to the police station where a formal charge was made and the trial had, in which plaintiff was convicted, established a reasonable ground for a belief on the part of the officer that plaintiff had been guilty of a breach of the peace, and a demurrer to plaintiff's evidence was rightly ruled."

In the case of Billingsley v. Kline Cloak Co., 196 Mo., 1.c. 539, the Court said:

"We have already called attention to the fact that plaintiff alleged the arrest and imprisonment were without probable cause and that she tried her case on that theory, and she concedes that she must abide by that theory in this court. In order then to sustain the judgment she must have shown not only her innocence, but that defendant was without probable cause to believe her guilty."

And again, in the same case the Court made the following statements with reference to probable cause (1.c. 539-540):

"Probable cause 'which will relieve a prosecutor from liability, is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man'. (Vansickle v.

Brown, 68 Mo. 627, 635; Stubbs v. Mulholland, 168 Mo. 47, 74). 'Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution.' (James v. Phelps, 11 Ad. & El. 483, 489). If we applied this definition to the facts of the case, we would be relieved from the necessity of saying that plaintiff was a party to obtaining the goods on bogus checks, by acquiescence, if not by participation. For it seems too plain for dispute that not only were the circumstances sufficiently strong to induce belief of her complicity in the mind of a reasonable man, but it would have required a most dense and abnormal mind not to have believed it."

#### Conclusion

It is the opinion of this department that if the patrolman acted in good faith, without malice, and with the judgment of a reasonable and cautious officer, the same would not constitute a false arrest even though the arrested person be innocent of the charge preferred against him.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

COUNTY OFFICERS: - SHALL FORFEIT OFFICE AND BE REMOVED, WHEN?

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3-26

March 21, 1934.



Honorable J. J. De Vereaux  
Mayor  
Warrenton, Missouri

Dear Sir:

This department wishes to acknowledge your enclosed clippings and letter of March 15, 1934, which reads as follows:

"Regarding case of Judge Louis Bolm, of Warren Co. I am enclosing clippings from the Warrenton, Mo. Banner to substantiate my statements made in a communication Feb. 22, 1934. to the Honorable Governor Guy B. Park. I believe that they will constitute sufficient proof that a vacancy exists. I might suggest to your office that you write the County Clerk, on unofficial stationery, and ask where you could get in touch with Judge Bolm, either by mail or for personal interview, and I am sure he will give you his St. Louis address as his permanent abode. If you feel that this evidence is not sufficient, I shall be pleased to furnish your office with the names of leaders of both parties, that you may interrogate."

The enclosed clippings read as follows:

"For Rent -- My home place in Truesdale; will rent whole house or several rooms, -- Louis Bolm, 1718 North Union Blvd., St. Louis or see Robert Bolm, Truesdale. "

and

"TRUESDALE -- \* \* \* \* Judge Bolm and daughter, Mrs. Elmer Gruene-waelder, and Mrs. Lulu Marie, came Monday from St. Louis, to spent several days while Judge Bolm attended court."

Section 2073 of the Revised Statutes of Missouri, 1929, providing for the election and tenure of presiding judges of the County Courts reads as follows:

"At the general election in the year eighteen hundred and eighty, and every two years thereafter, the qualified voters of each of said districts shall elect a county court judge, who shall hold his office for a term of two years and until his successor is duly elected and qualified; and at the general election in the year eighteen hundred and eighty-two, and every four years there-after, the presiding judge of said court shall be elected by the qualified voters of the county at large, who shall hold his office for the term of four years and until his successor is duly elected and qualified. Each judge elected under the provisions of this article shall enter upon the duties of his office on the first day of January next after his election."

Section 1824, R. S. Mo., 1929, prescribing the qualifications of judges reads in part as follows:

"Every judge of the supreme court and of the several courts of appeals shall be a citizen of the United States, not less than thirty years old, and shall have been a citizen of this state five years next preceding his election or appointment, and shall be learned in the law. Every judge of the circuit court shall be not less than thirty years of age, shall have been a citizen of the United States for five years, a qualified voter of this state for

three years next before his election or appointment, and shall be learned in the law. Every judge of probate and of county court shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election;  
\* . \* . "

Section 7, Article XIV. of the Constitution of Missouri, deals with the removal from office of county, city, and all public officers and reads as follows:

"The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Section 11202, R. S. Mo. 1929, providing when an officer shall forfeit office and be removed, reads as follows: "

"Any person elected or appointed to any county, city, town or township office in this state, except by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall, knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Mechem on "Public Officers", Section 437, states

"As has been seen in an earlier section, it is usually provided that public officers shall reside in the district for and from which they are elected, and the statutes generally provide further that the office shall become vacant upon their ceasing to reside within said district. The reasons for these provisions are found in obvious requirements of public policy."

Section 438 of the same work states:

"Where the law thus requires the officer to reside within the district which he represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.

"But a mere temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect."

Section 439 of the same work reads as follows:

"Thus, where a county officer leaves the county with his family with the intention not to return, or goes to another State with the intention of there making it his home or voluntarily enlists in the military service of the United States, he is held to have vacated his office; but a mere temporary absence, as to procure medical treatment, or to engage in business for a limited time, or to fill a temporary appointment, where the office may be and is filled by a deputy, does not operate to vacate it."

In Yonkey v. The State, 27 Ind. 236, l.c. 240, the court sets out Section 6 of the VI. Article of the Constitution of Indiana providing that,

"all county, township and town officers shall reside within their respective counties, townships and towns, and shall keep their respective offices at such places therein, and perform such duties, as may be directed by law."

The court, in applying the facts to the above section states further:

"If, then Yonkey, in December, 1863, ceased to reside in Clinton County, as alleged, he thereby abandoned and forfeited the office, and it became vacant; and any subsequent claim, or attempt of any one, as Yonkey's deputy, to hold the office or discharge the duties thereof, would be without right, and a usurpation. \* \* \* \*"

Again in 17 Neb. 598, the Court held that a vacancy may exist in the office of county judge, although the duties of such office are being discharged by a person temporarily appointed by the proper authority, but the statute under which such a decision was rendered reads as follows:

"Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows:

1. The resignation of the incumbent.
2. His death.
3. His removal from office.
4. The decision of a competent tribunal declaring his office vacant.
5. His ceasing to be a resident of the State, district, county, township, precinct or ward in which the duties of his office are to be exercised, or for which he may have been elected, \*\*\*\*\*"



In State ex rel. Attorney-General v. Sanderson, 280 Mo. 358, 217 S. W. 60, the court states,

\*\*\*\*\*the policy of the State is, that a duly elected or appointed official shall not be deprived of his position except for remissions in the performance of the duties of the office, or conviction of some crime which demonstrates he is unworthy to hold a position of honor or trust. Not only is said policy to be gleaned from statutory enactments but this court has decided that if an official possesses the requisite qualifications for his position, he can be removed from it only for misconduct connected with the performance of the duties of the office, except when some transgression apart from those duties is made by statute cause for removal; and that rule is general. \*\*\*\*\*

#### CONCLUSION.

The reason for a provision that he "shall have been a resident of the county in which he may be elected for one year next preceding his election" is found in obvious requirements of public policy, however, we find nothing in the statutes or in the decisions of the courts of this State, providing for the removal from office of an officer when the latter shall cease to reside in the district in which he was elected.

It is true that in Yonkey v. The State, supra, the court held that upon removal from the county, Yonkey abandoned and forfeited his office but one must bear in mind that in all similar cases, the Constitutions of the various states set out that a vacancy existed whenever the particular officer "ceases to be a resident of the State, district, county, township, precinct or ward in which the duties of his office are to be exercised, or for which he may have been elected,"\*\*\*\*.

We find nothing in the facts presented which

would indicate to us that Judge Bolm has failed personally to devote his time to the performance of the duties of his office which by law it is his duty to perform.

We are therefore of the opinion that until such facts are brought to light, his office cannot be declared vacant.

Respectfully submitted,

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WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

WOS/afj

NEPOTISM:-Teacher's contract becomes illegal only where related director participates in teacher's election, or where there was collusion or fraud.

4-20  
April 16, 1934.



Mr. J. B. Dearmont,  
Prosecuting Attorney,  
Mound City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We have a school board that has employed a teacher that is related to one member of the board in the prohibited degree. The related director was opposed to the employment and went on record as opposing the employment. The Board consulted me about the matter before then employed. I told them as I interpreted your opinion of August 25, 1933 to Hon. Orin J. Adams, the only way to bring about the employment would be for the related director to resign before the employment was made. This he refused to do. I further told the two directors, that as I interpreted your opinion, that an employment by them in defiance of the related director could not forfeit his position on the board, but that it would be an illegal and void contract on their part and endanger the payment of the teacher out of the school funds of the district, if contested. This same teacher was employed last year with this same related member on the board, but the matter was not raised at that time, nor did the fact that she was related to this member enter into the employment at that time.

1. Am I right in my interpretation of your former opinion?
2. Can this employment be reached in the manner made?
3. If not, would you advise contesting payment, out of the school funds, of the teacher's salary?

There is no collusion in this employment.

The related director has no children of school age. All patrons that have children attending school seem to be behind this employment. I think that there is a feeling on the part of the related director and the patrons that are behind him that they are paying the teacher more than they should. They would be disposed to contest payment under this employment."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The Supreme Court in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, 101, in construing the above constitutional provision, says as follows:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

As we construe the above constitutional provision and the decision in the Whittle case, it is the act of the related director in exercising his power to vote or appoint in favor of the related teacher that causes the forfeiture of office and makes the contract illegal. Where the related director does not participate by casting a vote or otherwise in the election of the teacher, such election is legal. Of course, if the related director brings about the election of the teacher through a fraudulent or collusive agreement, then, as a matter of law, we believe that the election would be illegal.

We do not believe that you correctly interpreted the opinion of this Department under date of August 25, 1933, directed to Hon. Orin J. Adams, Kingston, Missouri, and written by Hon. Harry G. Waltner, Jr., Assistant Attorney General. We quote from Mr. Waltner's opinion in order that you may find the views expressed in that opinion and the views expressed herein are entirely consistent. Mr. Waltner says as follows:

"From an examination of this Section it is evident that the members who are not related to the teacher employed would not offend against this provision by voting for the employment of a teacher who is related within the prohibited degree to another member of the board. In other words, the only one violating the provision is the related director. As to the effect on the member of the board not voting, and who is related within the prohibitive degree to the teacher employed, we think this question should be determined upon the ground of the good faith of the related director not voting for the employment of the teacher related to him in the prohibited degree. It does not seem logical or just that two or more members of the board having the power to employ a teacher could employ such teacher against the wishes of the other member when such teacher was related to the latter member within the prohibited degree, and by the acts of the other members of the board, in nowise brought about by the related member, subject the latter member to forfeiture of office. On the other hand, we are firmly of the opinion that if teachers are employed by a school board who are related to any member or members of the board, and the employment of such teacher is obtained by any collusion, understanding, agreement, or in any other manner involving the related director or directors, that the office of such director or directors is forfeited whether or not he or they vote for or against such employment, or even though he or they be not present at the meeting when such is appointed. This is consistent with the liberal construction given the amendment, and we believe was in the mind of the court when it stated in the Whittle opinion *supra*, 'either by casting a deciding vote or otherwise.' Accordingly, in the event a relative of a member of the board within the prohibited degree is employed as a school

teacher or other employe, the transaction should be scrutinized and searched with extreme energy and carefulness, and if there is a semblance of collusion or bad faith on the part of the related director in the employment, the member so related to the employed teacher should be ousted."

Mr. Waltner further held that:

"Accordingly, it is the opinion of this office that any contract entered into by the School Board and an employe, which works a forfeiture of office under Section 13 of Article XIV of the Constitution is a contract made 'in the teeth of the law' and is void and unenforcible."

Concurring on what Mr. Waltner held, we believe that it is only the member who participates in the election of the related teacher that performs an illegal act and lays himself liable to forfeiture of office. If the teacher related to one member is elected by the other members of the board, and the related director does not participate, either by casting a vote for such relative or by collusion or fraud, then the contract entered into between the teacher and the board is legal. It is only where the contract results from the related director participating in the election that the contract is void and cannot be enforced by the teacher, and it is only when the related director participates in the election that the related director can be made to forfeit his office. The other members of the board cannot, by voting for a teacher related to one member, cause the related director to forfeit his office, nor will the fact that the non-related members, in good faith, elect a member related to a member of the board, make them liable where the related director does not participate in the election of such relative.

You state in your letter that there is no collusion between the related director and the other members of the board, and that the related director, in good faith, opposed the employment of his relative and went on record as voting against him.

Upon the facts stated in your letter, it is therefore the opinion of this Department; (1) that the election of the teacher was legal and that the contract entered into between him and the board is legal and enforcible; (2) that the other members of the board would not be personally liable for warrants issued to the teacher upon this legal contract; (3) that the related director would not forfeit his office; and (4) that there would be no reason for contesting the payment of this teacher's salary which is due him under a legal and enforcible

Mr. J. B. Dearmont,

-2-

April 16, 1934.

contract.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:8



ELECTIONS  
CLERKS

- Only two clerks allowed in precincts casting
- less than three hundred votes.

7-16  
July 14, 1934



Honorable C. A. Dirckx  
Clerk of County Court  
Cole County  
Jefferson City, Missouri

Dear Sir:

We have your request of July 11, 1934 for an opinion upon the following statement:

"The question that puzzles us is Section 10211 Laws of 1933, which repealed the same Section of R. V. S. 1929. The old Section stated the judges could appoint four clerks, whereas the new Section of 1933 states the judges shall appoint two clerks in precincts of less than three hundred votes and in precincts of more than three hundred votes the judges shall appoint four clerks.

If this Section means the judges collectively shall appoint only two clerks in precincts of less than three hundred, it will be a difficult task to handle the election as there should be two clerks to attend to the recording books and two clerks to attend to the tallying of votes, or in other words four clerks are really needed."

#2 - Honorable C. A. Dirckx

There appear to be no adjudicated cases in this state on the particular issue raised by you. However, prior to the 1933 Legislature, the election law provided for four regular election judges, Section 10206, Revised Statutes of Missouri, 1929 and provided for two extra election judges, Section 10208, Revised Statutes of Missouri, 1929, making a total of six judges who, together with the four clerks provided for in Section 10211, Revised Statutes of Missouri, 1929, took care of the election in each precinct in the state. However, the 1933 Legislature took notice of the fact that many precincts in Missouri cast only a few votes, and the expense of ten people in such small precincts appeared to be excessive to the Legislature. Section 10211, Revised Statutes of Missouri, 1929 was repealed and a new section enacted in lieu thereof, Laws 1933, p. 239, wherein it was provided:

"In all precincts casting less than three hundred votes \* \* \* the judges shall appoint two clerks, and in all precincts casting three hundred or more votes \* \* \* the judges shall appoint four clerks. \* \* \*"

Thus, under the new statute, all precincts in the State of Missouri which cast less than three hundred votes in the last general election shall have only two clerks, one from each political party to be selected by the four judges in charge of that precinct on election day; in all precincts in the State which cast three hundred or more votes at the last general election, the six judges of election shall select, as under the old law, four clerks, two from each party.

It is the opinion of this office that only two clerks are allowed by law in voting precincts which cast less than three hundred votes in the last general election.

Respectfully submitted,

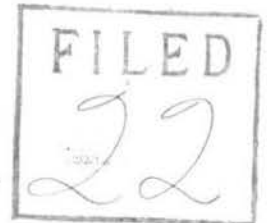
FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

PROHIBITION: An Indictment obtained before repeal may be  
prosecuted after appeal.

February 19, 1934 2-26-34

Honorable Gordon P. Dorris  
Prosecuting Attorney  
Alton, Missouri



Dear Sir:

This Department is in receipt of your request for  
an opinion as to the following state of facts:

"Will you please advise me what effect  
the newly enacted prohibition laws  
will have on cases filed and pending  
under the old laws. As an example, a  
party is charged in this County with  
transportation of intoxicating liquor,  
he was given a preliminary hearing  
last November and held for trial in  
Circuit Court, our Circuit Court  
convenes in February. Can we legally  
try this man for the commission of  
that offense, which was an offense at  
that time, but which probably is no  
offense now under the new laws?

Thanking you, we remain."

Section 661 R. S. Missouri 1929 provides:

"No offense committed, and no fine,  
penalty or forfeiture incurred pre-  
vious to the time when any statutory  
provision shall be repealed, shall  
be affected by such repeal; but the  
trial and punishment of all such

offenses, and the recovery of such fines, penalties and forfeitures, shall be had, in all respects, as if the provisions had remained in force."

In the case of State v. Balsamo (Kansas City Court of Appeals 1923) 246 S. W. 963, the court said:

"Section 7064, R. S. 1919, provides that future repealing laws shall not affect the punishment prescribed for a previous violation of a statute. Section 7065, R. S. 1919, makes a like provision as to prosecutions pending at the time of the repeal of such laws. Section 3709, R. S. 1919, is in effect a repetition of sections 7064 and 7065, R. S. 1919, with this proviso:

'Provided, that if the penalty or punishment for any offense be reduced or lessened by any alteration of the law creating the offense, such penalty or punishment shall be assessed according to the amendatory law.'

Defendant contends that under this proviso the punishment to be assessed is that prescribed by the Prohibition Enforcement Act. We think there is no merit in this contention, for the reason that the proviso relates to a reduction or lessening of the punishment made by an alteration of the law prescribing the offense. The Prohibition Enforcement Act is not an amendment or alteration of the local option law, but wholly repeals such law. State v. Walker, 221 Mo. 511, 108 S. W. 615, 120 S. W. 1198."

February 19, 1934

And in the case of State v. Walker 221 Mo. 511, the Supreme Court of Missouri in an opinion rendered by Burgess, J., said:

"Appellant's position that the occurrence of the local option election prior to the trial sufficed to prevent a conviction, because the dramshop act under which defendant was tried was not in force in the county at the time of the trial, might be well taken, but for the provision of section 2392 of the Revised Statutes of 1899. This section says no offense committed and no fine, penalty or forfeiture, or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment, but the trial and punishment of all such offences, and the recovery of such fines, penalties or forfeitures, shall be had as if it had not been repealed or amended."

In view of the foregoing it is the opinion of this department that the repeal of the State Prohibition Law does not prevent the trial and conviction of a person, who prior thereto was indicted for the violation of the State Prohibition Law.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

JWH:LC

2  
TAXATION: Postal Saving Deposits subject to taxation for state and local taxation.

April 7, 1934.

4-11



Hon. Gordon P. Dorris  
Prosecuting Attorney  
Oregon County  
Alton, Missouri

Dear Mr. Dorris:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

"Will you please advise me if Postal Saving Deposits are subject to state and county taxation; if subject to taxation would the County Assessor have a right to ask the postmaster to furnish list of such depositors?"

I.

APPROPRIATE CONSTITUTIONAL  
AND STATUTORY PROVISIONS.

Before proceeding to a consideration of your questions we desire to call to your attention certain pertinent constitutional and statutory provisions. We shall first direct your attention to the constitutional provisions respecting the exemption of property from taxation. Section 6 of Article X enumerates the property which shall be exempt from taxation in this state and reads as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also,

such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 7 of Article X is short but effective and reads as follows:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

section 9742 R. S. No. 1929, declares what property shall be subject to taxation and reads as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

The following section, Section 9743, enumerates the exemptions substantially in the same manner as the constitutional provision, Section 6 Article X, hereinbefore quoted. From this section it is evident that the legislative intent is that all property both real and personal, except that which is specifically exempted, shall be subject to taxation. We realize of course that although property may be "subject to taxation," unless provision is made for the assessment and collection of taxes on such property, the owner thereof cannot be required to pay taxes thereon. As to the assessment, we direct your attention to Section 9756 R. S. No. 1929, parts of which read as follows:

"The assessor or his deputy or deputies shall between the first days of June and January \* \* \* proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following to-wit: \* \* \* Such lists shall contain: \* \* \* sixth, money deposited in any bank, or other safe place; \* \* \* eleventh, all other property not above enumerated (except merchandise, bills and accounts receivable, and other credits of a merchant or manufacturer, arising out of the sale of goods, wares and merchandise, which have been returned for taxation, under sections 10081 and 10111 R. S. 1929, and its value; \* \* \*"



April 7, 1934.

With these constitutional and statutory provisions in mind we turn to a discussion of your question.

II.

DEPOSITS IN POSTAL SAVINGS  
DEPOSITORIES ARE TAXABLE.

It is the general rule that all tax exemption laws are to be construed strictly against the one claiming the exemption. The constitutional provisions hereinabove referred to, to-wit, Sections 6 and 7 of Article X of the Constitution, are to be construed so as to subject to taxation all property other than that specifically enumerated. This is plainly stated in the case of State ex rel. Publishing Company vs. Gehner, 294 S. W. 1017, 1. c. 1018:

"\* \* \* The policy of our law, constitutional and statutory, is that no property than that enumerated shall be exempt from taxation. Sections 6 and 7, Art. 10, Const. Mo.; \* \* \*"

An examination of these constitutional provisions result in the conclusion that postal savings deposits do not fall within any of the enumerated exemptions, nor is there any other constitutional provision in this state that would exempt such deposits from taxation.

There being no such constitutional provision running in favor of these deposits we turn to the statutory provisions. It appears that under either of the two classifications of Section 9756 herein quoted, the owners of such deposits are required to return the same to the County Assessor for taxation. The first classification hereinbefore quoted reads:

"\* \* \* sixth, money deposited in any bank, or other safe place; \* \* \*"

There can be little question in the mind of the ordinarily observant person that postal savings accounts are in the nature of bank deposits and are most certainly to be considered as money deposited in a safe place. It is further apparent from an examination of the federal law on the subject, as set out in Chapter 20 of Title 39, U.S.C.A. that Congress has placed postal savings

April 7, 1934.

depositories in the same category as savings banks and consider the relation of a depositor in a postal savings depository as comparable to a depositor in a bank. As an example, we refer to Section 766 of said Chapter, reading as follows:

"The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices, with accrued interest thereon as herein provided."

Also, parts of Section 768 as amended in 1933, which reads as follows:

"Any depositor may withdraw the whole or any part of the funds deposited to his or her credit with the accrued interest only on notice given sixty days in advance and under such regulations as the Postmaster General may prescribe; but withdrawal of any part of such funds may be made upon demand, but no interest shall be paid on any funds so withdrawn except interest accrued to June 16, 1933: \* \* \* \*"

While it is clear to us that postal savings deposits fall within the sixth classification herein referred to they are certainly returnable for taxation under the last provision of Section 9756, to-wit:

"eleventh, all other property not above enumerated \* \* \* and its value;"

This subdivision has been construed to be the "catch all" of our property tax law. It has been held to cover accounts receivable, credit or any demand for money (which would certainly cover the issue here involved). See the Gehner case supra, l. c. 1018 for the following quotation:

"Accounts receivable are amounts owing to a creditor on open account. Newport Nat. Bank v. Herkimer County Nat. Bank, 235 U.S. 100, cit. 184, 32 S. Ct. 633, 56 L. Ed. 1042. They are in the nature of credits which, under the statute (section 12967 R. S. 1929) include 'every claim or demand for money, interest, or other valuable thing, due, or to become due.' Thus defined they are declared by the statute above cited to be personal property. As such they are proper subjects of taxation within the limitations stated."

In making this statement the Court held this clause was not to be strictly construed so as to confine its effect to property of the same character but was to cover all other property of whatsoever kind or nature. Judge Walker remarked, l. c. 1018:

"We are therefore, of the opinion that the rule of ej usdem generis cannot be invoked in this case to relieve accounts receivable from the burden of taxation. To conclude otherwise would be, despite the comprehensive purpose of statutes of this character, to hold that the general words in section 12766, as amended supra, and the statement required to be made in the taxpayer's oath as to the return of this class of property, are meaningless." \* \* \*

We conclude that in this State postal savings deposits are subject to taxation and that the legislature has established appropriate machinery for the taxation of such deposits.

### III.

#### TAXATION OF POSTAL DEPOSITS NOT CONFLICTING WITH FEDERAL LAW.

We shall again return to the congressional enactment establishing postal savings depositories. A n examination of this Act, 39 U. S. C. A. 751-69, reveals that the only provisions respecting taxation are found in Section 760. This section provides:

"Any depositor in a postal savings depository may surrender his deposit, or any part thereof, in sums of \$20, \$40, \$60, \$80, \$100, and multiples of \$100 and \$500, and receive in lieu of such surrendered deposits, under such regulations as may be established by the board of trustees, the amount of the surrendered deposits in United States coupon or registered bonds" \* \* \* "The bonds herein authorized shall be exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority." \* \* \* "

April 7, 1934.

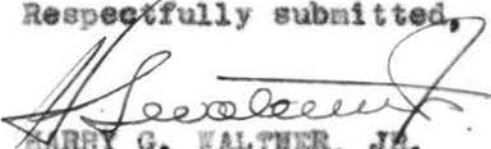
By this section a depositor is privileged to exchange his deposit for tax free bonds, made tax free by the provisions of this section. No similar provision is to be found anywhere applying to the deposits. No such exemption is given to owner or holder of savings deposits. To obtain such exemption, the deposit must be converted into a bond, payable upon the expiration of a term of years.

In view of this provision it cannot be said that Congress overlooked the possibility of state taxation of deposits in postal savings accounts. Specific exemption has been made for the bonds issued under the foregoing section. We find that in other cases Congress has been diligent in exempting obligations of the United States Government and its agencies from local taxation when it so desired. Federal Intermediate Credit Banks, 12 U.S.C.A. 1111; Federal Land Banks and Farm Loan Associations, 12 U.S.C.A. 931; Federal Reserve Bank, 12 U.S.C.A. 531; Agricultural Credit Corporation, 12 U.S.C.A. 1261. As congress, has failed to affirmatively act in this matter, it cannot be said that state taxation of these deposits would conflict with the Congressional enactment.

CONCLUSION.

It is therefore the opinion of this office, that deposits in postal savings depositories are subject to taxation in this state for state and local purposes and that the County Assessor may request a list of such depositors so as to enable him to assess such property against the owners thereof.

Respectfully submitted,



HARRY G. WALTHER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM

Prosecuting Attorney:

1. (a) Postal Savings Certificates held taxable.  
(b) Postmasters not required to give information concerning such to assessors.
2. (a) Failure to place revenue stamp on deed of conveyance is a misdemeanor with fine not more than \$100 for each offense.  
(b) Unstamped deed is neither invalid nor inadmissible in evidence.

April 10, 1934.

Mr. Gordon P. Dorris,  
Prosecuting Attorney,  
Alton, Missouri.

Dear Mr. Dorris:-

We have your letter of December 20, 1933, in which was contained a request for an opinion as follows:

"Will you please give us your opinion on the following questions:

"Are Postal Savings Certificates subject to state and county taxes; if so, are Postmasters required to give information to local Assessors as to who holds such certificates?

"A deed of conveyance showing consideration of certain amount requires a revenue stamp, 50¢ for each \$500.00; what is penalty for failure to so stamp the deed; and what effect does it have on deed of conveyance when no revenue stamp is affixed."

Concerning your first question, this office has already rendered an opinion holding that such Postal Savings Certificates are taxable by the State of Missouri. We therefore attach hereto a copy of that opinion in answer to your inquiry.

As to whether postmasters are required to give information to local assessors as to who holds such certificates, we call your attention to Title 39, Section 762 of the Postal Savings Depositories Act in the United States Code Annotated, which provides in part as follows:

"Section 762. \* \* \* \* and no person connected with the Post Office Department shall disclose to any person other than the depositor the amount of any deposits unless directed to do so by the Postmaster General. \* \* \* \*".





April 10, 1934.

From the above it is evident that not only is the postmaster not required to give out information concerning the amount of such certificates, but on the contrary is expressly forbidden to do so except upon the order of the Postmaster General. This is tantamount to the postmaster's not being required to disclose who holds such certificates since for the purposes of taxation the knowledge of who holds such certificates would be of no value unless the amount thereof were also known. Of course, should the Postmaster General so order, such information must be given; but in the absence of such an order we take the law to be as stated above.

Concerning your inquiry as to what is the penalty for failure to place a revenue stamp on a deed of conveyance, we refer you to Title 26, Chapter 18, said Chapter being entitled "Stamp Taxes on Specific Objects." Section 908, sub-section (a) of that Chapter provides as follows:

"Section 908. Tax on certain enumerated documents and instruments; offenses. Whoever--

"(a) Makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever without the full amount of tax thereon being paid; \* \* \* is guilty of a misdemeanor and upon conviction thereof shall pay a fine of not more than \$100 for each offense."

The Revenue Act of 1926 omitted the Stamp Tax on Conveyances section but has since been amended to include same; hence such section is now a part of the above mentioned Chapter 18 and the above quoted penalty section applies.

Regarding what is the effect on a deed of conveyance when no revenue stamp is affixed, it is difficult to answer such a general inquiry. According to the decisions involving the failure to stamp instruments, many factors arise in different situations, no hard and fast rule being drawn. The effect of the failure to stamp depends on what is in issue in each particular case, and on how the matter is raised. (See note to Section 901, Title 26, U. S. C. A. at page 620 et seq.).

The language of the Supreme Court of the United States in the case of *Cole v. Ralph*, 252 U. S. 286, 64 L. Ed. 567 is, however, illuminating on this question. At page 576 of 64 Law Edition the court states as follows:

Mr. Gordon P. Dorris

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April 10, 1934.

"As to the absence of revenue stamps, it is true that the deeds showing title in some of the plaintiffs \* \* \* \* were without the stamps required by etc. etc. But this neither invalidated the deeds nor made them inadmissible as evidence."

We submit the above for your consideration.

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

CMHJr:LC

Approved:

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Attorney General.



**SPECIAL ROAD DISTRICT:**

Incorporated city within special road district not entitled to part of general road funds.

May 4, 1934. 5-14

FILED

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Hon. Gordon P. Dorris  
Prosecuting Attorney  
Oregon County  
Alton, Missouri

Dear Mr. Dorris:

We are in receipt of your letter of recent date with request for an opinion; which letter of request is as follows:

"Will you please advise me on the following question:

Can an incorporated city within a special road district (in county not under township organization) require the County Court to order turned over to them a part of the road funds collected by the county collector under the general road levy? Or, are these funds so collected payable only to the treasurer of the special road district?"

For answer to the question asked in your letter, we must look to the provisions of the law relative to the organization and powers of special road districts in counties not under township organization.

Section 8024, R. S. Mo. 1929, provides where and how special road districts may be organized, and is as follows:

"Territory not exceeding eight miles square, wherein is located any city, town or village containing less than one

hundred thousand inhabitants, may be organized as hereinafter set forth into a special road district: Provided, however, the provisions of this section shall not apply to counties under township organization, and shall not apply to all counties in this state now containing or which may hereafter contain 50,000 inhabitants or more and lying adjoining any city of this state containing 300,000 inhabitants or more."

Section 8025 R. S. Mo. 1929, provides that special road districts "shall be a body corporate and possess the usual powers of a corporation for public purposes," etc.

Section 8026, R. S. Mo. 1929, provides the manner in which the commissioners of the special road district shall be selected and succeeding sections provide a scheme and system for caring for and management of the roads in said special road districts; and Section 8033, R. S. Mo. 1929, sets out the powers and duties of the board of commissioners, which section reads as follows:

"Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

Section 8041, R. S. Mo. 1929, provides that:-

"One fourth of all the pool or billiard table licenses collected by any city within any such special road district shall be set apart as collected by the city council for the improvement of the roads by the board of commissioners of such district, \* \* \* \* \*";

and this section further provides the method by which this money may be paid for the use of the board of commissioners of the special road district.

We then have Section 8042, R. S. Mo. 1929, which provides for the disposition of county taxes for road purposes which we hereafter set forth as follows:

"In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted

within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half of the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

In construing the above sections relative to the special road districts and the disposition of road tax moneys, the Supreme Court in *State ex rel. Monett Special Road District v. Barry County et al.*, 258 S. W. 710, 1. c. 713, had this to say:

"The three sections (10682, 10683, and 10818) as they now stand do not indicate any change of the legislative purpose with respect to the distribution of road and bridge taxes collected upon property within special road districts. Section 10683 provides that all that part of the special road and bridge tax which shall be collected and paid upon property lying within any road district shall when paid into the county treasury be placed to the credit of the district from which it arose. Section 10682, which directs the levy of a road and bridge tax in connection with the general levy for county purposes, makes no provision for its distribution. But section 10818, voicing the legislative purpose with respect to special road districts, provides that all money collected 'as county taxes for road purposes, or for road and bridge purposes, by virtue of any \* \* \* law,' upon property within a special road district, shall be set aside to the credit of such special road

district. The conclusion that a special road district is entitled upon timely application therefor to receive all moneys collected as taxes for road and bridge purposes upon property within its boundaries is unavoidable."

And the Supreme Court further said in *Little Prairie Special Road District et al. v. Pemiscot County et al.*, 249 S. W. 599, 1. c. 600:

"The statute formerly provided (sections 10481 and 10594, R. S. 1909; Laws 1913, pp. 667, 675), and still provides (section 10818, R. S. 1919), that the part of the general county levy which is set apart for road and bridge purposes and which is assessed and collected on property within a special road district, together with a designated part of certain licenses, shall be placed to the credit of such special road district and paid out to the commissioners or treasury of that district 'upon written application by said commissioners.' *Carthage Special Road District of Jasper County v. J. C. Ross et al.*, 270 Mo. loc. cit. 82, 192 S. W. 976."

We think from a reading of the statutes, and the construction put thereon by the Supreme Court, that it was contemplated that the board of commissioners of the special road districts should expend all of the general road taxes levied and collected within the boundaries of the special road district, and we are further fortified in this opinion by the fact that Section 8041, supra, provides that a part of the moneys collected by any city within a special road district upon pool and billiard table licenses is payable to the board of commissioners of the special road district in which such city may be, and by Section 8034, R. S. Mo. 1929, which provides that the board of commissioners in a special road district "shall have authority to expend not more than one-fourth of the revenue which may now or which may

May 4, 1934.

hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district." And said section further provides how and in what way the money shall be expended on the roads and streets in said cities.

#### CONCLUSION.

It is, therefore, our opinion that the road funds collected by the county collector under the general road levy, are payable to the commissioners of such special road district, or districts, or the treasurer thereof upon timely written application by the commissioners therefor, and that an incorporated city within a special road district cannot require the county court to order turned over to it the part of the road funds collected by the county collector under the general road levy within the corporate limits of said city.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

TAXATION.

Costs and attorneys fees and dismissal of suits by collectors, under House Bill No. 124, discussed.

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August 24, 1934.



Mr. W. N. Doss  
Secretary  
State Tax Commission  
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"We are in receipt of the following communication from the Collector of the City of Maplewood:

'In Re: Clinkscales Bill to relieve delinquent taxpayers of heavy penalties and interest, signed January 18, 1934 by Governor Park, in effect April 18, 1934.

'Did this law give to County or City Collectors the right to dismiss suits without costs to property owners, whether judgment has been rendered or not?'

'Also what recourse has the Attorney who filed the suit, to collect the costs of filing the suit?'

'In other words - has anyone a comeback on the Collector, after he dismisses suits without costs - if he had the right to do it?'

"Will appreciate an opinion from you relative to this matter at the earliest possible date."



## I.

Your inquiry concerns House Bill No. 124, Laws of Missouri, Extra Session, 1933-34, page 166, approved January 18th, 1934, effective April 12, 1934. Said section provides:

"That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

Before going into the questions involved, it may be well to consider the purpose and the history surrounding the enactment of House Bill No. 124.

Prior to July 24, 1933, delinquent taxes were collected by suits. Under the old statute the collector had the power to employ an attorney and bring a suit against the delinquent taxpayer. The statutes permitted the taxing as costs attorney's fee and penalty and interest, which the delinquent taxpayer had to pay. However, in 1933, Senate Bill No. 94 was enacted (Laws of Missouri, 1933, page 425 et seq.) which became effective July 24, 1933, and which provided a new scheme for the collection of delinquent taxes. Said act provided that the collector would sell the property without first placing same in judgment. The Legislature in 1933 also enacted laws remitting the interest, penalty and costs of the delinquent taxes, Senate Bill No. 80, Laws of Missouri, 1933, page 423, which expired and ceased to be in effect after January 1, 1934. This act was repealed by the Legislature in Extra Session, 1933-34 by Committee Substitute Senate Bill No. 40 and three new sections enacted in lieu thereof on the same subject (Laws of Missouri, 1933, Extra Session, page 152-153) which new act expired December 31, 1933. Thus, upon the expiration of Committee Substitute Senate Bill No. 40 on December 31, 1933, the remitting of interest, penalties and costs on delinquent taxes no longer was permitted. And the next law enacted by the Legislature in Extra Session, relating to remitting penalties on delinquent taxes, is the bill here under consideration, namely, House Bill No. 124.

It should be borne in mind that after July 24, 1933, the effective date of Senate Bill 94 (the law requiring the selling of property by the Collector without suit, to-wit, delinquent tax claims), no costs such as attorney's fees or court costs, abstractor's fees or sheriff's costs herein provided for, could be charged

August 24, 1934.

upon taxes thereafter becoming delinquent to be paid by the taxpayer. It should be further considered that this was the law by virtue and under the provisions of which taxes for 1933 became delinquent, so that after July 24, 1933, the Collector had no right to employ an attorney and accordingly no such costs can ever be charged against delinquent 1933 taxes, nor could any such court costs be placed against the property of the delinquent tax payer respecting 1933 taxes. However, if in any suits pending prior to April 13, 1933, the same were reduced to judgment after the expiration of Senate Bill 80, and before the effective date of House Bill 124, to-wit, between the dates of December 31, 1933 and April 12, 1934, then the taxpayer would have to pay the amount of the judgment which would probably include the taxes, penalties and interest and various other fees and charges. To sustain the above conclusions reached by us, we call your attention to the case of State ex rel. Attorney General v. Frank W. Bair, 333 Mo. 1, and State ex rel. Crutcher v. Koeln, 61 S. W. (2d) 750.

Bearing in mind the above premises, we will proceed with a consideration of your questions.

- A. Did this law give the county or city collectors the right to dismiss suits without cost to property owners, whether judgment has been rendered or not?

It is elementary law that if a suit is placed in judgment, after such judgment the city or other collector could not dismiss the suit. It would take an order of the Court to set aside or to vacate the judgment before a dismissal could be entered. This is true regardless as to the date upon which the judgment was rendered. However, by reason of the decision in the Bair case, supra, it is our opinion that no valid judgment for delinquent taxes could be rendered during the pendency of Senate Bill 80, and if any such judgment were rendered during that time, to-wit, between the 13th day of April, 1933 and the 31st day of December, 1933, such judgment would be a nullity. We quote from the Bair case, supra, 1. c. 17:

"All questions necessary to be discussed having been determined, it seems advisable, before closing this opinion, to observe briefly the effect of the change

August 24, 1934.

in the law upon the back-tax suits that have been filed, or may be filed, subsequently to the date, April 13 of the current year, when this new law became effective. Owing to the alternative options granted the taxpayer, with periodically and increasingly reduced advantage to him in the avoidance of penalties, a question of some difficulty is presented pertinent to the effect upon suits pending during any part or all of the entire period covered by the act. (8) Concerning this matter it is our view, (1) that none can proceed to final judgment before the expiration of the act on January 1 next; (2) a taxpayer exercising the first option, may pay the original tax without more and all penalties are thereby discharged and his pending tax suit, if any, will be abated; (3) exercising the second option, the taxpayer, if suit be pending against him, must in addition to the original tax pay one-fourth of all penalties formerly chargeable, in full discharge of the whole and the suit will likewise abate; and (4) the same process and result will apply in a general way to the remaining options."

Thus, while Senate Bill 80 was in effect, no final judgment could have been rendered against the taxpayer and if a judgment were rendered within that time it is our opinion that the taxpayer's right to discharge his taxes under the provisions of House Bill 124 should be allowed. However, a different situation is presented in the event a tax suit were reduced to judgment prior to the 13th of April, 1933, or between January 1 and April 12, 1934. In such a case there would be valid and subsequent judgment in favor of the taxing authority and against the taxpayer, which judgment would include the various penalties, interest and costs prescribed by law at the time. As to these cases, the taxpayer would be required to pay the full amount of the judgment and could obtain no relief by means of the provisions of House Bill 124.

In answer to your first question, it is our opinion first, that the city or other collector cannot dismiss any suit which has once been placed in judgment, whether such judgment be valid or a nullity. Second, that no valid final judgment could be taken against the taxpayer between the 13th of April and the 31st of December, 1933, and if judgment were entered during that time the same should be set aside and abated and the taxpayer permitted to pay the tax, relieved of all penalties, interest and costs, except such penalties as could accrue on 1933 taxes. Third, that if judgment were taken in a tax suit prior to the 13th of April, 1933 or between the 1st of January and 12th of April, 1934, the same is a valid judgment which could not be dismissed by the Collector, but which would have to be paid in full by the taxpayer.

B.

Also what recourse has the attorney  
who filed the suit, to collect the  
costs of filing the suit? - - - -  
In other words - has anyone a come-  
back on the Collector, after he  
dismisses suits without costs - if  
he had the right to do it?

In State ex rel. McKittrick v. Bair, supra, l. c. 15, the Supreme Court of Missouri, en Banc, held:

"The contract entered into between the collector and his attorney, and approved by the county court, imposes no liability upon either the State, county or the collector. It only fixes the status of the attorney as to his right to compensation and the amount thereof when in the tax suit the liability therefore becomes fixed upon the taxpayer's property by the final judgment in the case. \* \* \* The same rule necessarily applies to the other interveners, who as public officers have no contractual right as to their terms of office or their compensation or any vested right in either, the same being subject to legislative control. (Cases cited.) The fees of the collector and his attorney and of the interveners are subordinate to the general legislative

power to impose, increase, diminish or remit penalties for tax delinquencies, and no vested right of any of them is impaired by the remission."

Our answer to your question as to the recourse of the attorney, will be in the negative.

Your remaining question as to the right of the collector to dismiss the suits without costs has been answered hereinbefore.

### III.

We now direct our attention to House Bill No. 124. As shown hereinbefore it has been the policy of the last two legislatures to make the collection of delinquent taxes on a different basis and to also relieve penalties. By causing the collector to sell the property without the necessity of judgment relieves the taxpayer of attorney's fee and court costs, and by House Bill No. 124 relieves the taxpayer of excessive penalties already accrued.

House Bill No. 124 says in part as follows:

"\* \* \* and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

The word "penalty" has been defined by our Supreme Court, en Banc, in the case of State ex rel. Crutcher v. Koeln, supra, l. c. 753, as follows:

"It follows that as used in the chapter on taxation in the Revised Statutes the expressions, 'commissions', 'interest', 'fees' and 'costs' are included in the generic term 'penalty'."

August 24, 1934.

Thus, in St. Louis County (being a county between 200,000 and 700,000 inhabitants) the only penalty that may be placed against delinquent taxes is that prescribed by Section 10152, Laws of Missouri, Extra Session, 1933-34, page 153, except taxes placed in judgment prior to April 13, 1933, and between the dates of December 31, 1933 and April 12, 1934, and such is our opinion.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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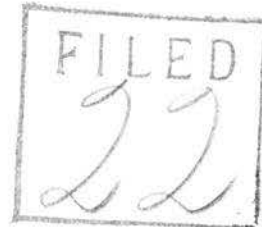
ROY McKITTRICK  
Attorney-General.

JLH:EG



RELATING TO POWERS OF MEMBERS OF STATE PATROL:  
(1) HAVE POWER TO ARREST WITHOUT WARRANT WHEN,  
(2) IF PERSON IN CUSTODY NO WARRANT SHALL ISSUE.

September 24th, 1934



Mr. A. F. Downs  
Justice of the Peace  
Marshall, Missouri

Dear Sir:

We acknowledge your letter of September 11th, in which you state and inquire as follows:

"I would like to have an opinion from your office on the following question.

I am a Justice of the Peace of Marshall Township, in Saline County. Quite frequently persons are arrested by members of the State Highway Patrol for law violations and brought before me as Justice of the Peace. It is my contention that when a person violates the law in the presence of a Highway Patrolman, and is arrested by the patrolman at that time and brought before me, that there is no need of me issuing a warrant for the arrest of that person and that the law does not require that I issue a warrant. My idea of a capias or a State warrant is that they amount to a command to some peace officer to apprehend the party named in the warrant and bring them before the Justice issuing the same. If the party to be arrested has already been arrested and brought before the Justice of the Peace I can see no reason for then issuing a warrant for the arrest.

Some of the officers of my court contend that it is necessary that I issue a warrant for the arrest of a person who has already been brought before me and I would like to have a letter from your office which will settle this question."



I.

Members of State Highway Patrol  
have authority to arrest without writ,  
rule, order or process, any person  
detected in the act of violating  
any law of the state.

Section 13 Laws of Missouri, 1931, page  
234, provides as follows:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offense against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

It appears from the provisions of section 13 (Supra), that no warrant, writ, order or process is necessary in order for a member of the State Highway Patrol to make arrest of all persons detected by him in the act of violating any law of the State.

Therefore this department interprets said section to authorize State Highway Patrol members to arrest all persons detected by them in the act of violating any law of the State.

II.

No warrant is necessary if the person charged is in custody or voluntarily surrenders himself in custody of the court.

Section 3611 Revised Statutes of Missouri, 1929, provides in part as follows:

"Upon the filing of the information, a warrant shall issue for the apprehension of the person charged with the offense, unless he be in custody or voluntarily surrender himself in custody of the court;...."

It appears from the provision of section 3611 (Supra) that no warrant shall issue in criminal cases upon the filing of the information, where the person charged is in custody or voluntarily surrenders himself in the custody of the court.

Therefore it is the opinion of this Department, where arrests are made by members of the State Highway Patrol, of persons detected by them in the act of violating any law of the State, and are forthwith taken by such member before the court or magistrate having jurisdiction of the offense, then no warrant shall be necessary.

Yours very truly,

W. W. Barnes

Asst. Attorney General

APPROVED:

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Attorney General

MOTOR VEHICLES: Government employee delivering parcels in Government service not required to have chauffeur's or any other license.

September 18, 1934.



Mr. J. Ernest Douglass  
Acting Postmaster  
Warrensburg, Missouri

Dear Sir:

This is to acknowledge your letter of September 11, 1934, as follows:

"Is a man employed by the Government in the Postal Service System, whose duty is delivering Parcel Post Parcels, requiring a truck in this disposition, required to have a drivers license?"

"This truck is let by contract to the Government at a stipulated sum.

"Please give me your opinion at the very earliest possible moment."

The narrow question presented in your letter concerns the right of the State to exact a license fee from an employee of the Government. Article I, Chapter 41, R. S. Mo. 1929, and Amendments pertain to motor vehicles and provides, among other things, for the licensing of chauffeurs and registered operators, each, in order to be licensed must possess certain qualifications and pay a stipulated fee.

In our opinion the State cannot exact a fee from such Government employee or require him to take out a license to drive the truck when done in the course of his employment for the Government, and as authority for such holding we rely upon the case of William E. Johnson, Plff. in Err., v. State of Maryland, 65 L. Ed., 126, Sup. Ct. U. S. We quote from the opinion of the Court delivered by Mr. Justice Holmes:

"The plaintiff in error was an employee of the Postoffice Department of the United States, and, while driving a government motor truck in the transportation of mail over

a post road from Mt. Airy, Maryland, to Washington, was arrested in Maryland, and was tried, convicted, and fined for so driving without having obtained a license from the state."

And further,

"The facts were admitted, and the naked question is whether the state has power to require such an employee to obtain a license by submitting to an examination concerning his competence and paying \$3, before performing his official duty in obedience to superior command."

And further,

"Here the question is whether the state can interrupt the acts of the general government itself. With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the state's inability to interfere has been regarded as established since *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579. The decision in that case was not put upon any consideration of degree, but upon the entire absence of power on the part of the (56) states to touch, in that way, at least, the instrumentalities of the United States (4 Wheat. 429, 430), and that is the law today."

And further,

"Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment. That was decided long ago by Mr. Justice Washington in *United States v. Hart*,"

Mr. J. Ernest Douglass

-3-

September 18, 1934.

And further,

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed. *Keim v. United States*, 177 U. S. 290, 293, 44 L. ed. 774, 775, 20 Sup. Ct. Rep. 574.

"Judgment reversed.

"Mr. Justice Pitney and Mr. Justice McReynolds dissent."

Yours very truly

James L. HornBostel  
Assistant Attorney General.

APPROVED:

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(Acting)  
Attorney General.

JLH:H

SCHOOLS:-Federal money used to pay teachers may not be considered as a bonus, but is to be applied as part of salary.

10-22  
October 15, 1934.



Mr. Gordon P. Dorris,  
Prosecuting Attorney,  
Alton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Will you please advise me on following questions:

"A school board contracts with a teacher to teach school, contracting to pay \$60.00 per month. During the term of school Federal aid to the extent of approximately \$90.00 is paid to the teacher. In paying the teacher shall the local board deduct amount of Federal aid received from sum it owes to teacher? That is, shall the Federal aid be considered as a part of the teacher's salary, or is that aid to be considered a 'bonus' for the teacher?

"This question has arisen in at least two districts in this county, both districts have funds on hand in the teacher's fund, to meet the monthly salary over and above the Federal aid received. The Federal aid is paid direct to the teacher, not thru the Board at all."

The delay in answering your inquiry has been due to our trying to get a ruling upon the matter about which you inquire from the Federal and State Departments through which this matter is handled. We have been unable, however, to obtain any interpretation dealing with Federal aid to school teachers. The following, however, are some of the rules and regulations in effect as to the payment of teachers during the past school year, as furnished by the Director of the Emergency Educational program:

1. "These additional funds may be used in payment of the salaries only of certified teachers for teaching the regular school work already under way this school year to maintain elementary and secondary schools in such areas and localities for the normal school term, with approximately the same teaching load as the present school year, on and after the date upon which the school had been discontinued for lack of its own funds, and in no case earlier than February 1."

2. "Teachers already employed in the schools, whose sole source of income is their salary, may be continued in their positions. Under similar conditions, those emergency relief funds may also be used to employ properly certificated persons in schools which have already closed or have not been open this year. All teachers who receive compensation from these funds shall be selected by the appropriate school authority and, after certification by relief authorities as to their unemployment status, be assigned to their tasks by such school authority."

3. "The pay of the teachers shall not be higher than that stipulated for the same positions during the current year."

4. "These funds cannot be used for administration, supervision, clerical or janitorial services, or for maintenance, equipment or supplies."

5. "None of these funds can be used to pay back salaries due, or to redeem warrants, script or other evidence of debt."

6. "Relief teachers paid from these funds may not be used to relieve so-called overcrowded conditions in class rooms or to intro-



duce additional subjects or activities in the school."

7. "Teachers' salaries. The salary paid teachers under the Federal Relief program will be the regular contracted salary for this year, provided that same is not excessive. In all cases where a regular salary was not stipulated in the contract the salary allowed under the Federal Relief program will not exceed the salaries paid last year or the average salary paid teachers in similar positions in the same or adjoining counties for this year."

8. "Available funds. Available funds to pay teachers for this year is understood to mean (1) balance on hand, (2) amount received into the teachers fund from county and township funds, (3) amount received into the teachers fund from the railroad, telephone, and telegraph tax, (4) the total amount of local taxes collected for the teachers fund, and (5) the amount received by the district from the state school fund for this school year."

As we understand these regulations it is obvious that the Federal money for teachers was to be used to pay teachers' salaries in instances where the school district is insolvent and not able to carry out the provisions of the contract and thereby keep the schools in session. We cannot believe that it was intended that this Federal money should be a bonus. There appears no sound reason why Federal money should be paid to a teacher where the district is able to pay the teachers the monthly salary which the contract calls for.

Under paragraph 1 of the above regulations it is stated that these additional funds are to be used in paying teachers on and after the date upon which the school had been discontinued for lack of funds. Paragraph 7 provides that the salaries paid to the teachers would be the regular contracted salaries. The entire scheme of the provisions seems to indicate that the purpose of the Federal relief is to help the

October 15, 1934.

various school districts continue their schools and to provide a means whereby teachers, who are employed by districts who do not have available funds, may be paid. We believe, therefore, that the money which is received by the teachers under this Federal program cannot be deemed to be a bonus, but rather is to assist the school district in question to meet the teacher's salary under the terms of the contract. We can see no necessity for using Federal relief money to pay a bonus to teachers who are being paid by the districts which employ them, and it is the obvious purpose, as we gather from the sections, that these Federal funds are only available to assist the school districts in meeting the payments due the teachers.

We had hoped to be able to receive a ruling by the proper Federal authority upon this matter, but were unable to do so. From the information which we have been able to receive we have concluded that the Federal relief money must be considered as a part of the salary and not a bonus, and that the school district in question should pay the balance due after deducting the amount of Federal money received.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

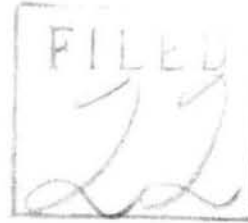
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ROY McKITTRICK,  
Attorney General.

FWH:MS

12  
CIRCUIT CLERK: Compensation at present time - up to Jan. 1, 1935.

11-4  
October 25, 1934.



Hon. Wm. A. Dollarhide,  
Prosecuting Attorney,  
Hickory County,  
Hermitage, Missouri.

Dear Sir:

This department is in receipt of your letter of September 14, 1934 wherein you request an opinion as to the salary of the Circuit Clerk and Recorder of Deeds, as follows:

"The population of Hickory County according to the 1930 census is 6430. Will you please advise what salary our Circuit Clerk and Recorder should be paid?

This inquiry is made at the request of this officer and our county court."

We assume that the Circuit Clerk acts as Ex-officio Recorder of Deeds and that both offices are filled by one and the same party. We cannot determine from your letter as to whether you are inquiring as to the salary of the Circuit Clerk and Recorder at the present time, or as to the amount of salary the Circuit Clerk and Recorder will receive after January 1, 1935. If your request relates to the salary after January 1, 1935, we are enclosing herewith copy of opinion rendered to the Hon. Birt F. Bryant, Clerk of the Circuit Court of Dunklin County, on March 7, 1934, which we believe properly determines the salary of the officer in question - likewise, the deputies.

As to the present salary of that official, the same is determined by Section 11786, R.S. Mo. 1929, the pertinent part of which is as follows:

"The clerks of the circuit courts of this state shall receive for their services, annually, the following sums:

In counties having a population of 7,000 persons and less than 10,000 persons, the sum of eleven hundred dollars; in counties having a population of 10,000 persons and less than 15,000 persons, the sum of twelve hundred and fifty dollars; in counties having a population of 15,000 persons and less than 20,000 persons, the sum of sixteen hundred dollars;

\* \* \* \*

Provided further, the provisions of this section shall not apply to any county which now contains or may hereafter contain a city of 75,000 inhabitants or more, or to any county which now contains or may hereafter contain 80,000 inhabitants and less than 150,000 inhabitants, in which circuit court is held in two or more places in said county; for the purpose of this section the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination: \*\*\*\*\*

In 1933 the Legislature repealed Section 11786, supra, and other sections relating to the fees, payment and disposition of the same by the Circuit Clerk and enacted a new section in lieu thereof known as Section 11786, page 369, Laws of Missouri, 1933; however, said section contains the following proviso:

"Provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Oct. 25, 1934.

In view of the foregoing proviso, it is necessary to continue to pay the Circuit Clerk and Recorder of Deeds in the manner as prescribed in Section 11786, R.S. Mo. 1929. The official returns from Hickory County in 1932, the same being the last general election, shows a total presidential vote of 2464. The multiple as contained in Section 11786 for determining the population is 5. Multiplying the total number of votes cast for President by 5 gives a total of 12,320. Again referring to Sec. 11786, R.S. Mo. 1929, we find the following words: "In counties having a population of 10,000 persons and less than 15,000 persons, the sum of twelve hundred and fifty dollars".

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the present salary of your Circuit Clerk and Ex-officio Recorder of Deeds should be the sum of \$1250.00 annually.

In 1933 the Legislature repealed Section 11812, R.S. Mo. 1929 and enacted in lieu thereof Section 11812, Laws of Mo. 1933, page 371, relating to the compensation and appointment of deputy circuit clerks. It has been ruled by this department that this section became effective 90 days after the adjournment of the 1933 General Assembly.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

BANKS AND BANKING:

Stock in National Banks after receivership  
not exempt from taxes, if of any value.

1-15  
January 10, 1934.



Hon. Albert Dunning  
Treasurer, Henry County  
Clinton, Missouri

Dear Sir:

This Department is in receipt of your letter of recent date with request for an opinion, which letter of request is as follows:

"I would like an opinion as to whether  
National Bank Stock, in Missouri, are  
exempt from taxes after having gone into  
receivership.

Or do the laws apply the same to State and  
National Banks?"

The statutory means and method of the assessment of banks in Missouri is set forth in Section 9765, R. S. Mo., 1929, as amended by Laws of Missouri, 1931, at page 357, which section is as follows:

"The property of manufacturing companies and other corporations named in article 7, chapter 32, insurance companies organized under the laws of this state and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate names. Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such

corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business: Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent. of the capital, <sup>surplus</sup> and undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinbefore provided: Provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers in addition to such taxes shall not exceed one hundred dollars per annum. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required to be sent to the state auditor, valuation of all property assessed under this section under the head of 'corporate companies,' and, in addition thereto, he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, on or before the twentieth day of February, in each year, an abstract of the assessment of all corporations or persons doing a banking business in his county, showing the



name of each bank, the number of shares of stock and their face value, the amount of reserve funds, undivided profits, premiums or earnings, and all other values, together with the assessed value thereof, also the value of the real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book."

And by the provisions of Section 9765a, R. S. Mo., 1929, which is as follows:

"That the tax provided in section 9765, R. S. 1929, is hereby declared to be the sole method of taxing national banking associations, their income, shares therein and dividends from such shares."

It will be seen from a reading of the above sections that National Banks are assessed in the same manner as State Banks are assessed in Missouri, and according to Section 9765, supra, the real estate is assessed to the corporation, the personal property is not assessed at all, but the value of shares of stock is assessed against the stockholders after deducting the value of the real estate owned by the bank and represented by such shares of stock. So, in the assessment of the shares of stock for taxation purposes, the purpose is to arrive at the true value in money of the shares of stock in the bank, less the value of real estate, if any, represented by such shares of stock. The real estate represented by such shares of stock is deducted for the reason that it is paid by the corporation and is paid where the land is located.

Your question is whether National Bank stock in Missouri is exempt from taxes after the bank has gone into receivership. The fact that the bank has been placed in the hands of a receiver does not exempt the bank or the shares of stock from taxation.

In Cooley on Taxation, Vol. 2, 4th Ed., Section 455, it is said:

"Property is not exempt from taxation because it is in the hands of a receiver."

While you do not state in your letter of request, we are assuming that your question pertains to an assessment made after the National Bank in question has been placed in the hands of a receiver, and we are basing this opinion upon that theory. If the shares of stock in the bank are assessed at their true value in money, less the value of the real estate, if any, represented by such shares of stock, the question for determination by the assessor and the other assessment officers would be the value of the shares of stock at the time of the assessment.

In the case of *State ex rel. United States Bank et al. v. Gehner et al.*, 319 Mo. 1048, 1. c. 1059, 5 S. W. (2d) 40, 1. c. 45, the Supreme Court said, in discussing the value of shares of stocks in banks, the following:

"It appears to our minds that such items of accrued taxes and of accrued interest are just as much debts and liabilities of relator banks, which must be paid and discharged by relator banks, as are the promissory notes and other paper obligations executed and issued by said banks, and outstanding on June 1, 1926, the date on which the value of the shares of capital stock of said banks is determinable for the purpose of assessment and taxation. By way of illustration, let us assume that the relator banks had closed their books of account and had gone into voluntary liquidation on June 1, 1926. What would have been the value of their assets on that date? What would have been lawfully distributable to the shareholders of said banks on that date; and what would have been the actual, true, or real value of the shares of the capital stock of relator banks on that date? Obviously, only the pecuniary value of the assets of said banks remaining for distribution to the shareholders after the payment and discharge of all debts and liabilities of said banks, including the items of accrued taxes and accrued interest owing by the banks on the date of liquidation, for certainly there could be no lawful distribution to the shareholders without first making provision for the payment and discharge of accrued taxes, accrued interest, and all other debts and liabilities, of whatever nature, owing by the banks on the date of liquidation. 14a C. J. 1196; *Avery v. Central Bank of Kansas City*, 221 Mo. 71, 85, 119 S. W. 1106. It

seems clear to us that the actual, real, and true value of the shares of the capital stock of relator banks can only be determined and ascertained by deducting from the gross value of the assets of said banks the accrued debts and liabilities of the relator banks here in controversy. The Constitution of this state (article 10, section 4) requires that 'all property subject to taxation shall be taxed in proportion to its value.' Under our Constitution, the species of property taxed (whether it be tangible property, real or personal, or whether it be the shares of the capital stock of a banking corporation) must be taxed 'in proportion to its value,' i.e., the actual or real value; not a false or fictitious value, but a value which is neither inflated nor deflated. In ascertaining and determining the true value of the shares of the capital stock of relator banks, for the purpose of assessing and taxing such shares, the corporate liabilities of the banks, whether such liabilities be in the nature of accrued taxes, interest, outstanding promissory notes, or bills and accounts payable, must be deducted from the total, or gross, value of the assets of said banks, because such corporate liabilities, regardless of their nature and form, affect the value of the capital stock of said banks. As we said in *State ex rel. Johnson v. Buder*, supra: 'Unless this deduction is made, the value of the stock will be, to that extent, inflated and fictitious.'

It is our opinion that shares of stock in National Banks in Missouri are not exempt from taxes after having been placed in the hands of a receiver, but the question would be as to the value of the shares of stock after receivership. If the receivership was justified, all of the liabilities and debts of whatever character, and costs of receivership, would have to be paid before

Jan. 10, 1934.

any dividends could be declared to the stockholders on their shares of stocks, so it would be improbable that the shares of stock on an assessment made after receivership would have much value, but it is possible that the shares of stock would have some value for assessment purposes.

Your letter of request was very short and perhaps we have not touched the point involved in your letter. And if we have not, we shall be glad to take the matter up with you further.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

(SCHOOLS - CONSOLIDATED SCHOOL DISTRICTS - APPOINTMENT OR  
EMPLOYMENT BY SCHOOL BOARD OF ONE OF ITS MEMBERS TO OFFICE  
OR EMPLOYMENT OF PROFIT - NEPOTISM - RIGHT OF CITIZEN TO  
INFORMATION OF AFFAIRS OF BOARD AND DISTRICT)

2-8  
February the Seventh,  
1934.



Mr. F. W. Dumard,  
6200 Lotus Avenue,  
Wellston, St. Louis County, Mo.

Mr. John L. Pardue,  
6205 Lenox Avenue,  
Wellston, St. Louis County, Mo.

Gentlemen:

A request for an opinion has been received from you under  
date of November 14, 1933, such request being as follows:

"As per your instructions during our recent conversation,  
we submit the following:

Wellston, Mo. - Unincorporated - Population around 10,000.  
Has a Consolidated School District, with a Board of six Direc-  
tors.

Wellston School Board's records, examined while in the St.  
Louis County Prosecuting Attorney's Office show that -

(1) Henry W. Briemeyer, while a member of said board, re-  
ceived a salary of \$125.00 per month as Secretary to the Super-  
intendent of Schools in addition to the \$150.00 per year re-  
ceived as Secretary to the School Board.

(a) Does this amount to wrongful distribution of  
school funds?

(b) If so, what is the penalty and whose duty is it  
to prosecute?

(c) What legal procedure is necessary in order for the  
school district to be reimbursed for the amount of the school  
funds wrongfully disbursed?

(d) When school funds have been wrongfully disbursed  
over a period of years, for how many years will board members  
be liable in a suit to recover such funds?

(e) For how long, after his resignation, is an ex-board  
member criminally liable for wrongful distribution of school  
funds?

(f) Does not section 9360 (R.S. 1929) prohibit the  
paying of salaries, beyond the amount stated in said section, to  
School Board Members of the Wellston Consolidated District, even  
though Wellston is not incorporated?

(g) Can a resigned School Board Member be appointed  
by the Board to a salaried position as Superintendent of Build-

ings or Business Manager for the Board or to some similar position and legally hold that salaried position? If not how can he be removed?

(2) John W. Hill, a member of the Wellston School Board, has a stepfather employed at a salary by said board. Mr. Hill claims that he did not vote when the Board appointed his relative.

(a) Can Mr. Hill be removed from office by action under the Anti-Nepotism Amendment?

(b) Should the County Prosecuting Attorney refuse to take action what other recourse is available?

(3) In addition to the above, the Wellston School Board persistently refuses to publish a DETAILED financial statement of all receipts of school moneys, when and from what source derived and of all receipts on what account etc. either in the paper published in our district or to post same in five public places in our district, but they publish a very condensed and general statement in a paper published in another part of the county.

(a) Is not this a direct violation of section 9360 and are not the Board Members guilty of a misdemeanor and punishable by a fine?

(4) Suppose a School Board employed a person at a stipulated salary or made donations to an organization, neither of which acts were specifically provided for in the Missouri Statutes, would such money paid out as salary and donation of school funds, amount to a wrongful distribution of school funds?

(5) Has a tax paying citizen of the Wellston School District the right to look at the records of the Board and must the Secretary and Treasurer of said Board give to said citizen information regarding the title of any particular employe of the said Board and the amount of salary paid to said employe?

(a) If this information is refused what recourse has the taxpaying citizen?

Your consideration of the above facts and your answers to the above questions will not only be appreciated by the undersigned but, we feel sure, by every law abiding citizen of Wellston."

According to a conference with you in connection with this request, it is our understanding that you have withdrawn and desire us to disregard questions (1-g) and (4), and consequently we shall eliminate these two questions from further consideration.

As to question (1), R.S. No. 1929, Section 9360 provides, in part, as follows:



"No member of any public school board of any city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year."

and under the facts furnished by you a member of the Public School Board did hold an office or employment of profit from said Board. The fact that such office or employment was as Secretary to the Superintendent of Schools, and not as a direct employe of the Board, would not seem to make any difference, in view of R. S. Mo. 1929, Section 9329 which provides, in defining the powers of school boards of city, town and consolidated schools, that "no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor", so that the Board itself would have authority and power over the employment as Secretary to the Superintendent of Schools.

It is our opinion that your question (1-a) is to be answered in the affirmative.

As to question (1-b), R. S. Mo. 1929, Section 9232 provides in part as follows:

"Any \* \* \* school director or other officer, who shall willfully neglect or refuse to perform any duty or duties pertaining to his office under this chapter, shall be regarded as guilty of a misdemeanor and subject to a fine of not more than one hundred dollars, to be recovered in any court of law in this state having competent jurisdiction."

Insufficient facts are given to show if the neglect or refusal was willful within this statute or if the acts complained of were willful, corrupt or fraudulent so as to bring them within R. S. Mo. 1929, Sec. 4090 or 4091, and on this point we express no opinion.

However, if in fact the acts could be established to be within either of these statutes, R. S. Mo. 1929, Section 11316 provides, in part, as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county."

As to question (1-c), if money has been disbursed without statutory authority so that the person who has received it is under a legal obligation to return it, as has been dealt with under (1-a) supra, and if the money did belong to and should be recovered by the School Board, the School Board would be the proper entity to institute suit against such person for its recovery, and



if the School Board, after formal demand by an interested citizen or taxpayer, refuses or fails within a reasonable time to bring such suit to collect the debt due to it, such citizen could institute suit in the name of the state, at the relation of the citizen or citizens against the School Board by way of mandamus to compel the School Board to proceed to collect such debt, State ex rel Wear v. Francis, 95 Mo. 44 (1888), wherein the court said:

"\* \* \* where a public right is involved, and the object is to enforce a public duty, the people are regarded as the real party, and in such case the relator need not show any legal or special interest in the result, the fact that he is a citizen, and, as such, interested in the execution of the laws is the sesame which unlocks the gates of mandatory authority whenever an officer whose functions are merely ministerial, refuses to perform his office and thereby causes detriment to the public interest." (Page 48)

As to question (1-d), R. S. Mo. 1929, Section 863, in defining the statute of limitations as to personal actions, provides as follows:

"Within three years: First, an action against a sheriff, coroner or other officers upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

As to question (1-e), R. S. Mo. 1929, Section 3393 provides as follows:

"No person shall be prosecuted, tried or punished for any offense, other than felony, or for any fine or forfeiture, unless the indictment be found or prosecution be instituted within one year after the commission of the offense, or incurring the fine or forfeiture."

If the prosecution were to be for a misdemeanor under Section 9232, Sec. 3393 would govern. If the prosecution were to be for a felony under Sec. 4090 or 4091, the limitation would be three years, R. S. Mo. 1929, Sec. 3392.

As to question (1-f), although the part of Section 9360 quoted under (1-a), supra, deals with public school boards of cities, towns and villages, this would not prevent its application to the Wellston School Board, because R. S. Mo. 1929, Section 9333, dealing with consolidated school districts, provides, in part, as follows:

"The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state."

and in the absence of any specific statute comparable to Section 9360, dealing with consolidated school districts, the provisions of Section 9360 would apply.

As to paragraph (2), the Constitution of Missouri, Article XIV, Section 13, provides as follows:

"NEPOTISM, BY ANY OFFICER OR EMPLOYE, FORBIDDEN -  
FORFEITS OFFICE. Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

and it was held in the case of *Norman v. Ellis*, 325 Mo. 154, 28 S.W. (2d) 363 (1930), as to affinity, as follows:

"Affinity is defined as a legal relationship which arises as the result of marriage \* \* \* 'between each spouse and the consanguinal relatives of the other.'" (P. 162)

and it was further held, as to the necessity of legislation for the enforcement of this constitutional provision, as follows:

"A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will." (P. 160)

Likewise, in the case of *State v. Bowman*, 184 Mo. App. 549, 170 S.W. 700 (1914), the issue was presented as to the right of a member of a public body to be appointed by such body to an office over which such body had a power of appointment, and the court held that such an appointment would be against public policy. The court said:

"\* \* \* we have no hesitancy in holding that it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office." (Pages 556, 557)

The court further, at page 559, referred to the Constitution of Missouri, and said:

"Section 18 of article 9, of our Constitution, provides that: 'No person shall at the same time fill two municipal offices either in the same or different municipalities.' \* \* \* If this constitutional provision does not absolutely prohibit our granting the relief prayed for, it certainly indicates the public policy of this State on the question we are now discussing." (Page 559)

Thus, as to your question (2-a), the answer is that the constitutional provision is self-enforcing, and as to (2-b), a suit in quo warranto could be instituted for ousting from office any person violating the anti-nepotism provision of the Constitution.

As to question (3), the Attorney General ruled in an opinion rendered to George W. Kriegesman, President, St. Louis County Press Association, 104 West Lockwood Avenue, Webster Groves, Missouri, that that part of Section 9360 of the 1929 Statutes which has not yet been quoted above, which deals with the publication of statements by school boards, and is as follows, " \* \* \* and provided further, that it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having graded schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein, then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and of all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all school purposes for the year; which said statement, so required to be made and published, shall be duly attested by the president and secretary of the board, and the secretary shall forward a copy of said report to the state superintendent of public schools at Jefferson City." means what it says. A violation of this part of Section 9360 could be prosecuted in the same manner as discussed in (1-b) supra, this being a misdemeanor punishable "by a fine not to exceed one hundred dollars."

As to question (5), the right of taxpayers and citizens to information regarding the affairs of the School Board and District is covered by that part of Section 9360 quoted under (3) supra, and for a failure to give out the information required by Section 9360 to be given out, the procedure for a remedy therefrom is treated under (3) above.

Mandamus would also lie. See (1-c) supra.

Respectfully,

*Edward H. Miller*  
ASSISTANT ATTORNEY GENERAL.

Approved:

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ATTORNEY GENERAL.

KEM/MC.

N  
PROBATE JUDGE: Publication

Where a newspaper misses only one issue it is not necessary that said paper be published continuously for another year before any legal notices can be published in it under the terms of Section 13775, R. S. Mo. 1929.

September 4, 1934.

Honorable A. B. Duncan,  
Judge of Probate Court,  
St. Joseph, Missouri.

Dear Sir:-

We have your letter of August 23, 1934, in which is contained a request for an opinion as follows:

"If a newspaper, which has been publishing legal notices for more than twenty years, and has done so continuously, misses an issue, must that paper be published continuously for another year before any more legal notices can be published in it, in order to comply with Section 13775 Revised Statutes of 1929?"

Section 13775, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 13775. PUBLIC ADVERTISEMENTS AND ORDERS OF PUBLICATION TO BE PUBLISHED IN NEWSPAPER OF COUNTY.- All public advertisements and orders of publication required by law to be made shall be published in some daily, semi-weekly, tri-weekly or weekly newspaper of general circulation in the county where located and which shall have been published continuously for a period of at least one year."

It is our opinion that the mere fact of a newspaper missing one issue will not disqualify said newspaper for the publishing of legal notices. Obviously, we think, the statutory intent was to provide that legal notices should be published only in well recognized and established newspapers. The word "continuously" is used therefore in the general sense and should not be regarded in too strict a light. Merely missing one issue could not seriously affect the standing of a newspaper, nor in a general sense could the paper be said to at that time cease its continuous publication. Our courts, in the construction of statutes, have invariably sought to effectuate the legislative intent as distinguished from following the literal and limited meaning of the language or words employed.



Hon. A. B. Duncan--#2

September 4, 1934.

In the case of St. Louis vs. Christian Bros. College, 257 Mo. 541, the Supreme Court in banc stated at page 552 as follows:

"On this point we will say that, in construing laws, it is permissible in arriving at the intent of the lawmaker to either expand or limit the meaning of his words, when it becomes necessary to make the law harmonize with reason. (Kane v. Railroad, 112 Mo. 34, l.c. 39; Keeney v. McVay, 206 Mo. 42, l.c. 68)."

In the case of Kerens vs. St. Louis Union Trust Co., 223 S. W. 645, the Supreme Court in banc stated at page 651 as follows:

"A statute should always be construed so as to effectuate the purpose of its enactment. To accomplish this end, the meaning of words may, with a proper regard for the object to be attained, be restricted and at other times extended."

In the case of State vs. Schwartzmann Service, Inc., 40 S. W. (2nd) 479, the court at page 480 stated as follows:

"It is a cardinal rule, universally accepted, that, in the exposition of a statute, the intention of a lawmaker will prevail over the literal sense of the terms; its reason and intention will prevail over the strict letter."

Finally, in the case of State vs. McKay, 52 S. W. (2nd) 229, the court at page 230 quoted with approval the following language and cases listed thereunder:

" 'A statute or ordinance will not be given a construction which will make it unreasonable or which will result in an absurdity.' "

We suggest that, in our present situation, to say that the missing by a newspaper of one issue should, for the present, disqualify it under Section 13775, above quoted, is unreasonable. We do not think that the statute requires the waiting of a year by

Hon. A. B. Duncan--#3

September 4, 1934.

a newspaper after missing an issue in order to enable said newspaper to publish legal notices within the statutory terms, other qualifications being in order.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

A handwritten signature in cursive script, reading "Correll A. Hunt". The signature is written in dark ink and is positioned above a horizontal line.

(Acting) Attorney-General



Relating: 1 To consolidation of offices of County Treasurer and Collector in certain counties.

Relating: 2 To time of election of party county committees.

2-17  
February 16, 1934.



Hon. Melvin Englehart  
Prosecuting Attorney  
Madison County  
Fredericktown, Missouri

Dear Sir:

We acknowledge receipt of your letter of December 20, 1933, in which you state and inquire as follows:

"Madison County, Missouri, has a population of less than 40,000. and elected a county treasurer in 1932. The present term of office of the county collector will expire Jan. 1, 1935, and hence the question arises in regard to the application of section 12132a, Laws of 1933, ss. 1.

Under the section quoted above, the collector of counties of 40,000 population or less, will take over the duties of county treasurers and the question is asked of me as to whether the treasurer of this county will assume the duties of the collector after Jan. 1, 1935 and perform such duties until the present term of office of the treasurer expires on Jan. 1, 1937. I see no provision of the section to that effect, but I would like to know the interpretation that your office will place on it. It seems to me that there will have to be a collector elected in 1934 in all counties of less than 40,000 population if such term of office expires in 1935. Am I correct?

It is provided in section 10280 R. S. 1929, that "the county committee shall be composed of the committeemen and committeewomen elected in the several townships at the August Primary next preceding and etc--" does this section mean that the county committeemen and committeewomen shall be elected every two years? The section provides that it shall be done at each primary election held in August."



I.

The term of office of all county treasurers now in office will expire December 31, 1936. Thereafter in all counties having a population of 40,000 or less the county collectors of such counties will become ex-officio county-treasurers.

Section 9883 R. S. Mo. 1929, provides as follows:

"The offices of sheriff and collector shall be distinct and separate offices in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

The above section provides for the election of a collector of revenue in all counties of the State at the general election in 1906 and every four years thereafter, that is, they shall hold office for four years. Thus it appears that at the general election in 1934 all of the counties are to elect a collector of revenue for an ensuing four years.

Section 12130 R. S. Mo. 1929, provides as follows:

"On the Tuesday after the first Monday in November, 1912, and every four years thereafter, there shall be elected by the qualified voters of the several counties in this state a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that may hereafter adopt township organization,

the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

The above statute provides that at the general election of 1912 and every four years thereafter the several counties shall elect a county treasurer. It thus appears that the term of all present county treasurers will expire December 31, 1936.

The General Assembly at the 1933 session repealed the said Section 12130 supra, and enacted a new section in lieu thereof which provides as follows:

"On the Tuesday after the first Monday in November, 1936, and every four years thereafter, there shall be elected by the qualified voters in all counties of this state now or hereafter having a population of 40,000 or more inhabitants according to the last decennial United States census, and in all counties of less than 40,000 inhabitants if under township organization, a county treasurer, who shall be commissioned by the County Court of his County, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that in counties having adopted or that shall hereafter adopt township organization, the term of office of said treasurer shall be extended to the first day of April next after the election of his successor."

From the provision of the above section we find that no provisions are made for the election of county treasurers in counties having a population of 40,000 or less according to the last decennial census but only in all counties having a population in excess of 40,000 inhabitants.

Section 12132A Laws of Missouri 1933, p. 338, provides as follows:

"On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

Thus we here find that on and after December 31, 1936, the counties having a population of 40,000 and less, according to the last decennial census, the collector of revenue shall take over the duties now performed by the county treasurer, and the said collector shall be county collector and ex officio county treasurer, and shall perform the duties now devolved upon each.

#### CONCLUSION.

It is therefore the opinion of this department that county treasurers now holding office in counties having a population of 40,000 or less, according to the last decennial census, will continue in office until the end of their term, December 31, 1936. Thereafter, in such counties the county collector of revenue will assume all of the duties of the office of county treasurer and will be county collector and ex officio county treasurer, with no additional remuneration.

II.

County Committeemen are elected at primary proceeding the general election on Tuesday next following the first Monday of each even year.

Section 10278 R. S. Mo. 1929, provides as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot, or party ticket on which he or she may desire to become a candidate for committeeman or committee-woman by complying with the provisions of section 10257 R. S. 1929."

Section 10280 R. S. Mo. 1929, provides as follows:

"The county committee, or city committee, as the case may be, shall be composed of the committeemen and committeewomen elected in the several townships, or voting districts, at the August primary next preceding, and shall meet at the county seat of the several counties of this state, and at such place in any city not within a county as the chairman of the then city committee may designate, on the third Tuesday in August of the year in which the primary election is held, and organize by the election of one of its members as chairman, and one of its members as vice-chairman, one of whom shall be a woman, and a secretary and a treasurer, one of whom shall be a woman, but who may or may not be members of the committee."

Section 1 of Article VIII, Constitution of Missouri, provides as follows:

"The general election shall be held biennially on the Tuesday next following the first Monday in November of each even year; but the General Assembly may, by law, fix a different day--two-thirds of all members of each house consenting thereto."

We construe the above statutes in the light of the constitutional provisions to mean, that at the primary proceeding the general election on Tuesday next following the first Monday in each even year, that the electors of each party so desiring may elect a committeemen and committeewomen, qualified electors of the precinct or voting district, for committeeman for such township or voting district as the case may be, and thus elected shall constitute the county committee for their respective parties.

Respectfully submitted,

W. W. BARNES,  
Assistant Attorney General.

APPROVED:

---

ROY MCKITTRICK  
Attorney General.

NWB:MM

COUNTIES:- Under Section 12165, Laws of 1933, pages 355-356,  
COUNTY CLERK:-county clerk, where he becomes a designated person  
under said section, may receive compensation for fur-  
nishing financial statement, but cannot collect com-  
pensation for preparing financial statements for years  
1930, 1931 and 1932, as statutes then in force did not  
authorize such compensation and clerk cannot prove  
contract with county court to pay him for such services

3-5  
February 27, 1934.



Mr. Melvin Englehart,  
Prosecuting Attorney Madison County,  
Fredericktown, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"Under Section 12165 Laws of 1933, of  
Missouri, it is provided that county  
courts of each county in the State  
shall prepare and publish in some news-  
paper, in said county, a detailed fi-  
nancial statement of the said county  
for the year ending December 31 pre-  
ceding. The above mentioned section  
further provides that the said finan-  
cial statement shall be prepared either  
by the county clerk or someone designated  
by the county court to prepare the said  
statement. Section one of this act re-  
peals Sections 12165 and 12166 R. S. of  
Missouri 1929.

Under the sections repealed there is no  
provision as to the compensation for a  
county clerk who prepares the annual  
financial statement. Also, there is no  
provision that in case a county clerk is  
paid on the statutory salary basis that  
he shall receive any additional compensa-  
tion for the statement.

At the present the county clerk of this  
county is requesting the county court to  
pay him the compensation as set out in  
Section 12166, Laws of 1933 of Missouri  
for the preparing of the financial state-  
ment of this county for the year ending  
December 31, 1933. In addition to this  
he has requested the county court to com-  
pensate him for each financial statement  
prepared for the years of 1930, 1931 and  
1932. There is nothing in the county



court record of this county, to show that the county court has at any time ordered the county clerk to prepare the financial statement and there is nothing in said records to indicate the amount of compensation that anyone should receive. So far as the record is concerned, the financial statements of this county for the years of 1930, 1931 and 1932 were voluntarily made by the county clerk and the court accepted such statements and at no time did he mention to the court, when such statements were accepted by the court, and approved that he was demanding compensation for the work in addition to his regular statutory salary. The first demand made for such compensation for the years of 1930, 1931 and 1932 was made February 8, 1934.

The county clerk has informed the court that if the compensation for the years 1930, 1931 and 1932 are not paid on the same basis as that for the 1933 statement, that he will bring suit to collect same.

Please give an opinion on this matter as quickly as possible, as said cause will probably be tried in the March term of the circuit court of this county."

I.

Section 12166, Laws of Missouri 1933, pages 356, 357, provides for the payment for the person designated to prepare the financial statement for the county. Said Section, among other things, provides:

"\*\*\*\*The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the state auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this Section. \*\*\*\*For the preparation of the for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record.\*\*\*\*\*"



Section 12165, Laws of Missouri 1933, pages 353-356, among other things, provides:

\*\*\*\*\*Or if no one has been designated said statement having been prepared by the county clerk, signature shall be in the following form:

Clerk of the County Court and ex-officio officer designated to prepare financial statement required by Section 12165 Revised Statutes 1929.\*\*\*\*\*

Under the foregoing section the county court is authorized to appoint as a designated person to prepare the financial statement any person, or upon a failure of the court to designate a person to prepare the financial statement required by Section 12165, the county court becomes the officer designated under the statute to prepare the financial statement. Under Section 12166, it is the duty of the county court to pay the person designated whether it be an outsider or the county clerk for preparing the financial statement, and the amount of compensation is limited not to exceed the price per hundred words and figures permitted to the clerk of the Court for the writing of the record, and no pay shall be allowed for pasting the printed copy in the record. In view of the foregoing statutes we believe that the Legislature has authorized and directed the county court to pay the county clerk for performing the service of preparing the financial statement whenever the county court has failed to designate some other person to prepare this statement.

In answer to your first inquiry, therefore, it is the opinion of this Department that where the county clerk of your county, as such, became <sup>the</sup> ex-officio officer designated to prepare the financial statement, as required by Section 12165, that such clerk may recover compensation for preparing such statement for the year 1933, at which time Sections 12165 and 12166 were in effect.

## II.

However, in dealing with the right of the county clerk to collect the same compensation for the years 1930, 1931 and 1932, we believe that you have an entirely different situation. Section 12165 and Section 12166, Laws of Missouri 1933, pages 355-356, became effective on July 24, 1933, and therefore were not in effect during 1930, 1931 and 1932. Such being true, the county clerk cannot base his right to compensation for making the financial statement for those years upon sections 12165 and 12166, Laws of Missouri 1933, pages 355-356. The right of the clerk to collect compensation for 1930, 1931 and 1932, inclu-

for making financial statements must be determined by the law in effect at that time, which were Sections 12165 and 12166, of the Revised Statutes of Missouri, 1929, which are as follows:

"Section 12165: And the said courts shall at the same time make out a statement of the amount of debt due by their counties and a detailed statement of receipts into and disbursements from the county treasury, such statement to show, separately, the amount received in each fund--first, from the general tax book; second, from the railroad tax book; third, from billiard and other table licenses; fourth, ferry licenses; fifth, from land back tax books; sixth, from personal delinquent lists; seventh, fines and penalties; and, eighth, from other sources. The disbursements shall be classified under separate heads: 'Salaries and fees,' 'Costs in criminal cases,' 'Roads and bridges,' 'Support of paupers,' 'Support of poor persons in lunatic asylums,' 'Support of boys in reform schools,' 'Support of girls in industrial home for girls,' 'Books and stationery,' 'Repairs of public buildings and fuel,' 'Expenses of election,' and such other classes as may be necessary, together with the names of the persons to whom warrants were drawn, and the total expended for each class of expenditure shall be given. The statement shall also show the amount of the last land and personal delinquent lists, of the uncollected land back tax books and the personal delinquent lists returned more than one year. It is made the duty of the state auditor to furnish the forms of such annual statements which shall be used in making such statement."

"Section 12166: The facts thus ascertained and the account and statement thus made out shall be entered of record in said courts and published in some newspaper in each county where any such may be printed, and if there be no newspaper published in the county, then copies of the same shall be put up in the most conspicuous place in each township of the county, by the sheriff, within three weeks after the adjournment of the term at which the proceedings mentioned shall have been had. One

copy of such published statement shall be filed in the office of the clerk of the county court and a certified copy of such statement shall be transmitted to the state auditor on or before the last day of May in each year. The statement herein required to be made and published shall be in lieu of all other statement of receipts and expenditures of counties required by law to be made and published."

Neither Section 12165 or Section 12166, R. S. Mo. 1929, carry any provision for compensating the county clerk for making the financial statement required under those sections. It is a well settled law in this State that whenever a county official seeks to impose a charge upon the county and collect a fee for services performed, he shall be able to point out the section in the statutes which authorizes the payment of the fee. It is evident from the reading of those sections that no provision is made for the payment of the fee demanded in this case. The rule is announced in *Sanderson v. Pike County*, 195 Mo. 598, 605, as follows:

"It is well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services that he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wofford, 116 Mo. 220, *Givens v. Daviess Co.*, 107 Mo. 603; *Williams v. Chariton County*, 85 Mo. 645, *Gammon v. Lafayette Co.*, 76 Mo. 675)."

It is apparent from the foregoing decision that before the county clerk can claim compensation he shall point out the statute which authorized the payment of the fee. The foregoing sections do not authorize the payment of any fee, and such being true, the county clerk is not entitled to any compensation by reason of the statutes. Since he is not entitled to any compensation by reason of the statutes, then the only other basis upon which he

can claim compensation is that the county court might have entered into a contract with him for the purpose of preparing that statement. We do not believe, however, that the facts stated in your inquiry will support such contention. It appears from your letter that the records of the county court are absolutely blank in so far as any contract between then and the county clerk is concerned with reference to the compiling of this financial statement. You state that the work was done voluntarily by the county clerk and although he has made no claim for such compensation for the years for which the statements were made, he now, for the first time, claims his right to be paid.

The county court is a court of record and can only speak through its records. It has no right to deal with any person or to charge the county for any commodity or service unless the records of the county court evidence the contract. It is said in *Sanderson v. Pike County*, 195 Mo. 590, 604:

"The county court is a court of record, and its acts and proceedings can only be known by its record. A contract with such court cannot be established by parol evidence. (*Maupin v. Franklin Co.*, 67 Mo. 327; *Dennison v. County of St. Louis*, 33 Mo. 168). No record of the county court was produced on the trial of this cause fixing the treasurer's compensation under either of the foregoing sections of the statute."

The same doctrine is announced in the case of *Maupin v. Franklin Co.*, 67 Mo. 327, 329, where the Court held that it was error to admit parol evidence as to an alleged contract with the county court, the court saying:

"The court below erred in admitting parol evidence as to the alleged contract made with the county court. A county court, like any other court of record, can only speak by its record, and the statute (1 Wag. Stat., 419, Art. 5), expressly requires that such courts (keep just and faithful records of their proceedings.' The obviously correct principle that parol evidence is inadmissible to prove a contract with the county court, was announced at an early day in this State. (*Medlin v. Platte County*, 8 Mo. 235; *Milan v. Pemberton*, 13 Mo. 598.) It seems to be thought the case of *Boggs v. Caldwell Co.*, (28 Mo. 586), enunciates a

different rule, but it will perhaps be found that case proceeded on the ground that the formality of entering an order of record was unnecessary, when relating to 'books in the office' of the clerk; and the verbal order in that instance was treated as analagous to one for furnishing ice during the session of court, or benches for by-standers. And even the authority of that case has been doubted in *Reppy v. Jefferson Co.*, (47 Mo. 66,) and it certainly seems that the proper, and if we give heed to the statute and the earlier decisions above noted, the only course to pursue is in every instance to let the record speak the only utterances of the court entitled to recognition. It has often been held by this court, in accordance with this view, that when a contract had been made with a county court, the record of that court was the only legitimate evidence adducible in support of the contract. (*Dennison v. County of St. Louis*, 33 Mo. 168 and cases cited; *Reppy v. Jefferson County*, supra.)"

The only case which we find that seems to stand for the proposition that the county court can be bound by a contract not appearing of record is the case of *Boggs v. Caldwell County*, 28 Mo. 586, cited in the above quotation. That case was not approved in the case of *Reppy v. Jefferson County*, 47 Mo. 66, cited in the same quotation. The *Boggs* case was cited with disapproval in the case of *Harkreader v. Vernon County*, 216 Mo. 606, 706, where the Court, in refusing to follow it, says as follows:

"\*\*\*\*\*The case of *Riley v. Pettis County*, 96 Mo. 318, is cited as authority for the proposition that the court erred in excluding the offer of testimony, but that case is not in point. It does not hold that the official action, whatever it be, of the county court ought not to be shown by its record. It holds that the mere record of the county court would not bind the other contracting party, if any, and that his assent or refusal to assent might be shown by parol. We are cited to *Boggs v. Caldwell Co.*, 28 Mo. 586; but that case was limited and distinguished in *Dennison v. St. Louis Co.*, 33 Mo. 168, and was doubted in *Reppy v. Jefferson County*, 47 Mo. 66, and its authority still further shaken in *Maupin v. Franklin County*, 67 Mo. 327. It has not been followed heretofore and we shall not follow it now."



In view of the foregoing cases and the criticism in the Boggs case, and the refusal of the court to later follow it, we deduce the rule to be that before any person, county officer or otherwise, can hold the county court under a contract made with it, that such contract must be evidenced by the records of the county court, through which alone the court can speak. Those cases hold that it is not proper to attempt to prove a contract with the county court by parol testimony, and that unless the contract is evidenced by the records of the county court there is no evidence to support the making of the contract.

In view of the foregoing cases we conclude that the county clerk cannot collect for the years 1930, 1931 and 1932 by reason of the statute for the reason that the statute does not authorize the payment of any compensation for the making of a financial statement. We further conclude that the county clerk cannot recover against the county by reason of a special contract made with the county court for the reason that the records of the county court, through which alone the court can speak and be bound, do not show that any such contract was ever entered into. Having decided adversely to the clerk's contentions of these two propositions, the sole question remaining is whether the clerk may collect on the basis of quantum meruit. In *Wolcott v. Lawrence County*, 26 Mo. 272, 273, the Court says:

"The petition in this case does not aver a contract of any kind with the county court but the plaintiff seeks to recover upon quantum meruit. In our opinion the county is not liable upon an implied promise."

#### CONCLUSION.

In view of the foregoing it is therefore the opinion of this Department that the county clerk is entitled to compensation for making the financial statement for the year 1933, if he becomes a designated person under Section 12165 and Section 12166, Laws of Missouri 1933, pages 353-356. It is our further opinion, however, that the county clerk, upon the facts stated in your letter, cannot recover compensation for making the financial statement for the county for the years 1930, 1931 and 1932 because:

(1) The Laws of Missouri, 1933, pages 353-356 and Sections 12165 and 12166, which furnish the basis for compensation for the making of the 1933 financial statement, were not in force during the years 1930, 1931 and 1932.

(2) Sections 12165 and 12166, R. S. Mo. 1929, which were in force during the years 1930, 1931 and 1932 made no provision for the payment of any compensation for the making

of such financial statements, and such being true, the official cannot point out the authority for collecting any compensation.

(3) The records of the county court do not disclose that any special contract was ever made with the county clerk in which they agreed to pay him any compensation for this service, and such being true, such contract cannot be proved by parol evidence.

(4) The clerk of no other person is entitled to recover against the county upon a quantum meruit for the reason that the county is not liable upon an implied promise.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S



**BUILDING AND LOAN: SHARES OF STOCK OWNED BY ONE IN BUILDING AND  
LOAN ASSOCIATION TO BE ASSESSED AND RETURNED  
AS PROPERTY - HOW?**

3-13  
March 12, 1934.



Honorable Arthur L. Elliott  
Assessor, Ray County  
Richmond, Missouri

Dear Sir:

In answer to your inquiry as to whether or not shares of stock owned by one in a building and loan association should be returned and assessed as property, we advise that such stock should be assessed to the individual owner thereof.

Section 9768, R. S. Mo. 1929, provides the following:

"All parties holding stock or shares as owners or in trust in any building and loan association in this state, on which no loan has been obtained from such association, shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June in each year, and the tax shall be levied upon said shares, and collected from such holder or depositor of the same, as taxes on other personal property; and any failure on the part of such owner, holder or depositor of such shares shall subject such holder to the same penalties now provided for failure to give the assessor a true list of all taxable property, verified by affidavit."

It is our opinion that shares of stock of Building and Loan Associations should be assessed to the individual owner of such shares and it is the duty of the individual owner to make the return.

City v. Ass'n. 145 Mo. 50;

State ex rel. v. Stamm. 165 Mo. 73.

Yours very truly,

---

JAMES L. HORNOSTEL  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

JLH/AFJ

STATE BOARD OF HEALTH: Pointing out sections relating thereto.

3-16

March 15, 1934.



Dr. W.T. Elam,  
State Health Commissioner,  
The State Board of Health,  
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of some time ago making the following inquiry:

"I am desirous of knowing the gist of the statute under which the Board of Health is operating at the present time. If you will kindly tell me where I can find or get a copy of this statute, I shall consider it in the light of a personal favor."

The Legislature of 1933 repealed Section 9020, R.S. Mo. 1929, which section dealt with the duties of the Secretary and enacted in lieu thereof, Sec. 9020, Laws of Mo. 1933, page 269, which is as follows:

"The Commissioner of Health shall perform such duties as may be prescribed by the board and this article. The members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. The president of the board shall certify the amount to the Commissioner of Health, and the traveling and other expenses of members, and on presentation of his certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

The Legislature also repealed Sec. 9024, R.S. Mo. 1929. This section dealt with the compensation of the Commissioner of Health. The new section enacted in lieu thereof is Sec. 9024, Laws of Mo. 1933, p. 269, and provides as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5,000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

Sec. 9044, R.S. Mo. 1929 dealing with permits for burial and removal of bodies, has been amended; the section being in force now is Sec. 9044, Laws of Mo. 1933, p. 270 and is as follows:

"The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other disposition shall have been properly issued by the local registrar of the registration district in

which the death occurs. Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him as hereinafter provided; Provided, that when a dead body is transported by common carrier into a registration district in Missouri for burial, then the transit and removal permit, issued in accordance with the law and health regulations of the place where the death occurred, when said death occurs outside of the state of Missouri, shall be accepted by the local registrar of the district, into which the body has been transported for burial or other disposition, as a basis upon which he shall issue a local permit, in the same way as if the death occurred in his district, but shall plainly enter upon the face of the burial permit the fact that it was a body shipped in for interment, and give the actual place of death; but a burial permit shall not be required from the local registrar of the district in which interment is made when a body is removed from one district in Missouri to another in the state, for purpose of burial or other disposition, either by common carrier, hearse, or other conveyance; and no local registrar shall, as such, require from undertakers or persons acting as undertakers any fee for the privilege of burying dead bodies."

The Legislature also repealed Sec. 9025, R.S. Mo. 1929, relating to the Deputy State Commissioners of Health and enacted in lieu thereof Sec. 9025, Laws of Mo. 1933, p. 271, which provides:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician,

as a Deputy State Commissioner of Health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

The section relating to the powers and duties of the State Board of Health of Missouri is Sec. 9015, R.S. Mo. 1929, which is as follows:

"It shall be the duty of the State Board of Health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the state. It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the State Board of Health."

Section 9015, supra, has not been amended and is the law now effective and under which the State Board of Health of Missouri derives its powers.

Other sections which we will enumerate for your information as relating to the State Board of Health are: Secs. 9014-13-16-17-18-19-9021-22-23-26-27-28-29-9030-31-32-33-34-35-36-37-38-39-9040-41-42-43-45-46-47-48-49-9050-51-52-53-54-55-56-57-58-59-9060-61-62.

In 1931 the Legislature enacted a new section, Sec. 9054a, Laws of Mo. 1931, p. 230, which provided:

"Whenever, prior to the taking effect of this article, a person was born in the state of Missouri, or a resident of Missouri born outside this state, such birth may be registered in the manner and according to,

March 15, 1934.

nearly as possible, the provisions of section 9053 of this article, by filling out blank registration papers secured from the local registrar and filing same, together with a registration fee of \$2.50, with the state registrar of vital statistics. Such papers shall contain the affidavits, sworn to before a notary, of at least two persons, knowing the facts. The state registrar may require further affidavits to establish the truth of the facts endeavored to be made of record by the certificate and may withhold filing of such birth certificate until his requirements are complied with. The state registrar may make and enforce appropriate rules and regulations to carry out this act and to prevent fraud and deception."

It is our intention to point out to you the changes in the laws relating to the State Board of Health and to quote the pertinent sections. We have not quoted the other sections for the reason that we take it for granted your department has these sections in pamphlet form.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH



OFFICERS: JUSTICES OF THE PEACE: Removal from township where Justice is appointed or elected disqualifies such Justice of the Peace from holding such office.

4-5  
April 3, 1934



Honorable Melvin Englehart  
Prosecuting Attorney  
Fredericktown  
Missouri

Dear Sir:

Receipt of your letter dated April 2, 1934 is acknowledged. The letter is as follows:

"In this county, there is one township by the name of German Township. The justice residing there has moved from the township and is residing in an adjoining township. The question has arisen as to whether he is now justice of the peace or whether the office is vacant.

I think this matter is covered clearly in section 2164, R. S. of Mo., 1929, which states that 'whenever a justice of the peace shall move out of the township, he shall deliver all files and etc to the clerk of the county court wherein he resides.'

Some members of the court say they have read in the St. Louis-Globe Democrat an opinion from the State Legal Dept., stating the opposite of this and that they can live in another township and still serve in the township where elected. If this is true, please write me or telephone me at once, as we desire to fill this appointment at once,

I remain."

Doubtless the opinion of this office to which you refer was an opinion dated March 21, 1934 and had under consideration the status of a county judge and not that of a

Justice of the Peace.

Section 2141 Revised Statutes Missouri 1929 provides:

"No person shall be eligible to the office of justice of the peace who is not a citizen of the United States, who shall not have been an inhabitant of this state twelve months and of the township for which he is chosen six months next before his election, if such township shall have been so long established, but if not, then of the township from which the same shall have been taken."

Section 2164 in part reads:

"Whenever a justice of the peace shall resign, move out of the township or be otherwise disqualified, he shall immediately thereafter deliver to the clerk of the county court, or, if in the city of St. Louis, the city register, all dockets, records, books, papers and documents appertaining to his office.\* \* \*

The words "or be otherwise disqualified" clearly show that the moving out of a township when any justice is elected or appointed is a disqualification to holding such office.

Section 2165 provides:

"The clerk of the county court, or city register, shall give the person delivering him such docket and papers a receipt therefor, and shall immediately thereafter cause the same to be delivered to some justice of the peace of the township or district in which the vacancy occurred, who shall then be possessed of all causes remaining undisposed of on said docket, and shall proceed to dispose of all such causes as if they had been originally brought before him."

April 3, 1934

In Mechem on "Public Officers" Section 438 it is stated:

"Where the law thus requires the officer to reside within the district which he represents, and a fortiori so where it expressly declares that his removal from the district shall create a vacancy, a permanent removal from the district represented will be deemed an abandonment of the office and a vacancy will result.

But a mere temporary removal for a limited time and with no intention to abandon or surrender the office or to cease to perform its duties, will not have this effect."

If the justice of the peace mentioned by you has permanently removed his residence from German township with the intention to abandon his residence in that township then, from the foregoing, we are of the opinion that he is no longer entitled to hold or discharge the duties of the office of justice of the peace in German township. As to whether or not the justice has permanently moved his residence from German township may involve a question of fact which you or the county court must determine for yourselves.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

ELECTIONS: Board of registration as now constituted in Jefferson City should meet at least ten days before the primary in August and make up an alphabetical list of voters for each precinct.

5.21  
May 15, 1934.

Hon. Henry W. Ells,  
City Clerk,  
Jefferson City, Mo.



Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"Complying with your advise over the phone a few days ago, I am writing to ask if you will kindly give us an opinion as to whether, under the permanent registration law as passed by the last Legislature, we are required to have this permanent registration of voters before the August primary or should it be after the primary and before the general election in November."

Section 30 of the law relating to registration in cities of 10,000 to 30,000 inhabitants, as found in Laws of Mo. 1933, page 239, provides (p.249):

"In all cities and towns now having a board of registration, in which the registration of voters has been had in accordance to law, the board of registrars duly elected at the election of November, 1932, shall constitute the board of registrars for said city under the provisions of this article as rewritten until the general election 1934."

We are informed that Jefferson City has now a board of registration, and in view of the foregoing section of the Act, this board of registration will continue to act until the general election of 1934.

Section 6a of the 1933 law as found in Laws of Mo. 1933, page 242, provides:

"Said Board of Registrars shall meet and hold sessions for the purpose of registration of voters at all the times necessary as provided in this act; which said Board shall also meet ten days prior to any general, special or primary election, or any general, special or primary city election, for a period of not to exceed two days and at least five days before said election for the purpose of making up an alphabetically arranged list of the voters in a book for each of the precincts of each of the wards or districts of their respective cities."

#### CONCLUSION

In view of the foregoing sections of the 1933 Act, it is the opinion of this department that the Board of Registration as now constituted in Jefferson City, Missouri should, at least ten days before the primary election in August, meet for the purpose of making up an alphabetically arranged list of the voters of Jefferson City in a book for each of the precincts in each of the wards or districts of Jefferson City.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

SCHOOLS: Restrictions on use by consolidated school districts of funds received from the State, (a) as income from the State school fund, and, (b) as State aid derived from the ordinary revenue of the State.

FILED

25

November 14, 1934

Hon. Melvin Englehart,  
Prosecuting Attorney Madison County,  
Fredericktown, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of October 29, 1934, such request being in the following terms:

"Please give me your opinion of the following inquiry according to the following state of facts; Consolidated Dist. No., 1, of Madison County, Missouri was organized under section 9338 R. S. of Mo., 1929, and is now operating under said section in regard to the state aid received by said school. They are voting a tax rate of \$1.00 on each hundred dollars valuation and they should receive fifty dollars per pupil in average daily attendance during the preceding year for teachers and incidental expenses. Of course the state is unable to pay this amount at this time but a certain per cent is paid.

I have been asked this question; "Is the amount of monies that this school district receives from the state to be divided between the teachers and incidental expenses of the school according to section 9338 or is it to be governed by section 9233, which provides that 'all moneys arising from taxation shall be paid out only for the purposes for which it was levied and collected; but the income from state, county and township school funds shall be applied only to the payment of teacher's warrants' "?

It seems that the State Dept., of Education has informed this district that section 9233 prevails, but I do not believe that the State Dept., of Education knows that said district is operating under section 9238. If you have prepared an opinion for the State Dept., of Education on this question, please mail me a copy immediately. I remain,"

November 14, 1934.

It would seem to us that the person asking the question presented in your letter was not entirely clear as to the distinction between the income of school districts from the permanent public school fund and the income of such school districts from the ordinary revenue of the State. We shall endeavor to point out the constitutional and statutory provisions which indicate that these two sources of income are separate and distinct.

## I

INCOME FROM STATE FUNDS DISTINGUISHED FROM  
INCOME DERIVED AS ORDINARY REVENUE.

R. S. Missouri, 1929, Section 9233, provides in part as follows:

"All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; but the income from state, county and township funds shall be applied only to the payment of teachers' warrants,"

and is included in Chapter 57 of such statutes within Article 2, which Article contains laws applicable to all classes of schools. If in such statute the phrase "income from state \* \* \* funds" describes all the money which the several school districts receive from the State for the support of their schools, then this statute would require on its face that all the money received by a school district from the State should be used to pay teachers' warrants. This, however, is not the meaning of such section.

Section 6 of Article XI of the Constitution of Missouri provides as follows:

"Public school fund, from whence derived, not to be diverted.-- The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also, all moneys, stocks, bonds, lands and other property now belonging to any State fund for purposes of education; also, the net proceeds of all sales of lands and other property and effects that may accrue to the State by escheat, from unclaimed dividends and distributive shares of the estates of deceased persons; also, any proceeds of the sales of the public lands which may have been or hereafter may be paid over to this State (if Congress will consent to such appropriation); also, all other grants, gifts or devises that have been, or hereafter may be, made to this State, and not otherwise appropriated by the State or the terms of the grant, gift



or devise, shall be paid into the State treasury, and securely invested and sacredly preserved as a public school fund; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

From this constitutional provision it is apparent that the school districts have two sources of income from the State, first, the income from the permanent school fund, and second, that percentage of the ordinary revenue of the State as may be by law set apart for this purpose, and another constitutional provision fixing a minimum amount is Section 7 of Article XI which provides as follows:

"Deficiency, how provided for--minimum from State revenue.-- In case the public school fund now provided and set apart by law, for the support of free public schools, shall be insufficient to sustain a free school at least four months in every year in each school district in this State, the General Assembly may provide for such deficiency in accordance with section eleven of the article on revenue and taxation; but in no case shall there be set apart less than twenty-five per cent of the State revenue, exclusive of the interest and sinking fund, to be applied annually to the support of the public schools."

From these provisions it is demonstrated that the provisions of Section 9233, above quoted, mean that it is the income from the permanent school fund which can be used only to pay teachers' warrants and that Section 9233 does not attempt to restrict the money received by school districts derived from ordinary revenue to be expended only for the payment of teachers' warrants. For further confirmation of this distinction see R. S. Missouri, 1929, Chapter 57, Article 24, which contains provisions dealing with the handling of the permanent State school fund, and also see Laws of 1933, page 24, which shows the disposition of the income from the permanent school fund, with which compare the Act on page 26 which shows the disposition of that part of the ordinary revenue to be distributed for the support of schools.

## II

### RESTRICTIONS ON USE OF STATE MONEY DERIVED FROM ORDINARY INCOME.

Although Section 9233, above quoted, requires the income from the permanent school fund to be used to pay teachers' warrants, there is no statutory provision similarly restricting the use of income derived by school districts from the ordinary revenue of the State. Furthermore, R. S. Missouri, 1929, Section 9358, provides in part as follows:

4. Hon. Melvin Englehart.

November 14, 1934.

"Whenever any consolidated school district votes one hundred cents on the one hundred dollars assessed valuation for teachers' and incidental purposes and the proceeds of said tax together with the estimated amount from county, township, and state funds and cash on hand amount to less than fifty dollars per pupil in average daily attendance during the preceding year for teachers and incidental expenses, the state superintendent of schools shall each year before apportioning the public school fund set aside and apportion to each such district a sum sufficient to enable said district to expend fifty dollars per year per child in average daily attendance."

The substance of this provision seems to be that if the amount derived from local taxation for teachers' and incidental purposes does not come up to fifty dollars per pupil, the difference shall be made up from the public school fund, and the phrasing and purpose of this statute would seem to indicate that where such a difference is made up, the difference as received from the State should be used for the same purposes for which the same amount would have been used had local taxation been sufficient to cover it, and such inference in our opinion would prevail in the absence of any contrary constitutional or statutory provision.

In conclusion, it is our opinion that although money received by a consolidated school district from the State as the income from the permanent State school fund can be used only for the payment of teachers' warrants under R. S. Missouri, 1929, Section 9333, that such section 9333 in imposing such a restriction is applicable only to income from the permanent State school fund and not to money received by a consolidated school district from the State which is not derived from such income but is derived from ordinary revenue of the State, and that where money is received from the latter source under Section 9358, such money can be used for incidental purposes as well as for the payment of teachers.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

MOTOR VEHICLE LAW: Sufficiency of statutory penalty for operating a motor vehicle on highways without license plates.

March 7, 1934. 3-13



Hon. J. Dorr Ewing  
Prosecuting Attorney  
Grant City, Missouri

Dear Sir:

We acknowledge receipt of your letter of February 13, 1934, enclosing copy of an Information and Motion to Quash, which letter is as follows:

"Enclosed you will please find a copy of the information filed, charging defendant, Harold Hass, of the crime of driving a car without license plates. You will also please find a motion to quash which is filed in this cause. The court is sustaining the motion to quash upon the grounds that the information is insufficient not in any way but upon the grounds, as I understand him, that the crime, being under Section C of Section 7770, and the penalty being a general penalty and purporting to cover all provisions, the act which penalty is provided in Section 7786, Section D is to general.

In other words this motion to quash is sustained on the grounds that there is no penalty provided by law for operating a motor vehicle without license plates thereon. Our court will be in session until about the 22nd of this month. I would like to know what you think as to whether this case should be appealed? I realize that this is not giving very much time for consideration of the case, but I must take an appeal at that time. Of course, I would not be the one, I take it, who would appear in the Appellate Court and in as much as your department does I would like to have your suggestions on the matter. . . . ."

March 7, 1934.

The enclosed information is as follows:

"J. Dorr Ewing, Prosecuting Attorney, within and for the County of Worth and State of Missouri, being first duly sworn, on his oath, informs the court that at the County of Worth and State of Missouri, on the 2nd day of November, A. D. 1933, one Harld Hass did wrongfully, wilfully and unlawfully drive and operate an automobile, to-wit: One Model "T" Ford Car, on the roads and highways of the State of Missouri without having at said time upon the front and rear thereof license plates issued by the Secretary of State of Missouri for the year 1933; against the peace and dignity of the state."

The enclosed Motion to Quash is as follows:

"Now comes defendant and moves the court to quash the information herein, for the reason that it does not charge a crime under the laws of the state of Missouri."

Section 7770 R. S. Mo. 1929, paragraph C applying to the registration of license plates of motor vehicles reads as follows:

"(c) Every motor vehicle or trailer shall at all times have displayed the registration plates issued by the commissioner, entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean, and so fastened as not to swing. On all motor vehicles one plate shall be displayed on the front and the other on the rear of such motor vehicle, not less than eight nor more than forty-eight inches above the ground, except that on trailers, motorcycles and motor-tricycles one plate shall be so displayed on the rear thereof." \* \* \* \*

Section 7786 R. S. Mo. 1929, paragraph D, referring to the penalty of the infringement of the above section reads as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

From the substance of your letter it would seem that the motor vehicle law as it relates to driving on the highways without license plates, and its provision for penalty for violation of same is attacked, because the penalty provided is said to be too general--that is, the penalty is said to be so general that it cannot be reasonably said to apply as a punishment for the failure to act as the law prescribes.

It is true, that a statute which fixes a crime should leave nothing to conjecture, not even the punishment as prescribed by law. The law should be complete and definite in all of its substantive elements. It is further true, that in the motor vehicle act the Legislature provided in Section 7770, paragraph C, R. S. Mo. 1929, that no person shall drive on the highways without first obtaining the proper state license, and then later in the act, in Section 7786, paragraph D, R. S. Mo. 1929, the Legislature provided for the punishment for the violation of the provisions of the act. In this latter section, the Legislature fixed the punishment for violating specific parts of the Act and provided that it be a misdemeanor for violating any of the other provisions of the act. By providing a punishment for any of the other provisions of the act, it is reasonable to conclude that they meant the provisions other than the ones where they had already fixed the punishment, and contained in the provisions of (a), (b) and (c) of the same Section.

Our Supreme Court said in State vs. Howell, 296 S. W. 370, 1. c. 371; 317 Mo. 330:

"\* \* \* It is entirely proper for the Legislature to prescribe different punishments for different kinds of offenses, and we know of no authority or principle which would prevent the Legislature from including in the same statute different offenses of the same general character. \* \* \* The range of punishment may vary with the gravity of the offense in each individual case. \* \* \*"

Hon. J. Dorr Ewing.

-4-

March 7, 1934.

It seems to us that in the case at bar the contention that the punishment as fixed by the Legislature is too general is not well founded.

It is the opinion of this office that the information as filed is in the language of the statute and is sufficient in form and substance. It is our further opinion that the Motion to Quash as presented by Defendant should be overruled.

Respectfully submitted,

WM. ORR SAWYERS,  
Assistant Attorney General.

APPROVED:

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ROY McKITTICK,  
Attorney General.

WOS:MM



COUNTY WARRANTS: Acceptable in payment of taxes - supplemental  
to opinion rendered to M.E. Montgomery 10/17/33

3-16  
March 15, 1934.



Hon. John A. Eversole,  
Prosecuting Attorney,  
Washington County,  
Potosi, Missouri.

Dear Sir:

This department acknowledges receipt of your letter  
of February 21, 1934, which is as follows:

"The county court of Washington County,  
Missouri wishes to know if the county  
collector is compelled to take county  
revenue warrants in payment of county  
taxes under the new budget law. Here-  
tofore a warrant issued in December  
could be paid on taxes when there were  
January and February warrants unpaid."

On October 17, 1933 an opinion was rendered by this  
department to the Honorable M.E. Montgomery, Prosecuting Attorney  
of Scott, County, relating to warrants being acceptable in payment  
of taxes. As this opinion bears on your question, we are enclos-  
ing copy of the same.

You will note that Sec. 9911, R.S. Mo. 1929, quoted  
in the enclosed opinion, was not repealed directly or by impli-  
cation. Under the new Budget Law, Laws of Mo. 1933, page 351,  
Sec. 22, it is provided as follows:

"All laws or parts of laws and expressly  
sections 9874, 9985 and 9986 in so far  
as they conflict are hereby repealed."

Washington County being a county of less than 50,000  
inhabitants, the first eight sections of the new Budget Law are  
applicable thereto. We have perused Laws of 1933, pages 340 to  
346, inclusive, and find no provisions which would conflict with  
Sec. 9911, supra.



March 15, 1934.

In Section 8, Laws of Mo. 1933, page 346, the following sentence appears in parenthesis:

"This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand."

By this sentence we interpret the same to be the intention of the Legislature that warrants are to occupy the same position as formerly .

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH  
Encl-1

AUCTIONEERS:

Only residents of the State may engage in  
business or trade of auctioneering.

3-26

March 20, 1934



Honorable J. Dorr Ewing  
Prosecuting Attorney  
Grant City, Missouri

Dear Mr. Ewing:

This is to acknowledge your letter as follows:

"I have been handed a copy of the opinion of your department, bearing date December 22nd, addressed to Hon. W. R. Aldrich, relative to foreign auctioneers.

Is it the opinion of your department that such foreign auctioneers are violating the provisions of Section 13727, R. S. of Mo., 1929, in selling, 'livestock agricultural productions, farming utensils and household and kitchen furniture sold in the county of the owners residence.', the auctioneer not having resided in this state at all.

In other words does this section apply to auctioneers who deal exclusively in the sale of exempt property, the auctioneer being a non-resident of this state. I am,"

We are attaching hereto copy of opinion referred to in your letter because we assume you do not have same for your files.

Section 13727 R. S. 1929 provides:

"No person shall be permitted to sell any property at auction of any kind unless he shall have resided in this state six months next preceding the time of making application for license."

March 20, 1934

Chapter 111 deals with public auctioneers, and a reading of said chapter shows that the legislature intended to do two things, first, regulate and license public auctioneers, and second, collect duty by virtue of such trade or business. The regulation primarily is to assure to the state the duty levied upon the proceeds of all sales made at public auction, and in the same chapter certain property is exempt from the payment of duty. However, in reading Section 13727 R. S. 1929, supra, it is very definite in that it says that,

"No person shall be permitted to sell property at auction of any kind."

The statute does not say that a person may sell property at auction subject to duty as does Section 13718.

In your inquiry you state that foreign auctioneers, namely, those that do not reside in this state, sell products that are exempt under Section 13733 from the payment of duty and you wish to know if said 'foreign auctioneers' have to have a license.

It is our opinion that such person who sells property at auction of any kind must have a license. We call your attention to the conclusion on page 4 of the attached opinion, to-wit; "Even if these parties from Iowa desired to be licensed they could not be."

Very truly yours,

James L. Horn Bostel  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General

JLH:LC

NOTARIES PUBLIC:

Acknowledgments executed by said notary in the name in which she was commissioned, but who was at the time married, are legal, valid and binding.

OPINION NO. 26

April 26, 1934

Honorable John A. Eversole  
Prosecuting Attorney  
Washington County  
Potosi, Missouri



Dear Sir:

This is to acknowledge your request for an opinion on the following facts:

"There was a woman resident of this county who was duly qualified and commissioned a notary public. She was single at the time, her commission being in her maiden name. After being so commissioned and entering upon her duties, she married. She kept her marriage secret for some time. During this time (that she was married) she notarized and took acknowledgments to many deeds, deeds of trust, and other papers.

"The opinion I would like to have from your department is whether or not the fact that these deeds, deeds of trust and affidavits were acknowledged by such person as above stated, and in her maiden name, makes the acknowledgments illegal or affects the validity of such instruments."

I.

Chapter 80, R. S. Mo., 1929, relates to notaries public, and Section 11738 of that chapter provides, among other things, that the Governor shall appoint and commission notaries public; that each such notary shall hold office for four years, and in order to be appointed one must possess the qualification of being twenty-one years of age or over, and a citizen of the United States and of the State of Missouri.

Section 11742 provides that a notary public, before entering upon his (her) duties, shall subscribe to an oath and file a bond. Thus, one being appointed and being commissioned a notary public, holds an office, with the powers and duties of administering oaths and taking acknowledgments.

"Women in Missouri have been licensed as attorneys at law by the Supreme Court. They have for years been recognized as eligible to hold office as notary public."  
State ex rel. Crow v. Hostetter, 137 Mo. 636, 1.c. 648.

The question for determination being, does the mere fact that a woman who is commissioned as notary public forfeit her commission by marriage?

We do not find any decisions of our courts on this question.

In Elizabeth Heights Realty Company v. Schaffer (Court of Chancery of New Jersey), 147 A. 541, 1.c. 542, the courts said:

"The affidavits relating to service of notices to redeem appear to have been taken before one Mabel Seibert, who, by such name, was commissioned a notary public of New Jersey. She was married on August 16, 1919. The jurat to the affidavits purporting to be proofs of service and nonredemption were signed by her as Mable Seibert Graff, notary public. In the absence of statutory authority the person commissioned as notary public under the name of Mabel Seibert was unauthorized to sign her name to jurats to affidavits as 'Mabel Seibert-Graff, Notary Public,' and consequently the purported affidavits must be regarded as a nullity. Women may be appointed and commissioned as notaries public (3 Comp.St. 1910, p. 3761, par. 211), but they can only act as such in their name as appointed and commissioned. I am constrained to consider that, if the Legislature contemplated the continuance of authority of a feme sole appointed notary public, after her marriage, legislation would have been enacted such as relates to women appointed and commissioned as masters in chancery and/or attorneys or counsellors at law."

The same case was appealed to the Court of Errors and Appeals of New Jersey, 158 A., 402, and that court overruled same, having this to say as concerning notaries public.

"The other point is that the affidavit itself was vitiated because the notary public who signed the jurat, and happened to be a woman, had married subsequent to being commissioned as an unmarried woman, and therefore (so runs the argument) was disqualified at the time of taking the affidavit from so doing. We consider that both these points are entirely without substance.

" \* \* \* However, it may be well to say with respect to the married notary that we are unable to follow the argument of counsel to the effect that where a married woman has been commissioned as a notary, she vacates that commission by marriage. In the absence of some statute in that regard, we should say that such a doctrine is unwarranted in law, especially in these modern days."

" \* \* \* This conclusion leads to a reversal of the decree and a dismissal of the bill so far as affecting the tracts now in dispute."

Section 11741, R. S. Mo. 1929, provides, in part, the following:

"Every notary public shall provide a notarial seal, on which shall be inscribed his name, the words 'notary public', the name of the county or city, if appointed for such city.  
\* \* \* No notary public shall change his seal during the term for which he is appointed."

We assume that the notary public in question had a seal, in accordance with the above section, i.e. had her name on such. You state that when she notarized these papers, after her marriage, she signed her maiden name, and/or the name in which she was commissioned.

## II.

In *Wilson v. Kimmel*, 109 Mo. 260, 1.c. 263, the court said:

"Although Mr. Bonney was an alien, and, therefore, did not possess the qualifications to hold the office of a notary public, still it does not follow that his acts as such officer are void. \* \* \* The law is well settled that

the acts of an officer de facto are valid so far as they concern the public or the rights of third persons who have an interest in the things done. Their official acts cannot be impeached collaterally.

" \* \* \* Here Mr. Bonney was duly commissioned a notary public, and he qualified by giving bond as the law required; he, therefore, had color of title to the office, and though he did not possess the qualifications to hold the same still he was a de facto officer, and his acts as such officer are valid. Any other rule would undo official acts, upon the validity of which the parties interested therein had and have a right to rely, and would produce the most disastrous results. The objection to the acknowledgment is, therefore, overruled."

Also in *Willimas v. Lobban*, 206 Mo. 399, l.c. 407, the court said:

"But even if timely objection had been made, we think there is no merit in the point. The official seal of the notary was attached to the deed and it is said in *Devlin on Deeds* (2 Ed.), section 501: 'An abbreviation of the official name of the officer taking the acknowledgment is sufficient. . . . The letters 'N.P.' are sufficient to show that the officer beside whose name they are written, is a notary public.' And we may add, especially where the officer, as in this case, certified that he affixed his official seal at his office, etc. And that seal shows he was a notary public."

In *Kansas City & Southeastern Railway Co. v. the Kansas City & Southwestern Railway Co. et al.*, 129 Mo. 62, l.c. 68, the court held:

"Neither of the points made are, in our opinion, sound, as legal propositions. The fact that a notary does not certify when his term will expire, nor where he lives, does not, in the least, destroy the effectiveness of the deed, to which he certifies an acknowledgment."



Corpus Juris, Vol. 46, p. 506, Art. 15, has this to say concerning the notaries de facto:

"Generally a person acting as a notary under color of authority with public acquiescence is held to be a notary de facto, and as to the public and third persons his acts are valid and cannot be attacked collaterally. The principle that ineligibility to hold an office does not prevent the ineligible incumbent, if in possession under color of right and authority, from being an officer de facto, with respect to his official acts, in so far as third persons are concerned, has been applied to one who is appointed and acts in good faith as notary, but who is ineligible or disqualified to act as such by reason of alienage, sex, or interest, or by acceptance of another office, even though his office as notary is hereby 'vacated' under the statute, or by reason of being an officer or stockholder in a corporation in violation of a statute; or one whose commission is defective, or who is holding over after expiration of his term, or who has failed to file his bond, take the oath of office, or otherwise comply with directory provisions of the statute; but in general no one can be a notary de facto without color of authority. It is well settled that a mere usurper is not an officer de facto; and the position depends upon a continuing exercise of the office, a single official act not being enough."

### III.

From the above and foregoing, it is our opinion that the acknowledgments executed by said notary in the name in which she was commissioned, but who was at the time married, are legal, valid and binding.

Respectfully submitted,

JAMES L. HORNBOSTEL  
Assistant Attorney General

JLH:ld

APPROVED \_\_\_\_\_

ROY McKITTRICK  
Attorney General

NEPOTISM: Under Section 13 of Article XIV of the Constitution,  
SCHOOLS: director who appoints relative related within the  
fourth degree forfeits office and teacher so elected  
cannot enforce contract against the district.

September 21, 1934



Mr. John A. Eversole  
Prosecuting Attorney  
Potosi, Missouri

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"Will your office please furnish me with  
an opinion relative to the provision of  
Section 13 of Article XIV of the Constitu-  
tion of Missouri, pertaining to the appoint-  
ment of a school teacher within the fourth  
degree of relationship to the school di-  
rector who makes the appointment.

"I desire to know whether or not a school  
teacher who has been employed by the school  
director, who is within the fourth degree  
of relationship can collect her salary as  
such teacher, or is the appointment void as  
a penalty for violation for part of the Con-  
stitution as well as that provision making  
the school director who makes such appoint-  
ments to forfeit his office. That part of  
the Constitution in connection with Section  
6529 of the Revised Statutes of 1929 makes  
this inquiry necessary. You will please  
furnish me with an opinion upon this ques-  
tion at your first convenience."

Section 13 of Article XIV of the Constitution of  
Missouri provides as follows:

"Any public officer or employe of this State  
or of any political subdivision thereof who

shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The Supreme Court in the case of State ex inf. McKittrick v. Whittle, 63 S.W. (2nd) 100, held that a director of a school district who violates the above constitutional provision forfeits his office; the court saying:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

To hold that the director forfeits his office and that the related appointee could take advantage of the illegal act of the director and receive the benefits therefrom would only correct half of the evil sought to be corrected by the people when they adopted the above constitutional provision. If the director could, by forfeiting his office, place upon the payroll a prohibited relative, then it would be possible to defeat the very purpose of the amendment by fraud and collusion. In many instances prior to the adoption of the amendment people sought to be directors simply for the purpose of placing their relatives in the schools as teachers and if the contract entered into between the board and the teacher could be enforced it would still be possible for directors to place their relatives upon the payroll of the district, even though they forfeited their office in so doing.

We, therefore, in construing the above constitutional provision and keeping in mind the evils sought to be remedied by

that provision, have steadfastly ruled that the contract entered into as a result of an illegal act of a director is void and unenforcible. Although this particular proposition has not, in connection with this constitutional provision, been decided by our courts, yet the law generally, in dealing with prohibitive provisions, upholds our view. In 13 C. J. 421, Section 352, it is said:

"Frequently a statute imposes a penalty for the doing of an act without either prohibiting it or expressly declaring it illegal or void. In cases of this kind the decisions of the courts are not in harmony. The generally announced rule is that an agreement founded on or for the doing of such a penalized act is void. In accordance with the view of Lord Holt in an old case; 'Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, tho there are no prohibitory words in the statute.' \* \* \* And it would seem that in all cases the true rule is one of legislative intent, and that the courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; \* \* \*."

Judge Napton quoted Lord Holt as above quoted in 13 Corpus Juris, and held as follows:

"The penalty inflicted by the act concerning Plats of Towns and Villages implies a prohibition against the sale of lots before the requisitions of the act are complied with, and the courts will not enforce a contract entered into against the spirit and policy of the statute."

In the case of Haggerty v. Ice Manufacturing and Storage Company, 143 Mo. 238, the Court says at page 247:

"Recurring to the petition, it shows on its face that plaintiffs contracted with defendant

corporation for the commission of a misdemeanor. \* \* \* The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to this suit where it finds them, unsanctioned by its favor and unaided by its process."

Section 6529, R. S. Mo. 1929, which you mention in your letter does not apply in this situation, as it applies to cities of the second class. While that section specifically provides that the person unlawfully appointed shall not draw any compensation, we believe that the same law applies regarding the interpretation of the constitutional provision, even though it does not expressly so provide.

It is therefore the opinion of this Department that where a director, in violation of Section 13 of Article XIV of the Constitution, appoints a relative related within the prohibited degree, he forfeits his office, and that the teacher so appointed cannot enforce her contract against the district, nor is she entitled to receive any compensation under the contract.

Very truly yours,

FRANK W. HAYES  
Assistant Attorney General

APPROVED:

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(Acting) Attorney General

WEIGHTS AND MEASURES. Right of county court to appoint scale inspector.

11-2

October 28, 1934.

Hon. John A. Eversole,  
Prosecuting Attorney, Washington County,  
Potosi, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of October 15th, 1934, such request being in the following terms:

"I have been requested by the county court of this county to find out what authority if any they have to appoint a scale inspector for this county. It seems that there are several pair of public scales around here which are used for weighing tiff and other minerals mined which have not been repaired for years and which are strongly suspected of being incorrect because of neglect."

I. No statute has been discovered creating or authorizing a county court to create the office of county scale or weights and measures inspector, and in the absence of such a statute a county court could not create such an office and appoint someone to fill it because county courts have only the powers which are expressly or impliedly conferred on them by statute.

"A county court possesses no powers except those conferred by statute, and, no statute having conferred the power it undertook to assume in the instant case, its action therein, \* \* \* is void." (State ex rel, and to Use of Broughton v. Oliver, 202 Mo. App. 527, 208 S. W. 112, 115 (1919) ).

II. If the scales are mine scales and if your problem is only concerned with coal, your question might be answered by R. S. Missouri, 1929, Section 13619, which provides in part as follows:

"The coal mine inspector of this state shall be ex officio inspector of weights, measures



2. Hon. John A. Iversole.

October 25, 1934.

"and scales used at coal mines, and he is hereby empowered and it shall be his duty to test the scales used to weigh coal mined in the mines of this state at least every six months, to ascertain whether or not such scales correctly measure the weight of such coal."

III. If the situation dealt with in your letter is broader than the provisions of such Section 13619, the only remaining method of dealing with such situation would seem to be by action by municipalities which would, of course, only cover scales within the corporate limits of such municipalities.

A. A state has the power to regulate weights and measures, to appoint inspectors of weighing devices and in general to enact any necessary provisions to enforce the honesty and correctness of such system.

"That the inspection and regulation of weights and measures are within the police power of the States, and laws passed by the Legislature for such inspection and regulation requiring dealers and traders to conform thereto, and for the appointment or election of officers or inspectors thereunder, are in the nature of police regulation and not repugnant to the Constitution of the United States or of this State can no longer be doubted."  
(Ex parte House v. Hayes, 237 Mo. 617, 636, 127 S.W. 305 (1910) affirmed 219 U. S. 270 (1911) ).

Such power can be delegated by the State to cities therein.

"As a police regulation, for the purpose of protecting the public and consumers from fraud and imposition in their purchase of commodities, it is recognized by the courts that the legislative authority has the right to regulate weights and measures and delegate that authority to municipal corporations so that the latter, in so far as they exercise police powers, may regulate weights and measures."  
(Stegmann v. Wecke, 279 Mo. 140, 148, 214 S.W. 137 (1919) ).



B. Where such power is expressly delegated by the state to a city the city can, of course, appoint a scale inspector.

Sylvester Coal Co. v. City of St. Louis,  
130 Mo. 323, 32 S. W. 649 (1895);

City of St. Charles v. Elsner,  
155 Mo. 671, 54 S. W. 291 (1900)  
(City of the third class).

C. Even if such power is not expressly delegated to a city, it will be implied from other powers as is demonstrated by the case of City of Lamar v. Waldman, 57 Mo. App. 507 (1894). The court stated the facts on page 510 as follows:

"The city of Lamar is a city of the fourth class. The statute provides that cities of the fourth class have 'power, by ordinance, to establish and regulate markets; and to pass such other ordinances for the regulation and police of said city, and commons thereto appertaining, as they shall deem necessary; and to pass such ordinances not inconsistent with its provisions, as may be expedient in maintaining the peace and good government, health and welfare, of the city, its trade, commerce and manufactories, and to enforce the same by fine and penalties and forfeitures, not exceeding \$100. R. S. sec. 1582. The city passed an ordinance providing for the weighing of hay, coal and other articles and defining the duties of city weigher."

The court held the ordinance valid except as to a provision irrelevant to the present inquiry and said in the course of its opinion:

"The statute, already quoted, conferred upon the city ample power to 'regulate markets' by ordinance. Without the special grant we think the general welfare clause conferred all the power needed for that purpose."

Ordinances regulating markets have been sustained as being reasonable and conducive to health and good government of municipalities. The power to pass an ordinance regulating weights is incident to and part of the grant to 'regulate markets.' It is therefore strictly a police power. It is exercised for the purpose of affording protection to the inhabitants of a city against false and fraudulent weights in the sale and exchange of commodities."

From the ruling in this case it would seem that at this time a court would hold that such a power should be implied to a city of the fourth class such as Potosi to appoint a scale inspector under R.S. Missouri, 1929, Section 7018, which provides as follows:

"The mayor and board of aldermen of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the Constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same."

IV. If the above courses of action should not be adequate and available, a further method might be invoked through the statutes imposing penalties and forfeitures on sellers who do not give correct weight or on persons keeping scales who knowingly do not weigh certain things correctly on such scales. We refer you to the following statutes:

"Any person who shall knowingly keep any measure or weights, and buy or sell any commodity whatsoever by such weights or measures as shall not correspond with the weights and measures deposited in the clerk's office, shall, for every such offense, forfeit and pay to the party injured ten dollars, to be recovered by civil action before any justice of the peace of the county." (R.S.No.1922, Sec. 14484)

"Any person or persons who keep any public or private scales, and weigh for themselves or others, mineral, lead, zinc, coal and other ores, who knowingly take more than ten hundred pounds for one thousand or more than twenty hundred pounds avoirdupois for one ton, or fail to correctly balance his or their scales before weighing, or shall fail or neglect to account for each fractional part of a thousand or ton, as the case may be, in weighing any of the ores herein named, which ores are bought and sold by the thousand or ton, shall, for every such offense, forfeit and pay to the party injured a sum not less than twenty dollars nor more than fifty dollars, to be recovered by civil action before any justice of the peace in the county." (R.S.No.1922, Sec.14490)

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In conclusion, it is our opinion that a county court would have no authority to appoint a scale inspector for the county.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

COUNTY BUDGET ACT: County warrants should be paid according to protest and classes should be paid in order of protest.

12-27  
November 30, 1934.



Mr. Sidney Everett,  
Treasurer of Laclede County,  
Lebanon, Missouri.

Dear Sir:

This department is in receipt of your letter of November 1 wherein you request the opinion of this department as to the following facts:

"A question regarding the payment has come to my mind. Under the budget system we have five classes of warrants. Some warrants from each class are issued and protested each month.

When paying time comes, should these warrants be paid by class or by protest, as you understand they are all paid out of the same fund. I want to know whether I shall pay class one first, then two, etc. or should I pay all classes as protested?"

As we construe the Budget Act, it did not change the financial structure of the county in its entirety. It was evidently the intention of the Legislature to compel counties to systematize the business of the county in such manner that an accurate check could be had of its financial condition at all times, besides the economic feature which might be involved.

Section 22 of the County Budget Act (Laws of Mo. 1933, p. 351) provides:

"All laws or parts of laws and expressly sections 9874, 9985, and 9986 in so far as they conflict are hereby repealed."

We cannot discern any conflict between the new County Budget Law and Sections 12139 and 12140, R.S. Mo. 1929, nor are they impliedly or expressly repealed. Section 12139 is as follows:

"He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same is presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: Provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated."

The above section sets forth the manner in which the Treasurer shall keep his books in regard to warrants. Section 12140, R.S. 1929 provides for the manner of payment of warrants and is as follows:

"No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current ex-

penses of the county, as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment: Provided, however, that nothing herein contained shall prevent the treasurer from receiving from the collector all scrips and warrants lawfully received by him in the payment of county tax: Provided, further, before the treasurer shall receive such scrips and warrants, the collector shall make out a list of such scrips and warrants, under oath, specifying the number and amount thereof, the date when received, and from whom received; and said list shall be filed and preserved by the treasurer."

#### CONCLUSION

In view of the foregoing sections, it is the opinion of this department that by the terms of the Budget Law, wherein it is said that the priority of the classes should be sacredly preserved, all warrants in Class 1 should be paid first according to their order of protest, and the payment of the other classes should follow in like order.

We are further of the opinion that Section 12140, supra, was not repealed by the new Budget Law in its entirety, but so far as it conflicts with the priority of classes as set forth in the Budget Law, the terms of the Budget Law should be followed and warrants paid accordingly.

Very truly yours,

OLLIVER W. NOLAN,  
Assistant Attorney General

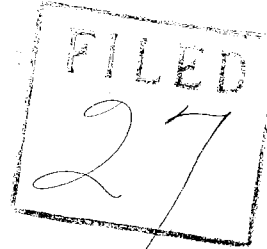
APPROVED:

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ROY MCKITTRICK,  
Attorney General

COUNTY PRINTING. Charges for printing election notices should be computed under Sec. 13773, R.S. Mo. 1929

1-31  
January 27, 1934.



Hon. Roth H. Faubion,  
Prosecuting Attorney,  
Barton County,  
Lamar, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of December 8 relative to the payment of the County Court of your county for printing of the Notice of Special Election of August 19, 1933. Your letter is as follows:

"I am mailing under separate cover copies of the Lamar Democrat and the Lamar Republican. A controversy has arisen between the Lamar Republican and the County Court of this county over the publication notices of the election held August the nineteenth regarding the Repeal of the 18th Amendment. The Lamar Democrat charged \$7.50 while the Republican charged approximately \$45.00. The Republican claims that the Democrat's publication was illegal because of its size and the size of type used, so far the court has refused to pay the demand of the Republican. I would like to have your opinion as to whether under the circumstances either or both are legal and whether or not the seemingly exorbitant demand of the Republican should be paid.

Also in the event of a strictly fee office is it permissible for the office holder to employ a member of his family such as Recorder?"



In order to intelligently answer your question, it would be necessary for us to have a technical knowledge of the terms and measurements used by printers; unfortunately, we do not have that knowledge. The question, however, should be decided by Section 13773, R.S. Mo. 1929, which is as follows:

"When any law, proclamation advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be published in any newspaper for the state, or for any public officer on account of or in the name of the state, or for any county, or for any public officer on account of, or in the name of any county, there shall not be allowed for such publication a higher rate than one dollar per square of two hundred and fifty ems for the first insertion, and fifty cents for each subsequent insertion; and for fractional squares and parts of squares in the same proportion: Provided, that in estimating, measuring and calculating the number of squares or parts of squares, the matter contained in said law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice shall be estimated, measured and calculated as if set 'solid' or without spacing between the lines, and the total number of ems shall be ascertained by multiplying the number of ems per line of the type used by the number of lines printed. Provided, however, that where any law authorizing and requiring the publication of any such law, proclamation, advertisement, nominations to office, proposed constitutional amendments or other questions to be submitted to the people, order or notice, shall require the use of a type having a body larger than eight point, or more than one size of type, or the use of any emblem, or the spacing of the lines so as to leave a blank space between the lines, said printing shall be paid for by the inch of space used, single column of 13 ems pica wide, which price per inch shall not exceed the rate of one dollar per inch, single column of 13 ems pica wide, for the first insertion, and fifty cents per inch for each subsequent insertion. When any law, proclamation, advertisement, nominations to office, proposed constitutional amendments, or other questions to be submitted to the people, order or notice, shall be required by law to be published in any newspaper, the rates herein specified shall prevail, and all laws or parts of laws in conflict herewith, except sections 13777, 13778 and 13779, R.S. 1929, are hereby repealed."

January 27, 1934.

The next section, to-wit, Sec. 13774, R.S. Mo. 1929, makes it the duty of the County Clerk to procure the best rates possible. Sec. 13774 provides:

" In procuring the publication of any law, proclamation, advertisement, order or notice, as in the next preceding section mentioned, the public officers shall accept of the most advantageous terms that can be obtained, not exceeding the rates limited in the preceding section."

In determining the rates to be paid for such advertising, the matter would depend largely on the original contract made by your County Clerk as to the amount of space and the form of the ballot as to whether or not the charges of each paper are proper or improper. If the County Clerk made an agreement with the Lamar Republican to print the election notices and his charges for the same do not exceed the amount as set forth in Section 13773, supra, then, of course, the charges are legal.

Under Sec. 13774, supra, the County Clerk has broad discretionary powers in the letting of such printing. In the case of *State v. Westhues*, 9 S.W. (2d) 612, a case in which a similar question with respect to the Secretary of State was decided, the Court said:

"Respondent did not find that the secretary of state was about to exercise his discretion fraudulently, so that no discretion would, in fact, be exercised by him, but quite obviously undertook to substitute his judgment for that of the secretary of state as to what considerations should control that officer in the exercise of his official discretion. This the trial court had no power to do. The secretary of state is an officer of a department of the state government, separate and distinct from the judicial department. In the absence of fraud, the exercise of his official discretion cannot be controlled by the judicial department. The legislative department may lay down rules for the guidance of the secretary of state in the performance of this duty, if so advised. Certain it is that the circuit court of Cole County had no power to interfere in the exercise of the discretion intrusted to the secretary of state upon the facts contained in the record before us, which record is stipulated here as the record before respondent when he entered the judgments complained of."

As to the computation of the charges, we suggest that the standard table of type measurements, showing the number of ems to the inch of the various sizes of type be used. According to this table

January 27, 1934.

there are:

6 Point	312 ems to 13 in column inch
8 "	176 " " " " "
10 "	112 " " " " "
12 "	78 " " " " "
14 "	57 " " " " "

Thus, by measuring the number of inches of the various sizes of type, the total number of ems can be readily ascertained. The Lamar Democrat's publication shows:

Space	No. Lines	Type	No. Ems
2 1/2"	15	12 Pt.	195
1-5/8"	10	10 "	150
5-3/4"	312 ems to in.	6 "	1794
Total			2145 Ems

This reduced to to squares would be 8.145 squares. The rate according to Sec. 13773, supra, is \$1.00 per square of 250 ems for the first insertion and 50¢ per square for each subsequent insertion.

The above computations were made by one familiar with the terms and measurements of printers; however, we are not vouching for the correctness of same or recommending especially that it be followed. As stated above, this is merely a suggestion.

The County Court, in the absence of any special contract made by the County Clerk, should have some one familiar with printing rates to compute the same according to Sec. 13773, supra, and make payment accordingly. The matter is not one which presents to this office a purely legal problem and should really be decided by your County Court.

With reference to the last paragraph of your letter requesting an opinion as to the propriety of an office-holder having in his employ a member of his family when the office is a fee office, we are enclosing copies of two opinions bearing on this question, one written to the Honorable Elliott M. Dampf, Prosecuting Attorney of Cole County on October 4, 1933, and the other to Hon. W.D. Ross, Circuit Clerk, Buffalo, Mo. No doubt, these opinions will give you the information you desire.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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Attorney General.

EMERGENCY RELIEF FUNDS:-No provision in Article 4 of Chapter 90, R. S. Mo. 1929, which prohibits the County, if they so desire to disburse a portion of their relief funds through the Federal Relief Committee.

3-5

February 26, 1934.



Mr. Eugene A. Farris,  
Prosecuting Attorney Ray County,  
Richmond, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would like to have your opinion upon the following question:

'Has the County Court the right to turn over all their pauper funds to the Federal Relief Committee for disbursement?'

As I told you in our telephone conversation, a lady representing this Committee has demanded of our County Court that they turn over to our local relief committee their pauper funds, which will amount to about \$500.00 per month, so that the committee might disburse the same.

I noticed one paragraph in the law (Federal) or at least it was contained in a pamphlet, wherein it was stated that 'all support for widows and orphans, etc., would have to be taken care of through the present County and Municipal Boards.'

There has been considerable complaint here about the way this relief money has been disbursed, and our Court does not feel like turning this amount of money over to them. They also threaten that in the event the County does not turn this money to them, all Federal Relief will be withdrawn from this County, what do you know as to that?"

The provisions dealing with the support of the poor for counties are found in Article 4 of Chapter 90, R. S. Mo. 1929. Section 12950 provides that the poor shall be supported by the County in which they are inhabitants. Section 12951 defines who are poor persons and Section 12952 defines who are inhabitants. Section 12953, provides as follows:

"The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any justice of the peace of the county in which any person entitled to the benefit of the provisions of this article resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

Section 12954, provides as follows:

"The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

Then follows several sections dealing with the allowance for funeral expenses, purchasing of land, erection of poorhouses, etc.

Section 12961, R. S. No. 1929, provides as follows:

"The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

We do not find anything in this Chapter which would prohibit the county court from disbursing their money for the support of the poor through the Federal Relief Committee. Section 12961 provides that the money shall be drawn out of the treasury upon the warrants of the county court, but we do not interpret that section to mean that the money may not be drawn out of the treasury on the warrants of the county court to be distributed by the Federal Relief Committee. Of course, we do not wish to be understood as ruling that this Committee would have any jurisdiction over the disbursement of funds for those who are housed at the County poor farm. The statute expressly provides that the poor farm shall be under the jurisdiction of a superintendent, but we find no provision in the statute which would prohibit county courts from using the Federal Relief Committee as a medium through which it might disburse funds for the benefit of the poor where they are not residents of a poorhouse.

We do not find any provision in the Emergency Relief Act of 1933 which provides that the support of widows and orphans shall be through the present county and municipal

February 26, 1934.

board. There may be some such regulation issued by those in charge of this relief. While we do not know by what authority the statement is made, we have been informed that one of the Federal requirements is that in the event the County does not turn its relief money over, the Federal Relief will be withdrawn from the County. This is a matter, we understand, of purely Federal regulation.

We are of the opinion, therefore, that there is no provision in Article 4 of Chapter 90, R. S. Mo. 1929, dealing with the support of the poor by the County which would prohibit it from disbursing its relief money through the medium of the Federal Relief Committee. This relief money, of course, does not apply to money for the support of poor farms and other County institutions.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

NEPOTISM:- Member of Board who does not exercise his right to vote in favor of prohibited relative will not forfeit office in the absence of fraud or collusion.

4-20  
April 12, 1934.



Mr. Charles Farrington,  
Assistant Prosecuting Attorney,  
Springfield, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Inquiry has been made into our office as to whether or not it would be in violation of our constitutional nepotism law for a member of a rural school board comprised of three members to be on the Board at a time when a first cousin of his was appointed as a teacher for the Board.

He says he will not vote for the man, and is personally against him and wants to know if it would remove him from the Board for the other two members to so vote."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The Supreme Court in construing the above constitutional provision in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, says at page 101:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or other-



April 12, 1934.

wise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

The constitutional provision makes it illegal for a member of a board to vote in favor of a relative within the prohibited degree. In the Whittle case above the Supreme Court declares that it is the exercising of his right to name or appoint that is in violation of the Constitution. If, as you state in your inquiry, the board member does not vote for his cousin, and, as a matter of fact, votes against him, then he is not guilty of violating the above constitutional provision because he has not exercised his right to vote in favor of the relative. To hold otherwise would make it possible for the other members of the board to elect the relative of an unfavored member of the board and thereby cause him, over his objection and protest, to forfeit his office. We do not believe that this was the intention of the constitutional provision.

However, if the related member of the board should, by collusion or fraud with other members, bring about the election of the relative while ostensibly taking the position of being opposed to him, then we believe that upon a showing of such fact the director might forfeit his office. We assume, however, the director about which you inquire is acting in good faith, and if so, the mere fact that a relative of his is elected by the other members when he does not participate in the election would not cause him to forfeit his office.

It is therefore the opinion of this Department that where a director, who is related within the prohibited degree to a teacher who is employed by a board of which he is a member, does not participate in the selection of that teacher, he will not forfeit his office because the other members of the board vote to employ the teacher.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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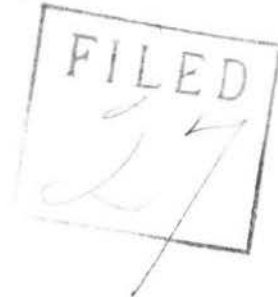
Attorney General.

FWH:S

ESCHEATS: Foreign administrator not entitled to Escheat Fund.

June 30, 1934.

Hon. Chas. Farrington  
Assistant Prosecuting Attorney  
Greene County  
Springfield, Missouri



Dear Mr. Farrington:

This is to acknowledge your letter  
of June 23rd as follows:

"In regard to the above-mentioned matter, I wish to procure an opinion and advice from you as to what our conduct in it shall be due to the fact that the State of Missouri and your office is more vitally interested in it than ours.

"In 1918 or 1919, an estate was probated in our Probate Court and it consisted in the proceeds of some war risk insurance. Marve Gann was a distributee of that insurance and entitled to about \$1,000.00 of the estate. It seems that Marve Gann had lived in Arkansas, but shortly after the 1918 or 1919, he went away leaving his wife and family and went to north Oklahoma, where he lived a life of a hermit and finally disappeared. In due course, the estate was ended up and due to the fact that the whereabouts of Marve Gann was unknown, he could not be reached, this fund escheated to the State of Missouri, and was so paid by our Probate Court to the Secretary of the Treasury. Marve Gann has been unheard of and only upon rumor alone is it believed that he con-

tracted pneumonia or some other fever in this mountain home of his and died. There has been no one produced that has actual personal knowledge of his death.

"Now, a couple of Oklahoma lawyers have come in representing the heirs and next of kin of Marve Gann, and request that the money be paid over to them. Our statutes, as you probably know, on escheats provides that any time within twenty-one years, a distributee, whose part has escheated or his personal representative, may come in and by petition, petition the Probate Court, where this escheat took place, and upon satisfactory proof, the Probate Court issues an order to that effect, which order is of the effect of a warrant and which the State Treasurer or Auditor must honor and pay out. So it is most essential that the proper procedure be had in the Probate Court here because it seems from the statutes that the duty is of the State with an opinion to pay out is mandatory. It is the duty of the Prosecuting Attorney in any county where such a proceeding is filed to represent the State, and file an answer.

"Now, what has happened is that the two lawyers have come to the County wherein Marve Gann is supposed to have died, and had letters of administration issued in Oklahoma appointing one W. C. Duke as administrator there. He has posted bond, as we understand it, with the Probate Court there. Now, he comes into Missouri and files a petition setting up those facts and asking for an order of the Court for the money which is escheated to the State. We have asked for time in order to fully investigate the law and get advice from your office in the matter, and it comes up on the 9th day of June, 1934, and our two legal queries, which appear to the writer, is (1) whether or not an administrator appointed in Oklahoma would have any capacity to bring a lawsuit in the Probate Court of Greene County. I believe that the answer to the same would be negative; the administrator being an officer generally only of the State of appointment, and

would have no representative capacity in Greene County. The writer feels certain that this is the rule as to suits brought by an administrator, but there may be a difference in this case as it is not strictly a lawsuit. And (2) if you are in agreement with our office upon this latter conclusion, do you not think it would be necessary that an Ancillary Administrator be appointed here to bring this procedure, and to make a bond to the Probate Court of Greene County, which would protect the County in case Marve Gann should later appear and demand his share?

"Please let us have your advice in the matter as soon as possible and any directions that you may have, for we feel that since your interest is far greater than ours that any steps should be by and with your consent."

We agree to the conclusion reached by you in this matter as stated by the facts contained in your letter. Chapter 3 and Amendments, R. S. 1929, relates to escheats. Section 623 of said chapter provides:

"Within twenty-one years after any money has been paid into the state treasury by an executor or administrator, assignee, sheriff or receiver, any person who appears and claims the same may file his petition in the court in which the final settlement of the executor or administrator, assignee, sheriff or receiver was had, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the prosecuting attorney, who shall file an answer to the same."

Section 624 of the same chapter provides:

"The court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim, but with-

out interest or costs; a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant."

From the above it will be noted that the Court, in order for the State Auditor to issue his warrants on the State Treasurer, must ascertain two facts from the claim presented: (1) that the person is dead; (2) that the heirs or persons applying for the fund are rightfully entitled to same.

Section 624 places the burden upon the Court to examine the claim and the allegations and proofs. Section 623 provides that the person must file a petition in the court and must state the nature of his claim.

Your letter states that one W. C. Duke was appointed an administrator in Oklahoma and was petitioning the Probate Court in Missouri for this fund. In other words, the petition filed in this case is brought in the name of an officer of the State of Oklahoma, and the question arises as to whether a foreign administrator has any title or right to the money? Our answer is in the negative.

In Hartnett v. Langan, 232 S.W. 403 (Mo.Sup.) 1.c. 409, the Court said:

"V. Nor were the plaintiffs entitled to any allowance for attorney's fees or expenses for bringing and prosecuting this suit. It is true the plaintiffs were obliged to bring the suit in order to secure a valid release of their property from the lien of the deed of trust. A foreign administrator has no title to nor right to collect or receipt for a note from citizens of this state and secured upon property in this state. Crohn v. Bank, 137 Mo. App. 712, 118 S.W. 498; Richardson v. Busch, 198 Mo. 187, 95 S. W. 894, 115 Am. St. Rep. 473; Naylor v. Moffatt, 29 Mo. 126; McCarty v. Hall, 13 Mo. 480; Bartlett v. Hyde, 3 Mo. 490; State ex rel. v. Bunce, 187 Mo. App. 614, 615, 173 S. W. 101.

"Schlaflly, not deriving his powers as trustee from the will of Tighe, the testator, which made no provision for any such trustee, but simply from the order of the circuit court of Clinton County, Ill., had no more title or power to collect and receipt for the balance due on the note and deed of trust in question than would a foreign administrator. The power of both is derived wholly from the laws of the state where they are appointed, and those laws do not operate beyond the limits of such state. Curtis v. Smith, 6 Blatchf, 537, Fed. Cas. No. 3,505; Scudder v. Ames, 89 Mo. loc.cit. 522, 14 S. W. 525; McPike v. McPike, 111 Mo. loc. cit. 225, 226, 20 S.W. 12; and other authorities supra. \*\*\*\*\*"

Yours very truly,

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James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH/afj



COUNTY WARRANTS: There is no conflict in the County Budget Law and Sections 9911 and 12140, R.S. Mo. 1929 and collector is not forbidden to accept county warrants in payment of taxes.

9-29 September 27, 1934.



Hon. Charles Farrar,  
Prosecuting Attorney,  
Buffalo, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of August 31, 1934 requesting an opinion as to the validity of county warrants in payment of taxes. Your letter is as follows:

"Section 9911, R.S. Mo. 1929 authorizes collectors to accept county warrants in payment of taxes under certain conditions, and Section 12140, R.S. Mo. 1929 provides that the county treasurer shall accept and give credit to the collector for county warrants accepted in payment of taxes.

Did the County Budget Law page 340 Session Acts 1933 repeal the sections cited above?

Under the County Budget Law is the collector forbidden to accept county warrants in payment of county taxes?"

On October 17, 1933 this department rendered an opinion to the Honorable M.E. Montgomery, Prosecuting Attorney of Scott County, Missouri in which it was held that county warrants are acceptable in payment of taxes. We are enclosing herewith a copy of this opinion, as it bears on your ultimate question, i.e., whether or not the County Budget Law repeals certain sections mentioned in your letter.

On October 26, 1933 we rendered an opinion to the Honorable H.B. Schroeder, Treasurer of Crawford County, Mo., also relating to the acceptance of county warrants in payment of taxes.



In this opinion Section 12140, R.S. Mo. 1929, mentioned in your letter is discussed.

As to your precise question as to whether or not these sections are in conflict with the new Budget Law, we must be guided by the law itself. Section 9, page 346, Laws of Mo. 1933 is as follows:

"In all counties in this state, now or hereafter having a population of more than 50,000 inhabitants, according to the last federal decennial census, the presiding judge of the county court shall be the budget officer of such county, or the county court in any such county may designate the county clerk as budget officer. The budget officer shall receive no extra compensation for his duties under this Act, and Sections 9 to 20 inclusive of this Act shall apply to such counties."

Section 1, page 340, Laws of Mo. 1933 reads in part as follows:

"This act may be cited and quoted as the County Budget Law. All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive, of this act."

Your county being of less than 50,000 inhabitants, is therefore guided by the first eight sections of the Budget Law. Section 9, supra, is applicable to counties of more than 50,000 inhabitants, and sections 9 to 20 inclusive apply solely to such counties, there remaining two sections which are applicable to all counties, i.e., Sections 21 and 22, p. 351. Section 22 is as follows:

"All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed."

You will note that none of the sections relating to county warrants in payment of taxes, or the duties of the treasurer in accepting warrants are expressly repealed.

From a careful reading of the first eight sections of the Budget Law we are unable to discern any conflict by the terms of the Budget Law which would prevent the county collector and the

Sept. 27, 1934.

treasurer from carrying out their respective duties under Sections 9911 and 12140, R.S. Mo. 1929. It is therefore the opinion of this department that the County Budget Law does not conflict with or repeal said sections and that the collector is not forbidden to accept county warrants in payment of county taxes.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

TAXES:- An individual may be doing business as a merchant  
MERCHANTS AND of a peddler or both at the same time, depending  
PEDDLERS:- upon the manner in which his business is conducted,  
and may be required to pay merchant's tax or secure  
secure peddler's license, or both.

October 2, 1934.



Mr. Roth H. Taubion,  
Prosecuting Attorney,  
Lamar, Missouri.

Dear Sir:

We are acknowledging receipt of your letter  
in which you inquire as follows:

"'A' who is a merchant in Golden City, Missouri also runs a truck to the country. In this truck are groceries etc. He runs the truck himself, takes orders and delivers the goods on the same trip. Provided he pays his county and city merchant's tax should he be compelled to also pay a peddlers license? A part of his deliveries are in response to orders received through the mail and by telephone.

"If 'A' should close his store and take out the peddlers license, should he then be compelled to pay the county and city merchants tax? In this latter case he would have no other business other than his truck."

Section 13312, R. S. Mo. 1929, defines who are peddlers and provides as follows:

"Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs and cheese, by going about from place to place to sell the same, is declared to be a peddler."

In the case of State v. Holmes, 63 Mo. App. 178, the defendant was convicted for not having a peddler's license, and the Court says:

"The case showed that he traveled from place to place in a two horse vehicle and sold kitchen cabinets, which were manufactured by him in this state."

The Court in the above case held that the man was a peddler and should have had a peddler's license. Section 10075, R. S. Mo. 1929, declares who is a merchant and provides as follows:

"Every person, corporation or co-partnership of persons, who shall deal in the selling of goods, wares and merchandise, including clocks, at any store, stand or place occupied for that purpose, is declared to be a merchant."

Under Section 13312 a person who sells goods, wares and merchandise by going from place to place is a peddler. Under Section 10075 a person who has a fixed place of business or store from which he sells goods, wares and merchandise is a merchant. Whether a person be a peddler or a merchant depends upon his method of doing business. A person may be engaged at the same time in the business of a merchant and in the business of a peddler, all depending upon whether or not he does business in the two distinct ways covered by the statute. In St. Louis v. Wietzel, 130 Mo. 600, it was held that if a person carries on different occupations that it was proper to impose a license tax upon each occupation. The Court says at page 619:

"And, if different occupations are pursued, it is competent to impose a license tax upon each occupation. Of this there can certainly be no dispute, and the contention can not therefore prevail that a license tax paid on a wagon for the general use of the streets, can be converted at the will of the licensee to pursue with that wagon any other occupation or trade, etc. As well might a merchant licensed under the provisions of section 6919, Revised Statutes, 1889, assume the role of an auction-

eer, section 678, Revised Statutes, 1889, and (apart from the privilege conferred by section 693) claim, because he had taken out a license on the stock of goods in his store as a merchant, that, therefore, the state had no further concern in the matter, and he might choose the manner in which he might sell his goods over the counter, whether by public or private vendue, and then if the state interfered with his operations as auctioneer vociferously assert that the law was arbitrary, unjust, oppressive and unconstitutional."

As we view the situation outlined in your letter it is possible that Mr. "A" could be required to pay a county and city merchant's tax for the business he operates as a merchant, and if he is also engaged in carrying on the business of a peddler he might also be compelled to take out a peddler's license from the county. Of course, as a merchant he would be entitled to sell his goods and deliver them wherever the purchasers might reside, but if, on the other hand, he loads his truck with merchandise and goes from place to place throughout the county and sells wherever he finds a willing purchaser, he may also be doing business as a peddler and if so he cannot escape paying the peddler's license, even though he might also be paying a merchant's license.

In answer to your second inquiry, if Mr. "A" should close his store then he could not be compelled to pay a county and city merchant's tax, but if he carries on the business of a peddler then he would be required to take out a peddler's license.

It is therefore the opinion of this Department that even though Mr. "A" is engaged in the business of a merchant and pays a county and city merchant's tax, he may also be required to take out a peddler's license if he is also engaged in the business of a peddler as defined by the statute; that if he is not engaged in the business of a merchant but is engaged solely in the business of a peddler he is required to take out a peddler's license and would not be required to pay a county or city merchant's tax. The question of whether the individual is doing business as a merchant or as a peddler, or both at the same time, depends upon his manner of doing business as established by the facts.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

SOLDIERS' BONUS - - Bona Fide resident entitled to bonus - - When?

1-24  
January 22, 1934.



Mr. R.T. Finks  
Chief Clerk  
Adjutant General's Office  
Jefferson City, Missouri

Dear Sir:

Your letter requesting an opinion from this office was as follows:

"FRANK PATE stated in his claim for Missouri Soldiers' Bonus that he was born in Cloverport, Kentucky, October 8, 1895; that he enlisted in the army August 12, 1915, at Jefferson Barracks, St. Louis, Missouri; that at the time of his enlistment his address was 3907 N. 25th St., St. Louis, Missouri, that he was a laborer by occupation and was not employed at the time of his enlistment.

He further states that he came to this State January 1, 1915, and resided here until the date of his enlistment on August 12, 1915; that his mother was deceased and his father resided at Cloverport, Kentucky, at the time of his enlistment; that he has resided in Missouri since his discharge from military service.

The claimant was a minor at the time of his enlistment - being only 19 years old, his parent residing in Kentucky, and only lived in Missouri seven months before entering service.

This claim has been disallowed because the claimant was not a bona fide resident of Missouri at the time he entered military service.

It is requested that this office be furnished an opinion as to whether the above named veteran was a bona fide resident of Missouri at the time of his enlistment."

Article 4, Section 44b of the Missouri Constitution provides as follows:



January 22, 1934.

"The General Assembly shall have power, for purposes of paying to each bona fide resident of the State of Missouri who served honorably in the military or naval forces of the United States of America at any time between the sixth day of April, nineteen hundred and seventeen, and the eleventh day of November nineteen hundred and eighteen \* \* \* provided no person shall be entitled to receive the bonus herein provided who was not a bona fide resident of the state of Missouri at least during the twelve months prior to the sixth day of April, nineteen hundred seventeen, or who has received a state bonus from any other state in the Union."

The applicant should submit proof of his claim. That is to say that under the constitution and law of this State, if he be a bona fide resident of this State at least during the twelve months prior to April 6th, 1917, as he claims he was, he is entitled to a bonus. The whole question involved in your query is simply this: When a soldier who became a resident of Missouri on January 1, 1915, and resided in Missouri until his enlistment on August 12, 1915, and continued to reside in Missouri after his discharge, should any of the time be included in computing the year of bona fide residence prior to April 5, 1917, that said soldier spent in the service after his enlistment.

Bona fide residence is to be determined objectively by the actions and conduct of the claimant, as well as subjectively by the assertion of facts in his claim. Bona fide residence is a matter of intention, on part of the claimant.

It is the opinion of this office in the instant case, that this soldier's time in the service, starting August 12, 1915, and ending April 6, 1917, should not be considered as negating his legal residence in Missouri, which he claims started on January 1, 1915, merely because such time was spent as a soldier away from his residence, and in the service of his country, and that upon proof of residence in Missouri for one whole year prior to April 6, 1917, this claim should be allowed. Proof of residence should be established in the statutory method.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED;

ROY McKITTRICK..



BLIND PENSIONS - Method of Application for.

February 9, 1934. 2-17-34



Missouri Commission for the Blind,  
3858 Westminster Place,  
St. Louis, Missouri.

Attention: Miss Marie M. Finan, Pension Secretary.

Gentlemen:

A request for an opinion has been received from you under date of October 4, 1933, such request being in the following terms:

"Recently we have received several applications filed by applicants before notary publics, in place of the probate judge of the county in which they reside.

These applications have been forwarded to us by the probate judges and by the applicant, and in one instance the probate judge forwarded the application to us which had been filed before a notary and sent in to him, and the judge requested us to advise him how to proceed.

We referred the judge to section 8836 of the pension law, which provides that - "any person who desires the benefits of this article shall apply to the judge of the probate court within his or her county or city or to the Commission for the Blind, who, if satisfied that the applicant comes within the provisions of this article, shall grant to the applicant a certificate of such fact and the certificates granted by the probate judges shall be certified to the Missouri commission for the blind at its office in St. Louis, Missouri, which shall consider the merits of such application and if approved by the commission, it shall certify same to the state auditor. All pensions payable under this article shall begin on the date of the filing of the application therefore before the probate judge of the commission, as may be."

We further advised the judge that we continually received requests for pension applications, and we had advised in each instance that we were not permitted to forward applications to individuals, and have suggested that the applicant call on the Probate Judge of his or her county and file an application. Our predecessor followed this plan, and it has worked out very successfully.

Our interpretation of the law is, that the applicant must appear personally before the probate judge or the duly authorized agent of the Missouri commission for the blind at its St. Louis office

February 9, 1934.

in order to file an application.

All applications filed before the commission at our office are filed before the writer, it being one of the duties of the pension secretary to accept such applications.

We are attaching hereto copy of application used when the applicant files with the probate judge, and our interpretation of the certificate of probate judge attached to this application is that the applicant must appear before the judge, before the application is acceptable to the commission.

We are also attaching a copy of application used when the applicant appears at our office, and our interpretation of the certificate attached to this application, is that the applicant must personally appear at the office of the commission before the commission's authorized agent.

On September 15, 1933, we received an application in the name of H. J. Robinson, Pike County, subscribed and sworn to before L. Edgar Estes, a notary public, copy of which application is enclosed herewith.

We wrote the applicant that as the law provided that any person desiring to obtain the pension should apply to the judge of the probate court within his or her county, we could not accept or act upon an application filled out before a notary, and suggested that the applicant appear before the probate judge of Pike County and file his application, to which we received a reply from Mr. Estes under date of September 29, 1933, taking exception to our attitude in the matter and stating that the law provides 'that the applicant shall apply to the judge of the probate court or to the commission for the blind, and as the party would probably have to be examined by the commission before the certificate of the probate judge would be approved, I thought it best to have him apply directly to the commission'.

Mr. Estes further states the application was not filed before him as a notary, he only took the affidavit as a notary public, that the applicants statements and answers to the questions were true.

As stated above, we have had several cases recently where the applications have been secured by applicant from the probate judge, filled out by some notary and notarized, and we have refused to accept them. We will therefore, greatly appreciate it if you will give us a ruling in this matter. If, we are going to accept applications filled out by notaries in this manner, and without having the applicant appear before the probate judge or the commission, it is our opinion we will be swamped with applications from ineligible applicants.

February 9, 1934.

We are most particular before accepting applications in this office that the applicant is eligible, particularly from a vision standpoint, and we are continually asking the cooperation of the probate judges to, as stated in their certificate 'inquire into the merits of the application, and be satisfied the applicant comes within the purview of the act'.

Our fund, for examination of ineligible applicants is limited and if the applicants are going to be permitted to file applications when and before whom they choose, and we in turn are going to be forced to permit an examination to decide whether or not they will be eligible from a vision standpoint, we are very much afraid it is going to greatly eat into our fund for examination of ineligible applicants.

We will appreciate having an opinion from you in this matter at your earliest convenience."

Revised Statutes Missouri 1929 Section 8896 provides the methods for applying for a blind pension, said statute being in part as follows:

"Sec. 8896. Judge of probate court to grant certificate to applicant for pension - - to be certified to Missouri commission for blind. - - Any person who desires the benefits of this article shall apply to the judge of the probate court within his or her county or city or to the commission for the blind, who, if satisfied that the applicant comes within the provisions of this article, shall grant to the applicant a certificate of such fact and the certificates granted by the probate judges shall be certified to the Missouri commission for the blind at its office in St. Louis, Missouri, which shall consider the merits of such application and if approved by the commission, it shall certify same to the state auditor. \* \* \* "

This statute was explained in the case of Hagan v. Commission for the Blind, 219 Mo. App. 330, 271 S. W. 1014 (1925) as follows:

"It will be observed that under section 4, a person deserving to be placed on the Blind Pension Roll may make application to either the probate judge (not the probate court) of his or her county or to the commission for the blind for a certificate. But the probate judge does not pass on the merits of the application. He only certifies to the Commission whether the applicant comes within the provisions of the Act, and it is the Commission that 'shall consider the merits of such application' and if the Commission approves it, the applicant's name goes on the pension roll. It is the Commission which has original jurisdiction or power to consider the merits of the application and to

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decide whether applicant's name shall go on the pension roll. \* \* \* \* \* It would seem that the presentation of the application to, and the hearing before, the probate judge is in the nature of a mere preliminary matter for the convenience of the blind person, who is permitted to make his application there first if he chooses, for the Commission is the body which is to pass on the merits of all applications, even those made to the probate judge; and this being the case, and the statute being silent as to the procedure to be had by the applicant where the probate judge refuses a certificate, the only thing the applicant can do would seem to be to take the matter from there to the Commission itself, that is, by availing himself of the other privilege of applying to the Commission." (219 Mo. App. pp. 333, 334.)

As to the certificate that the applicant comes within the provisions of the statute the Commission is given authority to prepare suitable forms by Revised Statutes Missouri 1929, Section 8897, which provides as follows:

"Sec. 8897. Commission to prepare suitable blank application forms. - - It shall be the duty of the commission for the blind to prepare suitable blank application forms for the use of blind persons in making application for pensions, which shall contain such questions for applicant to answer and other matter as the commission may deem appropriate to the end to be accomplished. All statements of an applicant contained on such application form shall be verified by the applicant and shall also be supported by the certificates of two disinterested and responsible householders of the county wherein applicant resides, who have known applicant for not less than two years next prior to date of such application, that such statements are true."

The use of the word "verified" means "under oath", State v. Trook, 172 Ind. 558, 88 N. E. 930 (1909) wherein the court said:

"Appellee's counsel defend the ruling of the lower court, on the ground, first, that the oath attached to the report was not one required by law, since the statute provides only that the report shall be 'verified,' but does not say that it shall be by oath or affirmation. We are mindful of the rule that in criminal proceedings statutes involved must be strictly construed, but the term 'verified' as used in this connection has such a well-known meaning as to admit of no doubt of the legislative intent. The primary definition of the verb 'verify,' when used in matters of law, as given in the Standard Dictionary is: 'To affirm under oath; confirm by formal oath; as to verify pleadings in an action; to verify accounts; etc. This is plainly the sense in which the term was here used, and the oath attached was therefore one required by law. De Witt v. Mosser, 3 How. Prac. (N. Y. 284;

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Patterson v. Brooklyn, 6 App. Div. 127, 40 N. Y. Supp. 581;  
(88 N. E. 931).

However, this requirement for verification by an oath before an officer authorized to administer oaths does not dispense with the necessity of a certificate of the Judge of the Probate Court if the application is made to such Judge any more than such verification by Notary Public or other officer would dispense with the necessity of a certificate of the Commission that the applicant comes within the provisions of the statutes if the application were made to the Commission instead of to such Judge.

The statutory methods of making an application to receive a blind pension give the applicant two alternatives as is apparent from the statutes and the Missouri case cited above. The applicant, if he chooses the first method, must apply to the Judge of the Probate Court in his county, such application to be in the form designated by the Commission and verified before a Notary Public or other officer. There is no provision in the statute requiring a personal appearance by the applicant before the Probate Court except that the applicant must satisfy the Judge that he comes within the provisions of the article, and must secure a certificate of such judge to this effect which is then to be certified to the Commission "which shall consider the merits of such application." (Section 8896). The second remaining method of application open to any person seeking a blind pension is to apply directly to the Commission. If such course is adopted the same verification must be made of the written application on the form prescribed by the Commission. Furthermore, in cases of applications made directly to the Commission, the Commission would be authorized to require a personal appearance before it of the applicant. The quotation just made from the statute authorizing the Commission to consider the merits of each application would seem to be sufficient to authorize the Commission to adopt and enforce a requirement that a personal appearance of each applicant would be necessary as a part of such consideration especially in view of R. S. Mo. 1929, Section 8891 which in defining the powers of the Commission for the Blind provides that "said commission may adopt by-laws or rules and regulations for its government."

In conclusion, it is our opinion that under the statutes and especially section 8896 any person desiring to apply for a blind pension must secure a certificate of the Judge of the Probate Court of his county that such applicant comes within the provisions of the statutory article governing blind pensions which must be certified to the Commission for the Blind, or that such applicant must secure such a certificate from the Commission for the Blind by direct application thereto, and that in the event the latter method is adopted by applicant it is our opinion that the Commission would have authority to require a personal appearance before it as a condition precedent to approval by the Commission of such application.

Very truly yours,  
EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

ATTORNEY GENERAL.

X

BLIND PENSIONS - Right to Pension for Period of Suspension from Pension Roll by Decision of Commission for the Blind.

February 13, 1934.



Missouri Commission for the Blind,  
3858 Westminster Place,  
St. Louis, Missouri.

Attention: Miss Marie M. Finan, Pension Secretary.

Gentlemen:

A request for an opinion has been received from you under date of August 31, 1933, such request being in the following terms:

"We are writing you for a ruling in the case of the above pensioner who was stricken from the pension roll February 15, 1929, after having been examined by Dr. W. E. Yount, Cape Girardeau, Mo., a member of our staff of examiners, and found to have too much vision.

This party appealed the case on February 19, 1929. It was finally agreed on July 17, 1929 between the attorneys representing the plaintiff and the Commission that the plaintiff's attorney would file a motion dismissing the appeal case, if the Commission would authorize a re-examination. This action was taken and the plaintiff was re-examined on July 29, 1929, by Dr. Weiner, who at that time advised he still had too much vision for the blind pension.

On July 17, 1930 the Commission received a letter from the attorney representing Mr. Looney asking for a re-examination, and on July 30, 1930, Mr. Looney was re-examined by Dr. O. A. Smith, and at that time Dr. Smith reported his vision within the pension limit.

Application was filed August 27, 1930, and after the case was reinvestigated he was certified to the State Auditor for reinstatement on the pension roll as of August 27, 1930 the date of the application.

This pensioner was originally put on the roll in 1921. In November 1928 there was an article in the newspaper advising this party had been arrested on a charge of selling home brew to a Federal Prohibition Officer. Case was on the docket in the Cape Girardeau County Circuit Court on January 9, 1929. This Department was endeavoring to secure some information relative to this, evidently having in mind the moral clause in the statute. However, just about the same time we received an anonymous letter that this party had more vision than the pension



February 13, 1934.

limit, and we ordered him in for re-examination by Dr. Yount, who advised he had vision beyond the limit set by the pension law, and as a result of this he was stricken from the roll.

After he was reinstated in 1930, and placed on the roll as stated above, we received a letter advising Mr. Looney desired to make application for pension from the time his name was stricken from the pension roll to the date of reinstatement, which we advised him was impossible, because, between the time he was stricken from the roll, and the time he was reinstated, his vision according to reports received from our Doctors, was greater than the pension limit.

On May 10, 1932, we received a letter from his attorney, Mr. W. E. Coffey, demanding back pension, and stating the Commission had dropped him from the pension roll because of violation of the Prohibition Law, and that the charge against him had been dismissed.

We wrote Mr. Coffey, and explained Mr. Looney had been dropped from the pension roll because of vision greater than the pension limit, and not because of the case against him for violation of the Prohibition Law.

However, Mr. Coffey has refused to accept our ruling in the case and has insisted the Commission had no right to remove Mr. Looney's name from the pension roll, and he demands pension from the time his name was off of the roll.

The latest development in the case is a sworn statement by Mr. Looney to the effect that he was stricken from the roll because of the fact he was arrested and charged with selling home brew, but that official reason was given as vision greater than allowed by law. He also claims that Dr. Weiner did not make a scientific examination of his eyes, and that Dr. Yount was prejudiced. Further states, that his vision had not changed during the past 8 or 10 years, and his vision was not greater during the years 1929 and 1930 when he was not on the pension roll, than it is at the present time, or it was at the time of examination by Dr. Smith, which examination resulted in his reinstatement on the roll.

He also has furnished us with several affidavits from residents of Cape Girardeau, all to the effect that he is and has been totally blind and was so during the years 1929 and 1930.

When Mr. Looney was examined by Dr. W. Speaulding, on June 14, 1921, the Doctor advised the vision in right eye "nil", in left eye, "light perception", which would make him eligible for the pension. The right eye has been removed.



February 13, 1934.

He was examined on February 24, 1926, by Dr. Albert N. Lemoine, another member of our staff, and at that time Dr. Lemoine reported right eye "removed"; left eye "light perception only".

After we received information that this party had more vision than the pension law permitted, we had him re-examined on January 8, 1929 by Dr. W. E. Yount, Cape Girardeau, also a member of our staff. At that time Dr. Yount reported right eye "removed", left eye "light perception, hand motion at two feet, and counting fingers at one foot", and it was as the result of this report from Dr. Yount that the man was stricken from the roll.

He was re-examined by Dr. Meyer Weiner, who was then our Medical Director on July 9, 1929. Dr. Weiner reported right eye "removed". Left eye "light perception, motion of a hand at one foot, motion of a hand at two feet, and counting fingers at six inches", which also showed his vision greater than the pension limit.

He was examined by Dr. O. A. Smith, on July 30, 1930, and at that time Dr. Smith reported his vision much decreased. Right eye "out", and left eye "light perception and motion of a hand at six or eight inches only", and as the pension law permits hand motion at one foot, or twelve inches, Dr. Smith's report showed the man was eligible for the pension, and as a result the application was filed and he was reinstated as of August 27, 1930.

Our file very clearly and definitely shows this man was stricken from the roll because of vision greater than the pension limit, and although we did have information concerning the charge against him for selling intoxicating liquors that had nothing whatever to do with his name being removed from the roll.

We have reports in our file from our oculists showing that during the time his name was off the pension roll, his vision was greater than the pension limit. The examination of July 30, 1930, showed him eligible from a vision standpoint, he was permitted to make an application, which he filed on August 27, 1930, and was reinstated as of that date and in accordance with the pension law, his pension began the date of the filing of his application.

With all of the above facts, we will ask you to give us a ruling in this case, as to whether or not this man is entitled to any pension during the period his name was not on the pension roll."

It is our understanding, and we will assume it to be the fact, that the pensioner was properly excluded from such pension during the period in

February 13, 1934.

question, and this opinion will be confined to the single question of law as to whether or not one whose name has rightfully been stricken from the pension roll because his vision is superior to the statutory standard, but whose vision later declines so as to bring him within such statutory standard, is entitled to a pension for the period during which his name was not on the blind pension roll.

The right to receive a blind pension is purely statutory. The statute authorizing payment of blind pensions is Revised Statutes Missouri 1929, Section 8894, which provides as follows:

"Sec. 8894. Vision test - who entitled to pension.- No person shall be entitled to a pension under this article who has vision with or without proper adjusted glasses greater than what is known as light perception; that light perception as used in this section means not more vision than is sufficient only to distinguish light from darkness and recognize the motion (not the form) of the hand of the examiner at a distance not greater than one foot from the eye; and no person shall be entitled to receive a pension except upon scientific vision test supported by the certificate of a competent oculist, approved by the commission, that such person does not possess a greater vision than that provided above in this section; and every person passing the vision test and having the other qualifications provided in this article shall be entitled to receive a pension of three hundred (\$300.00) dollars per annum, payable quarterly."

In this same statute is a prohibition against the receipt by any person of a blind pension who cannot come within the statutory definition of blindness, and since the pensioner in this case did not for the time which is in question possess the statutory qualifications, and since the statute prohibits any person receiving such pension who is not within the statutory standard, it is our opinion that such person could not be entitled to a pension for such period.

Our conclusion is strengthened by that part of Revised Statutes Missouri 1929, Section 8896, which provides as follows:

"\* \* \* whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll; \* \* \*

A remedy is provided for a person aggrieved by decisions of the Commission for the Blind "as to his or her property or income, residential or moral qualifications to receive the benefits of the article" by Revised

February 13, 1934.

Statutes Missouri 1929 Section 8901 which provides that an appeal may be taken from such decision "to the circuit court of his or her judicial circuit within ninety days from the decision complained of". This statute, when originally enacted in 1923 (see Laws of 1923, page 302, section 9) provided that "any person claiming the benefits of this act who is aggrieved by the action of the commission for the blind may appeal from its decision etc." and under the 1923 statute an appeal would lie from a decision of the Commission as to the vision of an applicant for pension. In Matter of Application of Edith Shelley v. Missouri Commission for the Blind, 309 Mo. 612, 274 S. W. 688 (1925). This statute as amended in 1925 (Laws of 1925, page 316) in which form it is still in effect as quoted above from the revision of 1929 limited appeals to decisions of the Commission as to "property or income, residential or moral qualifications" so that it seems that the statute since 1925 has made the decisions of the Commission as to vision non-appealable and, therefore, the decision of the Commission concerning the vision of the pensioner herein by which he was stricken from the pension roll would not be subject to attack.

It is our opinion that the pensioner Presley Looney, Dunklin County No. 16, is not entitled to a pension for the period during which he was not on the pension roll, subsequent to his being stricken off such roll by decision of the Commission for the Blind and up until his reinstatement thereon, and that the decision of the Commission for the Blind in striking him from such pension roll was, under the facts furnished in your request for opinion, proper, and not subject to attack or review at this time.

Very truly yours,

EDWARD H. MILLER  
ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

PHYSICIANS - May also be druggists and fill own prescriptions.

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5-26  
May 23d, 1934.



Honorable James J. Ferns  
Medical Licensure  
State Board of Health  
Jefferson City, Mo.

Dear Sir:

We have your request of April 17, 1934 for  
an opinion, which request is as follows:

"We have received a letter from a  
druggist asking for information as  
to whether or not an M. D. who owns  
a drug store can write prescriptions  
and fill them himself."

We find no statutory provision prohibiting a  
licensed M. D. from operating a drug store and filling his  
own prescriptions. In fact, we find ample authority ap-  
proving such practice. Section 13140, Revised Statutes of  
Missouri, 1929, relating to druggists and pharmacists, in  
part provides:

"Provided, however, that nothing in  
this section shall be construed to inter-  
fere with any legally registered prac-  
titioner of medicine or dentistry in  
the compounding or dispensing of his  
own prescriptions, \*\*"

Again, in Section 13161, Revised Statutes of Mis-  
souri, 1929, the Legislature clearly recognized the right of a  
practitioner of medicine to own and operate a drug store, when  
it used this language:

#2 - Honorable James J. Ferns

"Any physician doing business as a pharmacist or druggist, and owning or operating a drug store or pharmacy,"

The right of a physician to also be a druggist is recognized in *State v. Willis* (1907), 128 Mo. App, 214 by the following language, l.c. 216:

"A regular, registered and practicing physician may at the same time be the proprietor of a drugstore and a registered pharmacist, and may fill, from his stock of drugs, a prescription calling for intoxicating liquors and such poisonous drugs, including cocaine, as can only be sold on prescription. (*State v. Carnahan*, 63 Mo. App. 244; *State v. Pollard*, 72 Mo. App. 230.) He cannot sell these articles and afterwards fill out a prescription to cover the sale. (*State v. Hensley*, 94 Mo. App. 156, 67 S. W. 964.)"

It is, therefore, the opinion of this office that an M. D. may also own and operate a drug store and fill his own prescriptions.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

X

BLIND PENSIONS - Recipient of blind pension by person receiving income from other sources sufficient for ineligibility for such pension as disqualifying such pensioner from future benefits under blind pension law.

September 11, 1934



Missouri Commission for the Blind,  
3858 Westminister Place,  
St. Louis, Missouri.

Attention Miss Marie W. Finan,  
Pension Secretary.

Gentlemen:

A request for an opinion has been received from you under date of August 24th, 1934, such request being in the following terms:

"The above desires to apply for the state blind pension. He was formerly a pensioner, having filed an application on February 24, 1927. At the time of the filing of his application and subsequent investigation he did not advise that he was the recipient of \$70.00 per week - payable \$80.00 every four weeks - compensation from the state of Louisiana. This compensation was being paid him covering the loss of his vision as a result of an accident met with in that state.

A re-investigation of this case was made on July 20, 1929 and investigator reported pensioner advised he had been awarded \$8,000.00 compensation, to be paid \$20.00 per week for four hundred (400) weeks, commencing on October 25, 1926. He was, therefore, receiving this compensation at the time of his application for the pension and continued to receive same after becoming pensioner of the state of Missouri. Since the compensation being paid him was greater than \$600.00 per annum, which is the limit set by the pension law, he was accordingly stricken from the pension roll as of August 19, 1929.

Although Mr. Werntz was injured in Louisiana, while employed there, his family was living at Eldon, Missouri, where they had lived for the previous forty (40) years and where he owned his home, therefore, his residence was not involved.

Section No. 5905 - PERSONS VIOLATING PROVISIONS OF LA  
GUILTY OF MISDEMEANOR - provides:

September 11, 1934

"Any person or persons found guilty of violating any of the provisions of this article shall be deemed guilty of a misdemeanor; and any person who shall wilfully and fraudulently violate any of the provisions of this article for the purpose of obtaining any benefits thereunder, to which such person is not entitled, shall, in addition to the penalties otherwise provided herein, forfeit all right to future benefits hereunder."

We, therefore, respectfully request you to advise us whether or not Mr. Werntz because of the facts in his case has disqualified himself from future benefits of the pension and if Section No. 8905 applies to this case.

We also request you to advise if Section No. 8905 does not apply in this instance, when it does."

In Revised Statutes Missouri 1929, Section 8905, quoted in your request, a violation of any of the provisions of Article I of Chapter 51 of the Revised Statutes of 1929 which is not wilful and fraudulent is declared to be a misdemeanor and by plain inference a violation which is not wilful and fraudulent will not of itself disqualify any person from receiving future benefits under the blind pension law. As we understand the facts as stated in your letter, they do not indicate that the violation by Henry Werntz was wilful or fraudulent and we believe that a decision as to whether or not such violation was wilful and fraudulent would rest with the Commission for the Blind and would be final in the absence of an appeal to the Circuit Court under Section 8901. As to other cases to which Section 8905 might apply, we shall reserve our opinion until specific cases are presented for our ruling.

In conclusion, it is our opinion that a person who has violated the provisions of Chapter 51 of the Revised Statutes of Missouri 1929 by applying for and receiving a blind pension at a time when he was the recipient of an income sufficiently great to prevent him from being entitled to such pension, would not be disqualified, when such income ceased or fell below the statutory maximum, from receiving future benefits under the blind pension law, unless such person violated such law wilfully and fraudulently.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

APPROVED

(ACTING)

Attorney General



X  
BLIND PENSIONS - Right of Missouri Commission for the Blind  
to suspend payment of.

September 11, 1934



Missouri Commission for the Blind,  
3058 Westminister Place,  
St. Louis, Missouri.

Attention Miss Marie M. Finan,  
Pension Secretary.

Gentlemen:

A request for an opinion has been received from you under date of August 22, 1934, such request being in the following terms:

"We respectfully request your advice as to whether or not the Commission has authority to suspend payment of pension to pensioners, who refuse to pay their debts, such as rent, grocery bills, doctor bills, and so forth.

We have pensioners who have accounts with grocers, who give them credit for three months and expect to receive payment of account when the pensioner receives his quarterly check and then the pensioner refuses to pay. These accounts range from \$5.00 to \$50.00. Naturally these merchants appeal to us for assistance in collecting their bills.

Also can we legally, under the law, suspend payment of pension to those who dissipate or permit others to dissipate their pension, and as a result are without funds and are on relief rolls and being assisted by organized charities. We have cases where pensioners are without funds a week after receiving pension and are appealing to these charities to give them financial assistance. In several instances we have insisted pensioner give power of attorney to some reliable, reputable person, which has been done and as a result the pensioner is receiving the full benefit of the pension of the state. Are we within our bounds in doing this? Our only object is, of course, to protect the pensioner and to aid and assist him, when he is apparently unable to do so for himself.

Assuring you of our appreciation for your advice in this matter, we beg to remain"

Revised Statutes of Missouri 1929, Section 8693, provides that certain blind persons "shall be entitled to receive \* \* \* an annual pension \* \* \* payable in equal quarterly installments." There are two usual methods of dispensing money charitably, one, the method of direct payment for relief, and the other, the method of another person or an administrative body receiving such money and applying it for the use of the person being supported, in which latter method, which is a form of trusteeship, the beneficiary never receives the actual money devoted to his use, but only receives the things purchased therewith. It will be observed that the above statute indicates that the first of these methods is the method prescribed for blind pensioners.

Revised Statutes Missouri 1929, Section 8699, which relates to the method of distribution of blind pensions, provides in part that each pensioner must fill in and send to the State Auditor as a condition precedent to the receipt of each installment of his pension a requisition "containing, among other things, a statement that : . . requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension." If pensions were suspended in the manner suggested in your letter, it would not be possible for such pensioners to make this statement in their requisition and consequently it would not seem that the State Auditor would be justified in drawing his warrant for the payment of such pensions.

Revised Statutes Missouri 1929, Section 8902, provides as follows:

"It shall be unlawful for any person, organization, society, group or association to request, require, coerce, solicit or induce any pensioner under this article to contribute, donate, give, allot or part with, unwillingly, for any purpose whatever, any moneys received as a pension under this article; and any person, agent or representative of such organization, society, group or association who commits any such act or acts shall be guilty of a misdemeanor; and it shall be the duty of the commission for the blind to investigate all such cases coming to its attention and report same to the proper authorities."

This statute in its use of such terms as "allot" and "part with" would seem to mean that attempts on the part of other persons than pensioners to have such pensioners commit themselves in advance of the receipt of their pensions to the giving away of such pensions would be prohibited. Furthermore, such Section 8902 cannot, of course, mean that pensioners cannot disperse the money received

September 11, 1934

as pensions after its receipt, because such a construction would deprive pensioners of the use of the money so received and, therefore, such Section and its prohibitions must relate to restraints on the anticipation of pension money, i. e. to attempts to convey it before it is received and, therefore, the suspension of payments or the insistence that pensioner give a power of attorney, as outlined in your letter, might well be regarded as a misdemeanor under this statute.

The question might be raised as to whether or not a person seeking and receiving charity from other agencies might be disqualified from receiving blind pensions by that part of Revised Statutes Missouri 1929, Section 8893, which provides as follows:

"and provided further, that no blind person shall be entitled to the benefits of this article \* \* \* while publicly soliciting alms in any manner or through any artifice in any part of this state"

However, we do not believe that the provision just quoted would disqualify persons receiving relief from organized charity because it is our opinion that the statutory provision relates to public solicitation of alms such as the solicitation in public places from members of the public of contributions, and that such provision does not relate to the receiving of funds or commodities from organized charities.

A short answer to your inquiry might be that the Commission cannot suspend the actual payments of money to petitioners because under the statutes as we construe them the Commission never has any physical control over such pension money. Chapter 51 of the Revised Statutes of 1929 gives the Commission extensive powers in determining whether or not an applicant should be placed on the pension roll and in having applicants removed from the pension roll, but once an applicant is on the pension roll, as we understand this chapter and especially Section 8899 thereof, such pensioner secures his quarterly payments directly from the State Treasurer and sends his requisition therefor in directly to the State Auditor, and the Commission for the Blind has no direct connection with or control over the distribution of such pension money, as under the statutes the Commission has no legal right to receive or disburse it.

In conclusion, it is our opinion that the Missouri Commission for the Blind has no authority to suspend payments of blind

4. Missouri Commission for the Blind

September 11, 1934

pensions to any pensioners legally and properly on the blind pension roll.

Yours very truly,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

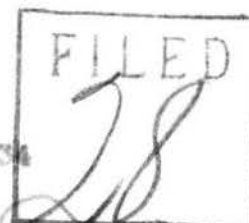
APPROVED:

*Correll C. Smith*

(ACTING) ATTORNEY GENERAL

BLIND PENSIONS - Right of Missouri Commission for the Blind  
to investigate income qualifications of  
pensioners.

September 12, 1934



Missouri Commission for the Blind,  
3838 Westminister Place,  
St. Louis, Missouri.

Attention Miss Marie M. Finan,  
Pension Secretary.

Gentlemen:

A request for an opinion has been received from you  
under date of August 17, 1934, such request being in the  
following terms:

"Since the pension law provides that any one who  
has an income or is the recipient of \$600.00 or more per  
annum from any source whatever shall not be eligible  
to receive the pension, it is our understanding that  
in cases of where we know our pensioners have an in-  
come over and above the pension limit, it is our duty  
to check on said income. Accordingly we have requested  
these pensioners to fill out the enclosed blank.

This pensioner has refused to fill out this statement -  
stating she has not kept a record of her income. We  
understand she does have additional income.

We, therefore, respectfully request you advise what  
action, if any, we are to take relative to payment of  
pension. Is she to continue to receive the pension  
when we do not know whether or not her income is with-  
in the pension limit?"

Revised Statutes Missouri 1929, Section 3693, which de-  
fines persons entitled to receive blind pensions, contains the  
following:

"Provided, that no such person shall be entitled to  
a pension under this article who has an income, or is  
the recipient, of six hundred (\$600.00) dollars or  
more per annum from any source whatever."

Whether or not an applicant for a pension or a person on the  
blind pension roll is receiving an income of \$600.00 or more  
per year is a question of fact requiring investigation on the  
part of the State or its instrumentalities so that possible  
violations of the law will be prevented, and the responsibility  
for having persons ineligible to receive pensions stricken from  
the rolls rests with the Missouri Commission for the Blind under  
that part of Revised Statutes Missouri 1929, Section 3696, which

provides as follows:

"whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll;"

The last statutory quotation above shows that the certification to the State Auditor of the fact of ineligibility of a person on the blind pension roll is the responsibility of the Commission, but the statutes do not directly delegate to any person or body the duty of making the investigation necessary to find out the existence or non-existence of such fact. However, it would seem that the Missouri Commission for the Blind would be the logical and appropriate agency to make this investigation for the following reasons:

A. It is the duty of the Commission for the Blind to determine whether or not the income of an applicant for a pension is sufficiently small to entitle such applicant to a pension, as Revised Statutes Missouri 1929, Section 3901, provides in part as follows:

"Any person claiming the benefits of this article who is aggrieved by the action of the commission for the blind as to his or her property or income, \* \* \* may appeal from its decision to the circuit court"

B. Chapter 51 of the Revised Statutes of 1929 which deals with blind pensions designates the Missouri Commission for the Blind and its officers and employees and the State Auditor as the officers or agencies or persons charged with the enforcement of the blind pension law, and if a choice should be made between these two in fixing the responsibility for keeping track of the eligibility of persons on the blind pension roll, it would seem that the choice should rest with the Commission and its officers and employees who are in far more intimate touch with the blind pensioners than the State Auditor of whose work the blind pension law is only a small fraction.

C. If the power and duty to investigate the eligibility from the point of view of income of blind pensioners does rest with the Commission for the Blind, such power must include the power to ask questions of pensioners and to require a pensioner

3. Missouri Commission for the Blind.

September 12, 1934

to fill in a form of report prescribed by the Commission which would seem within the power of the Commission which, by Revised Statutes Missouri 1929, Section 8891, is authorized to "adopt bylaws or rules and regulations for its government", and by Section 8897 is authorized to prepare the form of application blanks to be used by persons applying to receive blind pensions.

In conclusion, it is our opinion that if the Missouri Commission for the Blind is satisfied after investigation that a person on the blind pension roll is receiving from other sources sufficient income to make such pensioner ineligible to receive a blind pension, the Commission may certify this fact to the State Auditor, and that such certification could be made if the Commission is unable to find out from any other source the extent of such pensioner's income when such pensioner refuses to supply such information.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

APPROVED:

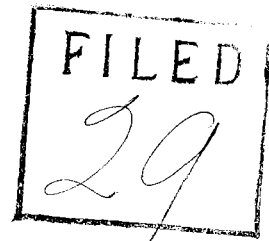


(ACTING) ATTORNEY GENERAL



ROAD DISTRICTS:--Surplus funds remaining after the full payment of the bond issue for which they were collected, may be transferred to the general fund of the District.

1-15  
January 11, 1934.



Mr. H. W. Fly, Secretary,  
Monett Special Road District,  
Monett, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Some years ago The Monett Special Road District issued bonds to the amount of Fifty Thousand Dollars at which time there was provided a levy of Fifteen Cents on the Hundred Dollar valuation to take care of principal and interest. Two years ago there was sufficient funds collected to pay bonds and interest in full with about Eight Hundred Dollars surplus, after which time no levy has been made. In a few months the last of the series of these bonds will be due.

Will you kindly advise what disposition may be made of the remaining Eight Hundred Dollars on hand which has been collected for bond and interest purposes?

We are aware of the fact that money collected for interest and sinking funds cannot be used for other purposes until such indebtedness has been paid, however, it is almost an impossible task to return this money to the taxpayer in an equitable manner. Hence, we are asking your opinion as to whether it can be transferred to the general fund without violating the law."

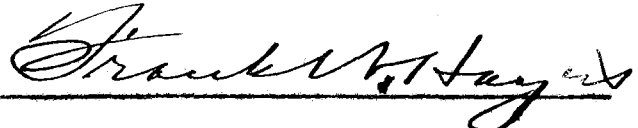
It appears from your letter that your district had voted a bond issue of \$50,000.00, and that the levy from time to time had been made for the purpose of paying the interest and retiring the bonds as they became due. There is now sufficient money on hand to retire the last of the bond issue, and when the last bond is retired there will be a

small surplus resulting.

The money resulting from the levy made for the purpose of paying off a bond issue, of course, could be expended only for that purpose. Such funds were property of the Road District. Since the bonds have all been paid off, there is no necessity for the continued existence of the fund to pay off the bond issue. The surplus funds remaining after the payment of the bond issue belong to the District, and we find no provision which prohibits the transfer of the surplus to the general revenue fund of the District.

It is therefore the opinion of this Department that the surplus money remaining after the discharge of the bond issue may lawfully be transferred to the general fund of the Road District.

Very truly yours,

  
Assistant Attorney General.

APPROVED:

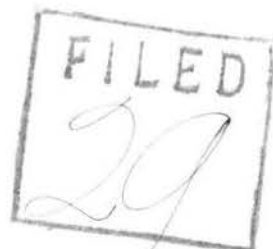
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Attorney General.

FWH:S

TOWNSHIP ORGANIZATION: Relating to and defining county bridges and township bridges in counties under township organization.

February 9, 1934. 2-17-34



Mr. Edward G. Flint,  
Pattonsburg, Missouri.

Dear Sir:

We acknowledge receipt of your letter of February 1, 1934, in which you state and inquire as follows:

"The Township Board of Cypress Township, Harrison Co., wish you would define the difference between a county bridge and a township bridge.

Is the township required to make the fills and approaches for county bridges?

Does the value of repairs on county bridges make any difference as to who repairs them, county or township?

I.

- (a) All bridges costing less than one hundred dollars to construct, in districts under township organization, are township bridges.
- (b) The building of fills and approaches to bridges constructed by county court in districts under township organization is a matter of contract with the county court.
- (c) Repairs costing less than twenty-five dollars, upon county bridges within the township, shall be made at the expense of the township Board of Directors.

Section 8164, R.S. Mo. 1929 provides as follows:

"The township board of directors shall construct and keep in repair all bridges in their district costing less than one hundred dollars; and shall make all necessary repairs, costing less than twenty-five dollars, upon bridges which are now or may hereafter be built within the township: Provided, whenever it shall be necessary in any road district for the township board to cause to be built a bridge, the cost of which exceeds twenty-five dollars, the board may, in its discretion, advertise for bids by giving at least fifteen days' notice, by five written notices, posted in as many public places in said township, or by publication in some newspaper published in the district of the time and place of letting the contract."

Section 8165, R.S. Mo. 1929 provides as follows:

"Whenever it shall be necessary in any township to build a bridge, the cost of which shall exceed one hundred dollars, the township board of directors shall make out and cause to be presented to the county court a certified statement of the amount of money necessary for the construction thereof, and, if deemed proper, the said county court shall cause the bridge to be built by contract as provided by law."

Sections 8164 and 8165, supra, appear to be self-interpreting; that is to say that the expense of all bridges costing in the construction thereof less than one hundred dollars, shall be borne by the township Board of Directors.

Under the same authority we rule that township boards of directors shall not only bear the expense of the construction of bridges costing less than one hundred dollars, but it is their duty to maintain them, as well as all bridges which have been or may

Feb. 9, 1934.

thereafter be constructed by the County Court in their district: provided, such repairs are less than twenty-five dollars.

The building of approaches and fills to bridges built by the County Court is a simple matter of contract for the Court.

Respectfully submitted,

W. W. BARNES,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

WWB:AH

CHIROPRACTIC: Qualifications for examination to secure license.

5-10

May 8, 1934.



Dr. Jerome F. Fontana, Secretary  
State Board of Chiropractic Examiners  
2605 Chippewa Street  
St. Louis, Missouri

Dear Dr. Fontana:

This Department acknowledges receipt of your letter of May 5, 1934, with a request for an opinion, which letter is as follows:

"It is the wish of this Board, that your office render an opinion in this case.

In May 1927, a student took the examination, and passed on all subjects with the exception of one. Today, seven years later, this student is appearing before this Board, and wishes to take the examination on the one subject, in which she failed at that time.

The question being, would she have to take the entire examination, due to the fact that she had not retaken the examination in seven years, or just take the one subject in which she failed."

Chapter 105, R. S. Mo. 1929, Sections 13546 to 13556, inclusive, contains the statutory law defining and regulating the practice of chiropractic in the State of Missouri.

Section 13549 of said chapter provides that any person desiring to practice chiropractic must first pay a license to do so to the board of chiropractic examiners, as provided by Chapter 105. Among other qualifications, an applicant for a license

May 8, 1934.

must pass "an examination in the following subjects: anatomy, physiology, symptomatology, hygiene and sanitation, chiropractic analysis, and practical application of their knowledge and skill in chiropractic adjusting and nerve tracing." Said section further provides that, "Any person failing to pass such examination may be re-examined within one year from the time of such failure without additional fee."

We note in your letter of request for an opinion that the applicant took the examination in May, 1927, and passed in all the subjects required except one, and after seven years have elapsed the applicant desires to take an examination in the one subject in which she failed.

#### CONCLUSION.

It is our opinion that the applicant must, in this case, make application anew; pay the fee of \$25.00; take the examination in all subjects as required by statute, and must pass in all subjects, before a license to practice may be issued by the Board of Chiropractic Examiners.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK  
Attorney-General.

CRH:EG



CHIROPRACTORS: One may be disbarred for immoral actions--immoral action discussed.

5-26  
May 23, 1934.

Dr. Jerome Fontana, Secretary  
State Board of Chiropractic Examiners  
2605 Chippewa Street  
St. Louis, Missouri.



Dear Dr. Fontana:

On May 11, 1934, you addressed a letter to this department requesting an opinion as to the right of the Board to revoke the license of one Dr. Erich F. Ebert, a Chiropractor licensed by the Board. In your letter you enclosed a news paper clipping which reads in part as follows:

"Ebert admitted under questioning that he had bought a medical diploma from Lindsay who was arrested recently by St. Louis authorities on charges of issuing and selling fraudulent diplomas. The charter of the Kansas City College of Medicine & Surgery, whose name appeared on the diploma, was forfeited by the Missouri Supreme Court in 1926 on charges that the college had trafficked in diplomas and had misused its charter powers."

On May 17, 1934, we wrote you requesting further facts upon which to base our opinion, stating that we desired the files and other history of this case, to which letter on May 19th you wrote in part as follows:

"\* \* \* In the year of 1926, on January 7th, Erich F. Ebert graduated from the Missouri Chiropractic College, and shortly after that our law was passed, and on September 9th and 10th, of 1927, Ebert was granted a license by examination. He has since renewed his license accordingly to our law, and I wish further to state, that his Chiropractic diploma and his license are authentic in every respect."

In the first few days of April of this year, Dr. Erich Ebert was caught in a fraudulent diploma net by our city police, and stated to them and our prosecuting attorney, that he had purchased a medical diploma of a school out of existence for the past few years from one George M. Lindsay, for the purpose of some day going to the State of Arkansas, and with this fraudulent diploma, there be granted the right to practice the science of medicine.

This Board at that time felt that if Dr. Erich Ebert was of a character, who would stoop to such dishonorable tactics, and due to the fact that he has embarrassed the Chiropractic profession as a whole, we felt that his license should be revoked on these grounds.\* \* \* \*

The Kansas City College of Medicine and Surgery referred to in the news paper article, was on June 23, 1926, ousted from doing business in this State for misuse of its corporate powers. The Supreme Court of Missouri in banc. in State ex inf. Otto, Attorney General v. Kansas City College of Medicine and Surgery, 285 S. W. 980, 1. c. 984, said:

"\* \* \*The evidence satisfactorily shows that the respondent has violated the law of its organization in at least two respects: It has been conducted for pecuniary profit, which that law forbids. It has misused its corporate powers in a manner which threatens serious injury to the public welfare.\* \* \* "

In other parts of the opinion the Court severely criticized that institution for issuing diplomas for a cash price to persons who never attended the school, having this further to say:

"\* \* \*We can imagine no more serious injury to the public than the issuance of degrees to practice medicine to persons wholly unqualified to treat the sick.\* \* \* "

Thus by the highest Court of this State the Kansas City College of Medicine & Surgery was shown to the public as an institution unfit to further use its franchise and powers because of its misuse and injury to the public. Thus Dr. Ebert is charged with knowledge as to the kind and character of the diploma he purchased. In fact he

openly admitted that he intended to use this diploma perhaps not to perpetrate a fraud upon the State of Missouri but in some other manner and form, as he stated that he was intending to qualify for an examination in the State of Arkansas.

It is our opinion that the Board may revoke the license of Dr. Ebert. Section 13553 R. S. Mo. 1929. 31 C. J. p. 251. In Re. Richards, 63 S. W. (2d) 672; State ex rel. vs. Ellis, 184 Ind. 307.

Section 13553 supra provides in part as follows:

"It shall be the duty of the board of chiropractic examiners to carefully investigate all charges of immoral or illegal actions of anyone to whom a license to practice chiropractic in this state has been issued.\* \* \*"

And further:

"\* \* \*The accused shall have an opportunity to be heard to answer such charges in person, or by attorney, and if upon such hearing it shall be proven beyond a reasonable doubt to the board, that the accused is guilty of such immoral or illegal action\* \* \*the board shall revoke his license."

31 C. J. page 242, defines "Illegal" as follows:

"Contrary to law, something which the law prohibits; something unlawful, unfit, not suited to the character, time and place; that which lacks authority of, or support from, law."

31 C. J. page 251, defines "Immoral" as follows:

"Contrary to conscience or the divine law; contrary to the moral or divine law; dishonest; hostile to the welfare of the general public; inconsistent with moral rectitude; inconsistent with purity or good morals; inconsistent with rectitude; licentious; not moral; unjust; vicious; wicked; wicked or unjust in practice."

In a recent case before the Supreme Court of Missouri in *Banc In Re. Richards supra*, it was held that an acquittal of a criminal charged against a licensed attorney would not prevent disbarment proceedings. The Court at page 678 said:

"\* \* \* Assuming, without deciding, that the indictment was based on the acts referred to, it certainly does not follow that after acquittal thereon these same acts may not be charged and proved as reasons for disbarment if they in fact show that respondent is unfit to continue in the practice of law. The great weight of authority is that statutory grounds of disbarment are not exclusive."

And further:

"\* \* \* Furthermore, we can think of no good reason why any misbehavior by respondent 'in his professional capacity,' even though it reach the gravity of a 'criminal offense involving moral turpitude,' is not a proper matter for investigation and disbarment as 'a misdemeanor and malpractice in his professional capacity.'\* \* \*"

And further, page 684:

"\* \* \* The apparent naivete of respondent's claim that in all that he did he was acting solely as Berg's attorney without any knowledge or intent of aiding and abetting the kidnappers is belied by the legal knowledge and intelligence displayed by him throughout these negotiations.\* \* \*"

Thus Mr. Ebert would not now be in a position to plead that the mere fact that he did not use the fraudulent diploma to gain the end for which same was purchased would bar the State Chiropractic Board from jurisdiction to hear and determine his case to see if he be guilty of immoral actions. In fact the presumption would be that one who would attempt to do the thing he tried to do and was only barred therefrom because of exposure and arrest would not in our opinion relieve him or avail him of a plea of no injury done or fraud perpetrated - consequently no right of the Board to take action. It goes without saying that Mr. Ebert did a very disgraceful thing, that he has shown himself to be of a character opposite to ethics, professional conduct, and without regard of the rights of the public.

One of the prime purposes of the Chiropractic law is to regulate the action and conduct of persons holding themselves out to the public to practice Chiropractic, and the public has a right to be assured that such are honorable and upright in their professional conduct. In State of Indiana vs. Ellis supra, page 338, the Court said:

"Immorality as defined by Webster is 'The quality of being immoral'; 'an immoral act or practice.' Immoral is defined by the same authority as 'Not moral'; 'inconsistent with rectitude'; 'contrary to conscience or the divine law'; 'wicked', 'unjust'; 'dishonest'; 'vicious'. Immorality as defined by lawwriters is 'That which is contra bonas mores'; 'an act or practice which contravenes the divine command or social duties'. Immoral, as that which is 'Hostile to the welfare of the general public'; 'wicked'; 'unjust'; 'dishonest'; 'vicious'; 'unjust in practice'.\* \* \*

And further; page 340:

"\* \* \*It is a practicable impossibility to set out in a statute in detail every act which would justify revocation of a license. The requirements of the statute can only be stated in general terms and reasonable discretion reposed in the officials charged with its enforcement. The statute in question is not void for uncertainty. Grounds commonly designated by statute upon which a medical board is authorized to revoke a physician's license, are 'unprofessional, dishonorable or immoral conduct.' 30 Cyc. 1557-1559.\* \* \*

In the above case the charges against the defendant were that he sold liquor in less quantities than a quart at a time without a license of the Board of Commissioners, and the Supreme Court of Indiana held that he was guilty and that his license could be revoked because of his acts of gross immorality.

In State ex rel. Lentine vs. State Board of Health, 65 S. W. (2d) 943, the Supreme Court of Missouri l. c. 949 said:

"\* \* \*It is well settled that the power given to certain boards or officers to grant a license to practice medicine and surgery within the state as well as to revoke such license for good cause upon charges preferred and a hearing thereon is an exercise of the police power. 'The interest of the state in the practice and character of physicians does not by any means cease with the granting of licenses. Clearly the state has the power to revoke the licenses for good cause.\* \* \*Grossly immoral conduct connected with the practice may be cause for revocation.\* \* \*A provision would seem valid if to the effect that a license may be revoked because of grossly unprofessional conduct or conduct grossly unprofessional and dishonorable, for a fair interpretation of these terms is that they mean conduct which is by general opinion considered to be grossly unprofessional because immoral or disreputable. Unprofessional conduct as used in statutes does not mean merely unethical conduct as judged by the peculiar standards of the profession but is generally held to mean dishonorable conduct. The mere fact that conduct is unprofessional is not enough to justify revocation but it must have an additional quality, as, for example be also dishonorable or disreputable.\* \* \*"

And further:

"\* \* \*We are constrained to hold that the use of the general terms 'bad moral character' and 'unprofessional and dishonorable conduct' in specifying the grounds for revocation of a physician's license does not render our statute so uncertain, vague, or ambiguous as to be unenforceable. Certainty is required in this, that in preferring a charge the licentiate is entitled to be advised and informed of the specific acts or course of conduct on his part alleged to be unprofessional and dishonorable or made the basis of a charge of bad moral character.\* \* \*"



May 23, 1934.

And further, page 950:

"\* \* \*It would not be practicable to the carrying out of the wholesome purpose of the statute to undertake to catalogue, list, or specify each and every act or course of conduct which would or under what circumstances, constitute bad moral character or unprofessional and dishonorable conduct, and we do not think the Legislature intended to do so.\* \* \*"

In conclusion, as stated hereinbefore, it is our opinion that if the Board as a fact, finds Mr. Ebert guilty beyond a reasonable doubt of immoral or illegal actions, that it has a right to revoke his license. In this connection, however, we assume that the Board has properly charged him with such acts.

Yours very truly,

James L. HornBostel,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

JLH:MM



Senate Bill 94: Taxation and collection of delinquent taxes in cities of the second class; unaffected by Senate Bill 94, Laws of Missouri, 1933.

65  
June 4, 1934.



Hon. Emerson Foulke  
City Attorney  
307 Bartlett Building  
Joplin, Missouri

Dear Mr. Foulke:

In accordance with my conversation with you of June 1, 1934, as a result of my letter to you of May 28th, your request for an opinion of April 20, 1934, has resolved itself to this problem:

"Is the mode of procedure in the collection of delinquent city taxes in a city of the second class varied or affected by the enactment of Senate Bill 94, passed by the 57th General Assembly in Regular Session and found at page 425 et seq. Laws of Mo. 1933."

In a somewhat lengthy opinion to the State Tax Commission of Missouri, this office has held that the effect to be given Senate Bill 94 in the collection of delinquent city taxes is to be determined by the class in which your city falls. The City of Joplin being a city of the second class and governed by the provisions of Article 3 of Chapter 38 R. S. Mo. 1929, would not in our opinion be affected by Senate Bill 94. Under the provisions of this Article specific laws have been enacted directing the manner in which delinquent city taxes shall be collected in these cities. This specific mode of procedure was not repealed by any provision of Senate Bill 94. The law does not look kindly upon implied repeals and there is a great doubt in our minds that the Legislature ever intended these specific modes provided for in Articles 2 and 3 of the Chapter to be changed by this Act.

Hon. Emerson Foulke.

-2-

June 4, 1934.

I am herewith enclosing to you a portion of the opinion of this office to the State Tax Commission dealing with this question so that you may be familiar with our reasons for this opinion.

I trust that this will be of assistance to you.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM  
Enc.

- COUNTY BUDGET: (1) Priority payment of classes.
- (2) Boarding of prisoners should be placed under Class 4 of the Budget Law.

July 9th, 1934.

7-16



Honorable Elbert L. Ford,  
Prosecuting Attorney  
Kennett, Missouri.

Dear Mr. Ford:

This department acknowledges receipt of your letter of August 1 relating to the new "Budget Law", which was passed by the last Legislature. We herewith quote your letter in full:

"On October 31st, 1931, the Attorney General's office gave Mr. Roy Monier, Chairman State Board of Eleemosynary Institutions an opinion wherein it states that the first subdivision of Section 9874, R. S. Mo. 1929, provides that the necessary expenses for the care of paupers and insane persons must be provided for and apportioned, does not give such expenses a priority or lien on the revenues of the County.

Please advise me at your earliest convenience if pages 340, 341, 342, 343 and 344, 1933 Session Acts means that the classification of expenditures as outlined in Section 2, gives these specific classifications a prior lien on the revenue of the County.

In other words please advise me if all warrants issued under classification 1, 2, 3 and 4 must be paid before any warrant issued in class 5, can be paid. In reading over this new budget law, I interpreted it as setting upon these different classes a prior lien on the revenue of the County.

July 9, 1934.

Please advise me what class the board of prisoners would come under in this new budget plan; since taking care of the paupers come under class 5 and since the sheriff receives sixty-five cents a day for board of the prisoners from the County I cannot interpret this in class 4 with salary of officers."

The section to which you refer is Sec. 2, p. 341, Laws of Missouri 1933, said section being as follows:

"The court shall classify proposed expenditures in the following order.

Class 1: The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1.

In estimating the amount required in class 2 the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement

of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county.

Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

Class 5: The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.

Class 6: After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

You will note that under Classes 1 and 2 the statute is definite and states that Class 1 shall have priority of payment over all other classes, and in the case of Class 2, it shall have priority of payment over all classes except Class 1. In the case of Classes 3, 4 and 5 there is no mention made as to whether or not they have priority of payment as numerically mentioned. Are we then to assume that classes 3, 4 and 5 are also prior liens in the absence of the statute being definite? In Sec. 1, under the "County Budget Law", the last sentence (Laws of Mo. 1933, p. 341) is as follows:

"\* \* \* \*The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

In Class 6, under the first proviso we quote as follows:

"\* \* \* \*Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six."

Under Sec. 5, Laws of Missouri, 1933, p. 344, the following is quoted as bearing on the question:

"Class 6: Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protect. Provided,

July 9th, 1934

however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. \* \* \* \*

Sec. 8, p.346, Laws of Mo. 1933, is as follows:

"\* \* \* Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance of payment of any such warrant shall be liable therefor upon his official bond."

In view of the foregoing sections, it is the opinion of this Department that even though classes 3, 4 and 5 are not specifically designated as having priority of payment, it was the manifest intention of the Legislature by reference and intendment to give them priority of payment and make them prior liens and they should so be treated. This conclusion is further augmented by the fact that the Legislature added Class 6, whereas, heretofore in Sec. 9874, R. S. of Mo. 1929, which was by the Legislature repealed, there were only five classes, none of them specifying priority of payment, and the Court has held under said repealed statute that there was no priority of payment or lien, thus showing that the Legislature in the new law undertook to give the classes priority numerically.

We turn now to a consideration of the last paragraph of your letter requesting an opinion as to what class the boarding of prisoners would come under the new Budget Law. It is obvious that this expense could not come under Classes 1, 2, 3 and 6. Class 5 deals with the contingent and emergency expense of a county and inasmuch as the boarding of prisoners is actual expense that is an expense certain and in no way of a contingent or emergent character, we believe that this expense properly belongs under Class 4.



July 9th, 1934

In order to analyze this class of expenditures, it is again set out:

"Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

Section 11794, R. S. of Mo. 1929 sets out the duty of the county court with reference to furnishing board to prisoners:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

Section 11795, R. S. of Mo. 1929 fixes the time and fee for furnishing board to prisoners, said Section being as follows:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

July 9th, 1934

Section 8526, R. S. of Mo. 1929 provides that the Sheriff of each county in this State shall have the custody, rule, keeping and charge of the jail within his county and of all the prisoners in such jail. Under this Section it is the duty of the sheriff to see that the prisoners are provided with food, bedding and medical attention. On this point, the Court in the case of State ex rel. Saline County v. Price, 296 Mo. 1.c. 130, said:

"Section 12551, Revised Statutes 1919 provides that 'the sheriff.....shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible.' In this capacity it became his duty to see that the prisoners confined there were provided with food, bedding and medical attention. Section 11003 makes it the duty of the county court at the November term of each year to fix the fee for furnishing each prisoner with board for each day during the following calendar year."

\* \* \* \* \*

"We note, in passing, that the General Assembly, in the enactment of this law, evidently had no suspicion that it was violating the constitutional provision forbidding a change in the fees of the office during the term of the incumbent, and that it also had in mind the theory that the sheriff should not be permitted to profit by contracting with others to perform this duty for less than he himself should receive. The humane intent which pervades this law is that the county court, in its capacity as the representative of the people of the county, should itself assume the duty of providing reasonable sustenance for prisoners through the officer charged with their custody, who should not be permitted to profit by the performance of that duty. While his fees for compensation for other services pertaining to his official duties were fixed by law, and protected by constitutional immunity, from change during his term of office, his compensation for feeding prisoners remained under the control of the county court to be fixed annually as circumstances might indicate.

July 9th, 1934

Neither the constitutional power of the Legislature, nor of the county acting within legislative authority to fix this compensation from time to time, has been questioned. It is founded in the very nature of the thing itself."

The general rule as stated in 50 Corpus Juris, p.361 shows clearly that the boarding of prisoners is a part of the duty of the sheriff. This rule is as follows:

"Where the statute merely allows a certain sum for the boarding of each prisoner, or allows the actual cost of boarding, the sheriff is not entitled to any additional compensation for services in keeping the jail or looking after the prisoners, as this is a part of his general duty."

Class 4 under the new Budget Law requires the county court to set aside an amount sufficient to pay for the conduct of the offices of all county officers. Inasmuch as it is the express duty of the sheriff to board prisoners, the expense of boarding prisoners becomes a necessary part of the conduct of his office.

In view of the foregoing therefore, it is the opinion of this Department that this expense should be placed under Class 4 of the new "Budget Law" as passed by the General Assembly of Missouri in 1933, Laws of Mo. 1933, p. 340.

Respectfully submitted,

OLLIVER W. NOLEN

APPROVED:

ROY McKITTRICK  
Attorney-General

JOHN W. HOFFMAN, Jr.  
Assistant  
Attorney-Generals

JWH/mh

BUDGET LAW - County Court cannot re-budget after budget is made up at the regular February term.

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7-16  
July 14th, 1934



Honorable Elbert L. Ford  
Prosecuting Attorney  
Dunklin County  
Kennett, Missouri

Dear Mr. Ford:

Your letter dated June 19th, 1934 addressed to this department was received. Your letter is as follows:

"I am having more trouble about the budget system. The budget as originally made by the County Court of this County placed in Class Number 4 \$41,709.73 and in Class Number 5 \$9,605.00. There is only about \$1500.00 in Class Number 5 and it is going to run short quite a bit and there is left in Class Number 4, \$26,000.00, so it looks like it will run long about \$8,000.00.

Please advise me by return mail if the County Court can re-budget and add \$5,000.00 to Class Number 5 and deduct it from Class Number 4. As you know Class Number 5 takes care of the in-mates of the County Farm and it is very necessary that we get your opinion about this as soon as possible."

The Budget Law, as now exists, is to be found in Laws 1933, p. 340.

Section 1 of the Law in part provides:

" \* \* The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. \* \* "

Section 3, in part, reads:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6."

Section 4, in part, is as follows:

"Not later than the first day of February of each year after the effective

date of this act, the clerk of the county court shall prepare and spread on the docket of the county court the following information and estimate: \* \* "

Section 6, concerning the duties of county officers with reference to the Budget Law, in part, is:

"Not later than the 15th day of January of each year, every officer who expects to claim pay for services or to receive supplies to be paid for from county funds shall submit to the county clerk the information hereinafter specified. (If state funds are received or expected to be received for all or any part of the expense such shall be considered as county funds for the purpose of this request.) The estimate of each such officer shall cover the entire year beginning January first and ending December thirty-first, both dates inclusive. No pay shall be received by any officer who fails to file this estimate."

Section 8 of the Act, in its entirety, provides:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that pre-

vided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.

Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer; participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."



July 14, 1934

From all of the foregoing, it needs no elaboration to reach the conclusion that it was the intention of the Legislature to pass an effective County Budget Law, and that the budget should be made up and completed by the several county courts at the regular February term of the sittings of such courts. The penalties provided in the Act by way of denying the right of compensation to officers who refuse to comply with same, as well as rendering officials who violate the Act, liable on their official bonds, make it clear that it was the intention of the Legislature to provide against any evasion of or deviation from the plain and strict requirements of the Act.

We are of the opinion that your county court cannot now re-budget its expenditures.

However, if in making up the classification of expenditures, the county court budgeted estimated expenditures in one class when, as a matter of law, such expenditures should have been budgeted in another class, the budget may be revised to the extent of permitting that to be done now which the law required to be done when the budget was originally made up.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

GL:FE

Nurse Examiners, State Board of

Where Board holds fees for application never completed for over three years and where applicant cannot be found Board may transfer fees to Nurse's Fund.

August 10th, 1934



Jannett G. Flanagan, R. N., Secretary,  
Board of Nurse Examiners,  
611 & 616 Central Trust Building,  
Jefferson City, Missouri.

Dear Miss Flanagan:

We have your letter of May 21, 1934, in which was contained a request for an opinion as follows:

"The Missouri State Board of Nurse Examiners in meeting May 3rd, 1934, instructed me to write for the opinion of your office on the subject of fees held where the applicant failed to complete application and apparently left the state without giving a forwarding address. No service was given or license issued.

"Fees are derived from the following:

License by examination .....	\$15.00
License of reciprocity .....	15.00
Provisional license .....	5.00
Annual re-registration of those practicing within the state.....	1.00

"Between 1927 and 1929, four nurses made application for license by reciprocity, sending in the fee with the partial application, but failed to complete the application, and all efforts on our part to locate these persons failed.

"In 1929, we had the verbal approval of the State Auditor at that time to open a savings account in the Board's name, and should we not hear from these applicants in a certain number of years, the amount could be turned into the Nurses' Fund, Sec. 13483, par. 4, R.S. of 1929. The account was opened February, 1929, the interest accruing \$5.04.

"The Board wishes to know if this money can now be transferred. The Board hesitates to make this transfer unless the statute of limitation has been reached for such money, as any refund would be charged against Appropriations, the Board deriving no benefit from the expenditure.

Miss Flanagan - #2  
Aug. 10, 1934

We are ready to act according to your decision on this matter."

Section 13483, sub-section 3, Revised Statutes of Missouri, 1929, provides as follows:

"3. The treasurer shall before entering upon the duties of the office give bond in the sum of one thousand dollars (\$1,000.00) with a surety or sureties to be approved by the board, conditioned upon the faithful accounting for all moneys coming into the hands of such treasurer; shall take charge of and issue receipts for all fees paid to the board and shall forward the same quarterly to the state treasurer to be credited to a fund which is hereby created for the sole use of the state board of nurse examiners."

Section 863 of Article 9, Chapter 5, Revised Statutes of Missouri, 1929, which article prescribes the period within which certain actions must be brought, provides as follows:

"Sec. 863. What within three years. - Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state. (R.S. 1919, Sec. 1318.)"

In view of the above two sections, we are of the opinion that the money referred to in your letter can now be safely transferred to the nurse's fund referred to in Section 13483. From an examination of the annotations listed under Section 863, it is obvious that the use of the term "or other officer," means any state officer. In this connection the case of State ex rel vs. Harter, 188 Mo. 516, 87 S.W. 941 holds that the term "or other officer" applies to the treasurer of a school district within the meaning of the statute. The statute would certainly therefore be taken to apply to the treasurer of your board.

Since more than three years has elapsed we are of the opinion that the money may be transferred with safety.

CMH,Jr:LKL

Very truly yours,

APPROVED: \_\_\_\_\_  
Attorney General

CHAS. M. HOWELL, JR.  
Assistant Attorney General

✓ CHIROPRACTIC: (1) Women entitled to practice chiropractic.  
(2) Fees  
(3) Names one may practice under.

September 19, 1934.



Dr. Jerome F. Fontana, Secretary  
State Board of Chiropractic Examiners  
2605 Chippewa Street  
St. Louis, Missouri

Dear Dr. Fontana:

This is to acknowledge your letter of September 12, 1934, as follows:

"We would appreciate your opinion upon the following cases:

We have about six women Chiropractors in our state who have been issued a license in 1927 under their maiden name. Since then they have married and consequently have assumed their marriage name. The question is, can they still practice under their maiden name or should they be issued a new license under their marriage name, and what fee should they pay for this license or this service.

Another case is of a Chiropractor by the name of Otto Albert Muensterman, who has recently had his name changed by the courts here to Otto Albert Mao. The question is the same as in the above cases.

Still another question is, where a few licenses issued in 1927 were signed by the first Board with ordinary ink, which has since faded to the extent, that they are not legible. I believe in this case where the names of the Board Members have faded completely, that no charges should be

I.

Chapter 105, R. S. Mo. 1929, pertains to "Chiropractic-- State Board of Chiropractic Examiners." Section 13549 provides in part as follows:

"No person shall engage in the practice of chiropractic without having first secured from the board of chiropractic examiners a license as provided in this chapter. Any person desiring to procure a license authorizing him or her to practice chiropractic in this state shall make application therefor to the board on a form prescribed thereby, giving his or her name, sex, age, which shall not be less than 21 years, name of school or college of which he or she is a graduate, and shall furnish the board satisfactory evidence \* \* \* \* \*."

Women in Missouri are recognized as eligible to practice chiropractic upon complying with the terms of Chapter 105, supra.

II.

FEEES.

Section 13552 of Chapter 105, R. S. Mo. 1929, provides the fee for renewal of licenses, and provides:

"\* \* \* Each practitioner of chiropractic shall display in his office in a conspicuous place his renewal license together with his license showing that he is lawfully entitled to practice chiropractic."

In order for one to practice chiropractic such must comply with the above section and at all times have on display his license and renewal license, which presupposes that if

one's license has been destroyed, mutilated or lost that the board would issue a new (duplicate) license to such person; and the same true as to the renewal license. No provision is made in the chapter, however, as to what fee the State Board may charge for a duplicate or copy of the license or renewal license. If a duplicate or copy of a license is furnished to a practitioner it necessarily means that it will cost the Board some sum of money to furnish same, and as the statute does not provide for the fee to be charged, we are of the opinion that the actual cost of so furnishing the duplicate or copy, or at least a nominal fee, only should be charged.

### III.

#### NAMES ONE MAY PRACTICE UNDER.

Hereinabove we quoted from Section 13549, R. S. Mo. 1929, to show that the applicant must give his or her name when such apply for a license and at the time of applying for a license it is to be presumed that the person would give the name that he or she lawfully possesses, that is to say, that at the time of applying for a license such person gave his or her true name.

The law recognizes the fact that one may change his or her name, first, by statute, second, by marriage, third, by divorce, and fourth, by adoption. Your inquiry concerns the change of name by marriage and by court action. Therefore, we shall concern ourselves with the affect of marriage on change of names, and on the change of names by the court.

There is no statute in Missouri that we can find that provides that on marriage the wife shall take the name of the husband. It is done, however, as a matter of custom. The purpose of a name is for identification.

Corpus Juris, Vol. 45, page 366, has this to say concerning the word 'name':

"A name is a word or words, designation or appellation, used to distinguish a person or thing or class from others;"



And further (page 368):

"The surname or family name of a person is that which is derived from the common name of his parents, or is borne by him in common with other members of his family."

And further,

"At marriage the wife takes the husband's surname, with which is used her own given name; and she may use the title 'Mrs.' to distinguish her from her husband and as being a married woman. But she is not properly designated as 'Mrs.' followed by her husband's initial or given and surname, unless it be proved that she is so known."

Quoting further, Corpus Juris, Vol. 30, page 511:

"The husband, as head of the family, has the right to fix the family name. A woman upon her marriage takes her husband's surname, which becomes her legal name. However, as at common law a man may lawfully change his name, there would seem to be no legal objection to his adopting his wife's family name should he desire. Under a statute empowering a court in its discretion to change the name of any person upon proper application, the court has power to change the name of a wife against the wishes of her husband."

The facts in your case show that six women were licensed in their maiden names and later married, which, according to custom, changed their names to the names, or family names, of their husbands. And the question arises as to whether such women may still practice under their maiden names or should they be issued a new license under their married names?



Missouri has what is known as the "Married Women's Act". Chapter 20, Section 2998, R. S. Mo. 1929, provides in part as follows: "

"A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, etc."

In Missouri if a married woman so desires, as far as conducting her business is concerned, she may do so in contemplation of law the same as a single woman may. A single woman engaged for a period of time in the practice of chiropractic would become known to the public by her maiden name and the fact that she married would not cause her to desist practicing chiropractic under her maiden name, in our opinion. If she desired to practice chiropractic under her married name, as she would have a right to do, then it is our opinion that a new license should be issued to her and such new license should then be recorded with the circuit clerk of the county or city in which she maintains an office; and that the new license with the name under which she is practicing should be displayed in her office. Section 13552, supra.

Missouri has what is known as a registration of fictitious names, found in Article 3, Chapter 136, and Section 14342 of said article and chapter provides as follows:

"That every name under which any person shall do or transact any business in this state, other than the true name of such person, is hereby declared to be a fictitious name, and it shall be unlawful for any person to engage in or transact any business in this state under a fictitious name without first registering same with the secretary of state as hereinafter required."

The facts presented to us in your inquiry, in our opinion, do not bring a woman, practicing in her maiden name and so licensed, within said statute. That is, if a woman

is licensed in her maiden name and continues to practice in her maiden name after marriage, then she does not have to have her name registered with the secretary of state, neither does she have to have her license changed to her married name.

As to the person who has his name legally changed by order of court, it is our opinion that a new license should be issued to the person so as to make the license correspond to the name as changed by the court. When this new license is issued, such should be recorded and at all times be on display in the practitioner's office. Our answer as to the fee to be charged for such service will be that as heretofore given in Article II of this opinion.

In answer to your remaining question, as to issuance of licenses that have faded, our opinion would be that a charge should be made the same as for other duplicates or copies issued to other persons. We suggest that if a duplicate license is issued because of change of name, that the new license should recite such fact; and if a duplicate or copy is issued because the original license was lost or destroyed or illegible, then the word 'duplicate' or 'copy' should appear on the new one issued.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

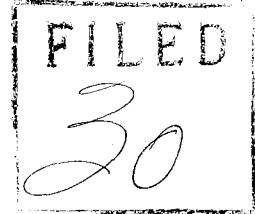
(Acting) Attorney-General.

JLH:EG

NEPOTISM:--Road Districts are political subdivisions under Section 13 of Article XIV; Commissioners have no right to contract for own benefit with the District.

2-1

January 29, 1934.



Mr. Ted Frossard,  
Prosecuting Attorney,  
Cassville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would like to have the opinion of your office on the following question regarding an interpretation of the Nepotism amendment.

Is it a violation of the amendment for commissioners of special road districts, or districts organized under Article 10, page 2267, R. S. 1929, to employ relatives within the prohibited degree to do work on the roads?

Are commissioners permitted, under Sec. 8065, to hire themselves to do road work?

May road overseers in any district employ relatives within the prohibited degree to do road work?

Your opinion on these questions will be very highly appreciated."

I

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision, any public officer or employe of the State or any political subdivision thereof, who appoints a person to render service to the State or any political subdivision thereof, when such person is related within the fourth degree, is guilty of nepotism.

In our opinion the Commissioners of special road districts come within the prohibition of that constitutional provision. In *State ex rel. v. Harper*, 256 S. W. 489, the Court holds that a special road district is a public corporation, saying:

"Special road districts are public corporations, and the Legislature can create them the same as any other public or municipal corporation with such powers of taxation, not exceeding the constitutional limits, and in such manner, as it deems necessary or expedient."

Since the special road district is a political subdivision of the State, any officer or employe of such road district who appoints a relative within the prohibited degree to render service to such road district violates the above constitutional provision.

It is therefore our opinion that road districts are included within the above prohibition as political subdivisions, and that the Commissioners of road districts are public officers or employes of political subdivisions; that the Constitution would be violated if a road overseer should employ relatives within the prohibited degree to work upon the roads.

## II

Section 8076, R. S. Mo. 1929, among other things, provides:

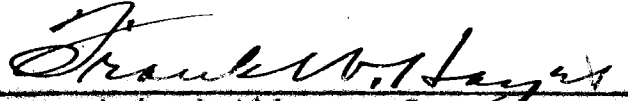
\*\*\*\*"Said Commissioners may advertise for bids for such contract in any manner they may choose; and the contract shall in no case be let to any commissioner, nor shall any commissioner, directly or indirectly, have any pecuniary interest therein other than the performance of his official duties as herein required."\* \* \* \* \*

As we interpret the foregoing section of the statute, it prohibits commissioners of road districts from having any interest in any contract to which the road district is a party. While work by commissioners for the road district might not be evidenced by a formal written contract, yet at

the same time when they work for the road district they are entering into a contractual relation with the district, and are directly interested in such contract.

We are therefore of the opinion that commissioners of road districts cannot, in view of the above section, enter into any kind of contract, whether written or verbal, for the performance of any labor or services with the district. They are representatives of the district itself and cannot at the same time enter into a contract for their own benefit with the district.

Very truly yours,

  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
Attorney General.

FWH:S

GAME AND FISH DEPARTMENT:

Right to forfeit lease on or  
recover possession of Big  
Spring Park, lease to Don B.  
Bales dated April 18, 1933.

3-26

March 22, 1934



Honorable J. B. Funkhouser  
Chief Clerk Game and Fish Department  
Jefferson City, Missouri

Dear Mr. Funkhouser:

This Department acknowledges receipt of  
your letter dated March 16, 1934 as follows:

"I am writing you relative to a  
contract at Big Spring State Park  
with Don B. Bales, who has the con-  
cession there.

There is a CCC camp in the park and  
we wish to tear down the present  
concession building and the two  
cabins that Mr. Bales is now using  
and build new ones. His contract  
says that he has the right to renew  
same for another year, but we do  
not want to renew same. Would his  
failure to pay his installment on  
the date specified be a good cause  
for cancellation? You can see by  
the contract that these payments  
should have been made on the first  
of the month from May 1st to  
October 1st and on the back of this  
contract you will notice that he did  
not pay anything from August 4th  
until January 30th, 1934. We also  
had to allow him \$100.00 for damage  
he claimed the water did.

Kindly look this contract over and  
write us a letter on it so we will  
have a record for our files."

March 22, 1934

Attached to your letter is contract referred to, also notice signed by Don E. Bales to the Missouri Game and Fish Commission dated February 27, 1934, purporting to give notice of the writer's desire to continue the operation of the inclosed lease according to the terms thereof.

The yearly rental provided for in the lease is \$500.00 to be paid as follows:

"Fifty dollars (\$50.00) on May 1, 1933.  
Fifty dollars (\$50.00) on June 1, 1933.  
One hundred dollars (\$100.00) on July 1, 1933.  
One hundred dollars (\$100.00) on August 1, 1933.  
One hundred dollars (\$100.00) on September 1, 1933.  
One hundred dollars (\$100.00) on October 1, 1933."

The payments on the rental as the same appear on the back of the lease are as follows:

"May 3	\$50.00
June 30	150.00
August 4	100.00
	<hr/>
	\$300.00

Jan. 30	100.00
	<hr/>
	400.00

\$100.00 deducted for damages by  
water as per contract."

The last paragraph on the second page of the contract in part reads:

"It is further agreed that in the event that the second party fails \* \* \* to comply with any of the terms or conditions of this permit, \* \* \* the Game and Fish Commissioner may revoke this permit, and all rights and privileges thereunder\* \* \*. Provided, however, no such revocation shall be had except upon the specific approval of the Governor of Missouri, after arbitration as above provided for, is had."



The second paragraph on the third page of the contract provides:

"It is understood and agreed that upon the expiration of this contract, the party of the second part may renew the same upon the same terms and conditions as herein contained, for a further period of one year, by giving written notice at least 30 days prior to the expiration of the present term to the State Game and Fish Commissioner of his intention and desire to so renew the same, and upon the receipt of such notice, the Game and Fish Commissioner will thereupon renew said lease as hereinabove set forth, provided that the rental for the second year shall not exceed the amount herein specified."

The letter of Don B. Bales to the Missouri Game and Fish Commission, dated February 27, 1934, above referred to, reads:

"Under the terms of our contract I hereby give notice that I desire to continue the operation of the Big Spring Merchandising, Cabin and Boating concession for a period of a year, beginning 'on the 1st day of May, 1934, and ending on the 30th day of April 1935,' under the same terms and conditions as set out in said contract entered into on the 18th day of April, 1933."

The right to revoke the permit, as that right is contained within the contract itself is known as a forfeiture under the common law. With reference to forfeitures of contracts at common law the St. Louis Court of Appeals in *Carbonetti v. Elms* 261 S. W. 748, 750, said: (citing a great number of cases)

"It is the well-established rule of the common law that to authorize a forfeiture of a leasehold estate for nonpayment of rent demand must be

made for the payment of the rent precisely on the day when the rent becomes due, and for the precise amount due, and the adjudicated cases show that the common-law rule is in all respects fully recognized by the American courts with much unanimity."

In view of the conclusion we have reached in this matter, the foregoing quotation is not material to the question now at hand but we present the same to you for your future guidance should you at any time be entitled to revoke the contract.

In *Carbonetti v. Elms*, supra, at page 750 the court further said:

"It is also held that, where under a covenant in the lease the lessor has the right of forfeiture for nonpayment of rent, he may elect to avoid or not avoid the lease, and may do so by word or deed, and, if he does any act inconsistent with avoiding it, such as distraining for rent, or demanding rent subsequently due, he waives the forfeiture. *Camp v. Scott*, 47 Conn. 366; *Sauer v. Meyer*, 87 Cal. 34, 25 Pac. 153."

It appears from the notations on the back of the contract that \$400.00 in cash has been paid on the above rental, and while not paid on the due dates, the payments were nevertheless accepted and credited as payments on the rental.

The eighth paragraph on the first page of the contract reads as follows:

"It is understood and agreed that should the party of the second part be partially prevented from operating the concessions herein leased, because of an extensive and continued high water stage of the river, or because of destruction of cabins or concession buildings, that upon application to the Governor of Missouri, the consideration of this contract shall be proportionately reduced in proportion to the time or the amount of such inability on the part of the party of the second part to carry on his concessions."

March 22, 1934

It appears from the notation on the back of the contract \$100.00 was credited on the rental as for damages from water. The last quoted provision of the contract justified such credit on the contract, if proper facts were present, which we assume they were. Anyway the credit was given on the rental which amount completed satisfaction of the rental for the entire year covered by the contract. Under the decision last quoted from you waived any right to forfeit the contract by acceptance of the rent at times later than the due dates thereof, and the payment of the rental was completed by the credit on account of damage by water.

We are of the opinion you are not in a position to revoke the contract and that the notice given by Don B. Sales dated February 27, 1934, is sufficient to extend the operation of the lease for one year beyond the 30th day of April, 1934, according to the terms thereof.

We are returning you your inclosures herewith.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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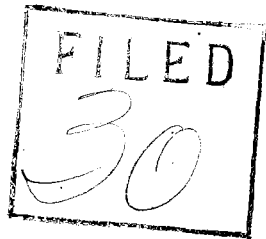
ROY McKITTRICK  
Attorney General.

GL:LC

Inclosures

COUNTIES:-County Court must transfer unexpended balance in road fund to the general revenue fund to be expended under the provisions of the County Budget Act in the purchasing of right-of-ways.

June 13, 1934.



Mr. Ted Frossard,  
Prosecuting Attorney,  
Cassville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"The county court of this county has requested me to obtain your opinion on the following matter.

"A farm to market highway is going to be built in this county extending from the Roaring River State Park to Seligman. It has been the custom for the county court to assist the road districts in obtaining the right of way for these roads. Last year the county court recognized that this obligation would occur and at the end of the year arranged to leave in the 1933 road fund a sum sufficient to pay for the necessary right of way outside of the Seligman Road District.

"This road is now ready to be built and the court wants to know whether they can use this money still remaining in the 1933 road fund to pay these claims, or whether, under the new budget law, they must advance into the 1934 general revenue fund all the surplus remaining in this 1933 road fund, and then apportion it out according to the priority of payments called for by the budget law."

You inquire whether the balance left from the road fund can be used by the county court for the purpose of purchasing right-of-ways in road districts, or whether the funds shall be transferred to the general revenue fund and then apportioned out according to the priority payments as provided for in the budget act. The budget act is found in Laws of Missouri 1933, pages 340 to 351, inclusive, and became effective July 24, 1933. We shall not attempt to quote this act to you but shall call your attention to the various provisions

which we think apply. We do not find that our courts have as yet passed upon the question about which you inquire. The general purpose, as evidenced by the budget act, is to require a business-like administration of the affairs of the county, based upon an estimate of probable expenditures and an estimate of probable receipts from the revenue. We do not believe that the budget act does or was intended to specify the purposes for which the county may expend its money so long as the purpose is a lawful one, but it does specify the priority which shall exist among the payments to be made by the county court.

We believe it was the intention of the budget act that all funds belonging to the county at the time that this act goes into operation shall be transferred into the general revenue fund, there to be paid out according to the priority expressed in the law. If moneys remaining in the various funds should be kept segregated in those particular funds to be expended for the purposes for which the various funds were created, then the effect would be to destroy the purpose and effectiveness of the budget act. If such funds could be held intact and the moneys used not under the terms of the budget act, then the priority of payments required by the budget act would be a nullity. If money remaining in the road fund at the present time could be used for the purchase of right-of-ways without considering the requirements of the budget act, then money in all other funds set up by the county court could be used in the same way. The result would be that the budget act would not become effective as to the county moneys contained in those funds until such time as those funds were exhausted. As we construe the intention and requirements of the act all funds of the county, when the budget scheme is put into effect, must go into the general revenue fund, to be administered under the priorities and requirements as set forth in the act.

Class 3 of Section 2 of the act provides as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

Section 5 deals with the classification of estimated expenditures and Class 2 of the Section provides as follows:

"Repair and upkeep or replacement of bridges on other than state highways and not in any special road district. List bridges."

It appears under Section 2, Class 3, that the county court shall apportion money for the upkeep, repair and replacement of bridges on other than state highways which are not

June 13, 1934.

in any special road district. This is made an obligation of the third class. It is apparent that the purchasing of right-of-ways in road districts would not come under Class 3 above. Neither would it come under Class 2 of Section 5, as set out above. Class 6 of Section 2 provides as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

That the county court may lawfully expend the county funds for the purpose of obtaining right-of-ways in the building of the state highway system has not, to our information, ever been questioned. As a matter of fact, such practice has obtained in this State practically since the beginning of the present road law. We do not understand the budget law to define what are lawful expenditures by the county courts. The budget act simply declares the priority which certain claims based upon lawful obligations shall be paid. Under Class 6 of Section 2, which is the last class, the county court may expend its unexpended funds for any lawful purpose. We believe that an expenditure for right-of-ways, as suggested in your inquiry, may properly be made under Class 6, but, of course, the requirements and conditions of Class 6 must first be met. In other words, we believe that the act does not provide for the expenditure of funds for right-of-ways in any of the five prior classes. We further believe that the act itself does not prohibit the expenditure of money for purchasing right-of-ways, providing such right-of-ways are purchased under the proper classification and the requirements of the budget law are complied with.

We are therefore of the opinion that any funds remaining in the road fund shall be transferred to the general revenue fund of the county, and that the expenditure of those funds for the purpose of purchasing right-of-ways must be done under the priorities and classifications as set out in the act and above discussed.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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Attorney General.

MUNICIPALITIES: Public Service Commission:

Public Service Commission  
cannot fix, regulate or  
control the rate of a municipi-  
ally owned water plant.

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September 11, 1934. #30

Messrs. H. G. Fries, Elmer  
Mintchel, Roy Minkres  
Water Committee of the City of  
Mound City, Missouri

Gentlemen:

This department is in receipt of your letter of August 31st, wherein you state as follows:

"You have visited our city and gotten a glimpse of it. We are asking you for some legal information in regard to our water plant which is owned by the City and operated by our city council.

"The city council needed a little more revenue than the old rate which they were charging, provided to make the running expenses of the plant and cost of operation. When they did this, a protest was made by a user and patron of the plant.

"He holds in his protest that the city council must file an application with the Public Service Commission of the State of Missouri in order to grant them a permit to change the rates of the City water to its customers.

"We always were told by legal authority that the Missouri Public



Service Commission had no jurisdiction over municipal water and light plant, so we are coming to you for your legal opinion on this question."

The title to the Public Service Commission Act as found on page 556, of the Laws of Missouri, 1913, reads as follows:

"AN ACT to create and establish a public service commission, prescribing its powers and duties, and to provide for the regulation and control of public service corporations, persons and public utilities and to provide penalties for offenses by public service corporations, persons and public utilities, their officers, agents and employees, and by other persons and corporations, and repealing all acts and parts of acts inconsistent with the provisions of this act, with an emergency clause."

Article IV., Section 5188, R. S. Mo. 1929, provides as follows:

"This article shall apply to the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power, and the supplying and distributing of water for any purpose whatsoever."

Article IV., Section 5190, R. S. Mo. 1929, subsection 5, page 1445, dealing with the general powers of the Public Service Commission in respect to gas, water and electricity, reads as follows:

"5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, insufficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters."

The foregoing section contains an express direction to the Commission in the circumstances indicated to "determine and prescribe the just and reasonable rates and charges" of municipalities; and Section 5188, supra, recites among other things that "This article shall apply to \*\*\*\*\* the supplying and distributing of water for any purpose whatsoever."

In the case of City of Columbia v. State Public Service Commission, 43 SW(2d) 813, 329 Mo. 38, the sole

issue made by the pleadings in the case was, "Does the Public Service Commission of the State of Missouri have jurisdiction to determine and fix the rates to be charged by a municipally owned electric light plant?" Respondent, the City of Columbia, denied the jurisdiction of the Public Service Commission to fix the rates to be charged and in its petition pleaded among other things, that

"Fifth, if it be said that the Public Service Commission Act contemplates the supervision of municipally owned electric light plants, then such provision of the Act is unconstitutional in that it is in violation of section 28, Article 4 of the Constitution of Missouri, providing that no bill shall contain more than one subject which shall be clearly expressed in its title."

Respondent's particular objection to the Title of the Public Service Commission Act, as is found on page 556 of Laws of Missouri, 1913, supra, was that it did not clearly express the subject of regulation and control of municipalities. Counsel for appellant replied to this objection by stating that the title to the Act, "An Act to create and establish a public service commission, prescribing its powers and duties," was broad enough to include all the duties and the powers given to the Commission by the Public Service Commission Law.

The Court, in holding that the power to fix rates to be charged by municipalities which own and operate an electric light and power plant was not conferred by a valid law upon the Public Service Commission, said:

"\*\*\*\*\* Under the foregoing rule, this suggestion can have no application because the title is not confined to any such general statement. It immediately descends to particulars by limiting the objects of 'regulation and control' to 'public service corporations, persons and public utilities,' without mentioning municipalities. Counsel for appellant say that the word 'corporations' includes 'municipalities,' but it seems obvious that

'municipalities' are not 'public service corporations.' Moreover, the act itself (Laws of 1913, p. 558, Section 2) separately defines a corporation, a person, a municipality, and a public utility, without any overlapping, as follows:

" 'The term "corporation," when used in this act, includes a corporation, company, association and joint stock association or company.

" 'The term "person," when used in this act, includes an individual, and a firm or copartnership.

" 'The term "municipality," when used in this act, includes a city, village or town.

" 'The term "public utility," when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraphic corporation, water corporation and heat or refrigerating corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act.'

"If the legislative intent was to provide for the 'regulation and control' of all four of the subjects thus separately defined and distinguished in the act itself, it is fair to assume that the title would have expressly named all four subjects. Certainly, in the light of these definitions, a title that omitted one subject would not be a 'fair forecast of the contents of the bill,' if any of such contents undertook to regulate and control the omitted subject, and such is the status of the act now under con-

Messrs. Fries, Mintchell  
and Minkres.

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9/11/34

sideration. Such a title is obviously misleading and violative of the constitutional provision here invoked. \*\*\*\*\*

"The fixing of rates to be charged by a municipality owning and operating an electric plant is an exceedingly positive and vital form of regulation and control. For the reasons above stated, we are constrained to hold that the power to fix such rates has not been validly conferred upon the Public Service Commission, and the judgment is affirmed."

### CONCLUSION.

In view of the foregoing case and sections, we are of the opinion that any attempt of the Public Service Commission to fix, regulate or control the rate of a municipally owned water plant is invalid and without legal force.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

(Acting)  
Attorney-General.

11/18/80

TAXATION: Delinquent personal taxes collected by suit, Section 9940  
R. S. Mo. 1929. No sale under Seante Bill 94 until  
November 1934.

122  
January 18, 1934.



Hon. William S. Gabriel  
Attorney At Law  
Independence, Missouri

Dear Mr. Gabriel:

Your letter of December 21, 1933 to General McKittrick  
requesting an opinion of this office respecting Senate Bill 94  
has been referred to the writer. Your questions are as follows:

- "1. Does this law affect personal delinquent  
taxes, other than some provision for the  
Collector charging them against certain real  
estate?
2. Does the law include delinquent real  
estate taxes for 1932, now a year delinquent,  
but upon which suits have not as yet been  
filed?
3. Does the law permit sale of real estate  
for 1933 delinquent taxes before November  
1, 1934?"

We shall answer your inquiries in the order above  
named.

I.

SENATE BILL 94 DOES NOT EFFECT  
RIGHT TO BRING SUIT FOR DELIN-  
QUENT PERSONAL TAXES.

One of the methods provided by the statutes for the  
enforcement of the payment of personal taxes is found in Section  
9940 R. S. Mo. 1929. This section reads as follows:



"Personal taxes assessed on and after June 1st 1887, shall constitute a debt for which a personal judgment may be recovered before a justice of the peace or in the circuit courts of this state against the party assessed with said taxes. All actions commenced under this law shall be prosecuted in the name of the state of Missouri, at the relation and to the use of the collector and against the person or persons named in the tax bill, and in one petition and in one count thereof may be included the said taxes for all such years as may be delinquent and unpaid, and said taxes shall be set forth in a tax bill or bills of said personal back taxes duly authenticated by the certificate of the collector and filed with the petition; and said tax bill or tax bills so certified shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suits under this law shall be sued and served in the same manner as in civil actions before justices of the peace and in circuit courts, and the general laws of this state as to practice and proceedings and appeals and writs of error in civil cases shall apply, as far as applicable, to the above actions. Said actions shall be prosecuted by attorneys employed as provided in article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions: Provided, however, that in no case shall the state, county, city or collector be liable for any costs nor shall any be taxed against them or any of them. For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted after the expiration of said first day of January, and within five years from said day. Said personal tax shall be presented and allowed against the estates of deceased or insolvent debtors, in the same manner and with like effect, as other indebtedness of said debtors. The remedy hereby provided for the collection of personal tax bills is cumulative, and shall not in any manner impair other methods existing or hereafter provided for the collection of the same: Provided, further, that in counties which now have or which may hereafter have a population of more than 200,000 and less than 500,000 no suit shall be entered on a delinquent personal tax before the first day of



March following the day when said bills are placed in the hands of the collector, and in each case the attorney shall be allowed 10 per centum on the amount of money actually collected and paid into the county treasury: Provided, however, that in each case a fee of 40 cents may be charged; and provided, in counties having a population of over 200,000 and less than 500,000 such fee shall be collected on all delinquent personal taxes, and such fees shall be taxed and collected as other costs and penalties and shall not be deducted from the tax. This section shall not apply to counties having a population of more than eighty thousand and less than one hundred and fifty thousand in which circuit court is held in more than one place."

By an examination of the foregoing section it is apparent that this sets up a complete system and procedure by which payment of personal taxes may be enforced by suit. Senate Bill 94 as found at page 425 Laws of Missouri 1933, does not repeal or amend this section. While it may be said that Section 9962 of said bill permits the collector to charge personal property tax against the real estate it is clear that real estate may not be sold for the payment of delinquent personal tax. We direct your attention to the last clause of this Section which reads as follows:

"Nor shall such personal property tax so charged be entered on the delinquent list of land and lots and included in any delinquent land tax sale."

Accordingly, it is clear that it was not the intention of the Legislature that delinquent personal taxes could be enforced by a sale of real property under the provisions of Senate Bill 94.

It is the opinion of this office that the bringing of a suit for the enforcement of the payment of delinquent personal taxes is at this time an appropriate remedy by means of which the collector can obtain payment of such delinquent taxes.

## II.

THE PAYMENT OF DELINQUENT LAND  
TAXES MUST BE ENFORCED UNDER THE  
PROVISIONS OF SENATE BILL 94.

Prior to the enactment of Senate Bill 94 delinquent land taxes were collected by means of suit. The statutes carefully set up the manner and method of procedure. Section 9952 R. S. Mo. 1929, provided for the enforcement of the payment of such taxes by suit. Section 9953 provided how the action should be prosecuted, the form of the petition and the weight to be given the tax bill. Section 9954 provided for the employment of an abstractor by the county collector. Section 9955 provided for the abstractor's compensation. Section 9956 provided for the form of the judgment if against the defendant. Section 9957 provided what term the suits were to be tried. Section 9958 provided for the execution of a deed by the Sheriff in case of a sale. All of these sections and several others were repealed by Senate Bill 94 and an entirely new method of procedure was established by that law. Senate Bill 94 became effective on the 25th day of July, 1933. After that date these statutes provided for the enforcement of the payment of land taxes by suit were extinguished except for the purposes set forth in Section 9962b of said bill. A part of this section reads as follows:

"\* \* \* provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions

that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

It is to be noted that there is no authority for the institution of any new suits, the only provision is that suits already instituted might be prosecuted to judgment and the tax lien foreclosed as provided by those sections.

Accordingly it is the opinion of this office that no suit for delinquent land taxes can be instituted at this time but that 1932 land taxes upon which suit was not entered prior to the 24th of July 1933, must be enforced under the provisions of Senate Bill 94.

### III.

#### SENATE BILL 94 DOES NOT PERMIT SALE OF PROPERTY FOR DELINQUENT TAXES BEFORE THE FIRST MONDAY OF NOVEMBER OF 1934.

It has heretofore been the opinion of this office that by reason of Senate Bill 80 no sale of land for the payment of delinquent taxes could be held in November of 1933, although Senate Bill 94 was in all respects operative at that time. The provision for the sale of lands for delinquent taxes is found in Section 9952a of Senate Bill 94, page 430 Laws of Missouri 1933. Portions of this Section read as follows:

"\* \* \* All lands and lots upon which taxes are delinquent and unpaid shall be subject to sale to discharge the lien of said delinquent unpaid taxes is provided for in this act on the first Monday of November of each year,\* \* \*"

The provisions of the above section definitely set the date of sale as being the first Monday of November of each year. There is no authority for the sale being held any sooner. This law has established a uniform rule for the sale of property for delinquent taxes. It is our belief that the time requirement is mandatory at least insofar as would make a sale held prior to the first Monday of November of each year void. It would be very confusing, unfair and unequitable to subject land to sale at any time during the year that might suit the fancy of the Collector.

Hon. William S. Gabriel.

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January 18, 1934.

From the foregoing it is apparent that our opinion can only be that no sale under Senate Bill 94 can be held prior to the first Monday of November 1934, and that such sales are to be held annually on the first Monday of each succeeding year.

We trust that the foregoing may be of assistance to you in solving your problem.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

HGW:MM

TAXATION: COLLECTOR: Suits for delinquent real estate taxes instituted prior to the effective date of Laws Missouri 1933, page 425, are governed by statutes in effect at the time suits were instituted and not by Laws Missouri 1933, page 425.

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September 19, 1934



Honorable William S. Gabriel  
209 First National Bank Building  
Independence  
Missouri

Dear Mr. Gabriel:

This Department acknowledges receipt of your letter dated September 7, 1934, as follows:

"I read your opinion pertaining to the new delinquent tax law, and am writing you for an additional opinion based upon Section 9962b of the Act in question.

As attorney for the Collector of this County, I filed a large number of suits for the collection of delinquent taxes for the years 1930 and 1931, aggregating some six thousand, with perhaps four thousand still pending.

My question is, whether under Section 9962b, I cannot proceed to collect these taxes under the old law, which allowed attorney's fees, and also whether the Collector will not be authorized, upon payment of these taxes covered by suits pending, to collect attorney's fees as provided by the old law.

If your opinion accords with my own, that the Collector is so authorized, we will be able to collect in a great amount of

Honorable William S. Gabriel

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September 19, 1934.

delinquent taxes, beginning about the middle of November. As the matter stands now, there will be no pressure whatever for the payment of these delinquent taxes two and three years old. The State, County and Schools (as well as the Attorney) are deeply interested in their collection.

I will appreciate your opinion upon this question at your early convenience."

Section 9962b of Laws of Missouri 1933, page 444, among other things, provides that:

"\* \* \* nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, \* \* \*"

From the foregoing it is clear that as to suits instituted for the collection of delinquent real estate taxes, when such suits were instituted prior to July 24, 1933, would be governed in all things according to the procedure under applicable statutes in force at the time the suits were instituted and without regard to Senate Bill 94, Laws of Missouri 1933, page 425.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

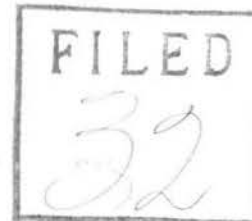
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(Acting)  
Attorney General.

GL:LC

FINGERPRINTING: No liability incurred by Sheriff of Putnam County if officer used reasonable judgment, and if person under arrest was not coerced, threatened or compelled to submit to the taking of fingerprints.

1-22  
January 17, 1934.



Mr. A.R. Gibson,  
Sheriff of Putnam County,  
Unionville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of November 4 relative to taking fingerprints of prisoners, same being as follows:

"I have been up against it here for the reason that I have been told by the prosecuting attorney here that I am not permitted to take fingerprints of prisoners except those under conviction on felony charges.

In several cases I am sure that I could have produced conclusive evidence for conviction as I have been lifting fingerprints everywhere I am called out on a robbery, if it had been legal to do so.

I have noticed that Sheriff Bash of Kansas City was going ahead fingerprinting. I wish you would give me an opinion on this as I do not wish to get myself in a jam. You see this is a republican county, and being a Democrat they are watching every move I make, trying to catch me liable."



The statutes of Missouri are silent in regard to the taking of fingerprints or bertillon measurements except in cities having a population of five hundred thousand or more. The only statute we find dealing with the Bertillon System is Section 3794, R.S. Mo. 1929, which is as follows:

"Any person convicted of a felony, which shall not be set aside or reversed, may be subjected by or under the direction of those in whose custody he is to the measurements, processes and operations practiced under the system for the identification of criminals, commonly known as the Bertillon signaletic system. Such force may be used as necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic card and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law."

You will note this section only gives an officer authority to take fingerprints and bertillon measurements after a person has been convicted and the sentence affirmed.

We do not have any cases in Missouri bearing on this question. In the decision of State v. Clausmeier, 154 Indiana 599, the Court said:

"'Unless this discretion' is abused through malice, wantonness or a reckless disregard for, and a selfish indifference to the common dictates of humanity, the officer is not liable."

In the same case, the Court said with respect to taking photographs, the following:

"The duty of the police, always existing, and reaffirmed by the charter \*\*\*\*\*to preserve the public peace, prevent crime, detect and arrest offenders', gives them necessarily a wide range of incidental powers to to accomplish the mandate of the statute. The existence of the so-called 'rogues' gallery, and the taking of photographs, weights and measurements,

Jan. 17, 1934.

finds its authority, if anywhere, in this provision, or in the accepted pre-existing principles of which it is the expression. So far as habitual criminals are concerned, their supervision and control, no serious question could well be raised as to the propriety or legal character of the acts involved. One of the phases of police supervision, says Professor Thiedeman, in his state and federal control of persons and property, 'is that of photographing alleged criminals and sending copies of the photographs to all the detective bureaus. If this is directed by the law as a punishment for crime of which the criminals stand convicted, or if the man is in fact a criminal, and the photograph is obtained without force or compulsion, there can be no constitutional or legal objection to the act, for no right has been violated.' The taking of photographs in such cases has authority to support it."

#### CONCLUSION

In the last analysis, we wish to say that if an officer used reasonable judgment, and if the person under arrest was not coerced, threatened or compelled to submit to the taking of fingerprints, it would be the opinion of this department that it would incur no liability. However, discretion should be used and official authority should not be abused.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

SURVEYORS:

For the surveying of accreted lands, such as river bars, the County Court need not necessarily employ the County Surveyor but may employ any surveyor.



1-23

January 20th, 1934.

Mr. L. C. Gillis,  
County Surveyor,  
and Ex-Officio Highway Engineer,  
Oregon, Missouri.

Dear Mr. Gillis:-

We have your letter of October 18th, 1933, in which is contained a request for an opinion as follows:

"At the general election in November, L. C. Gillis, a Democrat, was elected County Surveyor of Holt County by a large majority. He defeated John H. Peret, a Republican, who has held this office for sixteen years. The County Court is Republican and on December 7, 1932, this County Court gave Peret a contract to survey several Missouri River bars amounting to about 3200 acres and agreed to pay him 65¢ an acre as allowed by law. But Peret did not start work on this project until after the first of this year, or until after he had gone out of office. The Court evidently used Section 11179 as their alibi in giving this contract, which took \$2,080.00 from the newly elected surveyor. He is still working on this work, having been busy at it most of the time since the first of the year.

"What was the use of having an election if the old surveyor is going to hold over and keep on working? According to Section 111581 are these surveys legal? The Court must have gotten their authority from a misrepresentation of Section 11179, but there are no suits pending on this land as it has never been surveyed before. Please send me your opinion regarding this survey and sale of land, and how shall I proceed in order to get this work?"

We feel that the opinion above requested resolves itself into a construction of Section 11179, Revised Statutes of Missouri, 1929, and since we are unable to find any decisions to aid us in such construction, we are forced to construe said section according to the legislative meaning and intent as we see it.

January 20th, 1934.

Article 6, Chapter 66, Revised Statutes of Missouri, 1929, sets forth the law as applicable to accreted lands such as the river bars mentioned in the letter above quoted.

Section 11166, contained in said Article, provides as follows:

"Sec. 11166. COUNTIES MAY SURVEY AND SELL.-  
"All counties in which any such lands are situated shall have the power to cause the same to be appropriately surveyed, and to sell and convey them in the same manner that the swamp lands acquired under the act of congress of September 28, 1850, entitled 'An Act to enable the state of Arkansas and other states to reclaim the swamp and overflowed lands in their limits,' afterward donated to the counties in which they were situated, or conveyed; and the proceeds of all such sales shall become a part of the swamp land school funds of the counties in which said lands are situated."

Section 11169, contained in said Article, provides as follows:

"Sec. 11169. LANDS TO BE SURVEYED, HOW.-  
In surveying the lands and islands referred to in this article the surveyor shall connect the survey thereof with some established section, quarter section, meander or other United States survey corner conveniently near or adjacent to the land or island to be surveyed; he shall meander islands and such lake and river bed lands as may abut on a navigable river or lake; he shall subdivide such lands into sections and quarter sections by producing and extending the lines of the surveys made by the United States surveyors over such islands and lands from the shore from which said islands or lands may be surveyed."

Section 11179, also contained in said Article, provides as follows:

"Sec. 11179. COUNTY COURT MAY EMPLOY SURVEYORS AND ATTORNEYS. The county court may employ surveyors to survey said lands and islands, and attorneys to represent them in any suits pertaining thereto, and shall pay such surveyors and attorneys reasonable compensation for their services, to be paid out of any funds arising out of the sale of such lands and islands, or out of the general revenue fund of the county as may be agreed upon at the time such surveyors and attorneys are employed."

January 20th, 1934.

As will be seen from a reading of the above, Section 11166 gives the county the power to survey and sell such lands; Section 11169 sets forth the manner in which such lands shall be surveyed, and Section 11179 provides by whom such surveys may be made. We are not of the opinion that Section 11179 applies only to lands concerning which some suit has arisen because from the punctuation and the arrangement of the clauses, such meaning does not appear. To the contrary, the section clearly provides in the first two lines that the County Court may employ surveyors to survey said lands and islands without any following limitation as to what surveyor or surveyors may be employed. The mere fact that the next clause provides for the employment of attorneys to represent said surveyors in any suit that may arise is of no import. The clauses are separate and distinct and are divided from each other by a comma.

Section 11581, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 11581. WHAT SURVEY SHALL BE LEGAL EVIDENCE.-  
No survey or resurvey, hereafter made by any person, except that of the county surveyor or his deputy, shall be considered legal evidence in any court in this state, except such surveys as are made by the authority of the United States or by mutual consent of the parties."

The question is asked whether, according to the above section, the surveys referred to in the above quoted letter are legal. We are of the opinion that they are. The above section refers only to what surveys shall be considered legal evidence in a court and can have no effect on the actual legality of surveys for other purposes. In addition, Section 11581 is a general section of the laws on surveyors, while Section 11179 is a section applying solely to the type of lands to be surveyed in this instance. Of course, should a survey be made under Section 11179 by any surveyor other than the county surveyor and a suit should arise concerning such lands, such survey could not be used as legal evidence unless the parties to the suit consented thereto. If said parties would not so consent, a further survey would have to be made by the county surveyor, said survey, under Section 11580, being at the expense of the person demanding same. This may seem a somewhat circuitous procedure but under the laws as they now stand, we can see no alternative.

As noted above, Article 6, Chapter 66, Revised Statutes of Missouri, 1929, sets forth the law on accreted lands and surveys

L. C. Gillis--#4

January 20th, 1934.

relative thereto. Section 11179 of that Article provides in plain terms for the employment of surveyors by the county court. Since this provision does not specify what surveyors shall be employed, we are of the opinion that the county court need not necessarily employ the county surveyor for such work.

Very truly yours,

CMHjr-MB

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

APPROVED:

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Attorney-General.



/ Assessors.

Assessor need not view land to make assessment each year but may validly assess by reference to old assessment book.

9.12

September 11, 1934.



Mr. J. R. Gideon,  
Prosecuting Attorney Taney County,  
Forsyth, Missouri.

Dear Sir:-

We have your letter of July 7, 1934, in which was contained a request for an opinion as follows:

"Please advise me if the county assessor may employ a deputy collector to help him make out the personal and real estate books? This work to be done in a clerical capacity only and not as a deputy assessor. Please advise me further whether the assessor must actually see each land owner each year and view the land in order to make the real-estate assessment or may he use the old assessment book and make such changes as he deems necessary when making out the land book?"

The law relating to assessors and assessment of property is set out in Article 2, Chapter 59, Revised Statutes of Missouri, 1929.

With regard to your first question we find nothing in the statutes to forbid a county assessor from employing a deputy collector in a purely clerical capacity provided the assessor pays for same out of his fees.

As to your second question we refer you to Section 9760 Revised Statutes of Missouri, 1929, which provides as follows:

"Sec. 9760. Assessor to make list where none is given.--Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching same. (R. S. 1919, Sec. 12770.).

In the case of State ex rel. vs. Carr, 178 Mo. 229, where the identical section of the 1899 statutes was before the court, it was held, at page 238, as follows:



Mr. J. R. Gideon

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Sept. 11, 1934.

"Neither did the fact that the assessor did not go upon the land and assess it upon his own view, and that he simply accepted the previous assessment as shown by the assessment books that were turned over to him by the clerk of the county court, render the assessment invalid."

The court in the above case regarded the section as directory and not mandatory. This case is still the law in this state; hence the assessor is not required as a matter of law to actually view the land.

Very truly yours,

CMEHJr:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

Approved:

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Attorney General

ASSESSORS: COUNTY CLERKS: County clerks shall deliver  
Assessor's book to Assessor.  
When.

December 15, 1934

12-15

Honorable R. W. Gilkison  
Collector of Revenue  
Rock Port  
Missouri



Dear Sir:

Your letter dated August 22, 1934 was received.  
Your letter follows:

"I have several people wanting to pay the  
1934 tax, and as yet, the county clerk  
refuses to deliver me the said tax books.

Page 421, Section 9876, 1933 Missouri Laws.  
The board of equalization is the first week  
in April and the board of appeals is the  
last week in April. I do not know of  
any lawful corrections, or adjustments  
later than the board of appeals.

Thank you very much if you will advise me  
when I am to receive the 1934 tax book."

On account of the very heavy volume of work passing  
through this office your letter in some manner became mis-  
placed, and answer was not made thereto. While we assume  
that the matter has probably straightened itself out by  
this time we owe you an apology and will make same by answer-  
ing your letter.

Section 9876 Laws of Missouri 1933, page 421, reads  
as follows:

"As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax book for the use of the Collector; and when the Assessor's book is in two or more volumes, such extensions shall be made in all such volumes, and each volume shall be authenticated by the Clerk with the seal of the Court. And upon a failure to make out such extension of taxes in the Assessor's book or books, as the case may be, and deliver same to the Collector in the time specified, the County Court shall deduct twenty per centum from the amount of fees which may be due the Clerk for making such extension, and such Assessor's book, with the taxes so extended therein, shall be called the 'Tax Book'."

The above quoted section controls the duty of the Clerk of your County Court to deliver you the Assessor's book after all equalizations, corrections and adjustments of the assessments for the previous year have been made. It is the duty of the county clerk within ninety days after the lapse of such time to make up the Assessor's book and deliver the same to you. Of course we do not know when the final corrections and adjustments were made with reference to the assessments referred to, that will have to be determined by you.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

GL:LC

STATE BOARD OF HEALTH: Entitled to fee for transcription of  
"still birth" certificates. 13 U.S.C.A.  
101.

February 9, 1934. 2-17-34



Dr. Herman S. Gove  
State Board of Health  
Jefferson City, Missouri

My Dear Dr. Gove:

Several days ago you requested information as to whether or not the State Board of Health is entitled to compensation from the Federal Government for copies of "still birth" certificates.

We premise our remarks respecting this matter with the observation that this compensation is provided for under the Federal Law and that our opinion on this matter is not binding.

Without question the Federal Government has concerned itself respecting the accurate compilation and registration of vital statistics. They have in many instances directed the appropriate agencies to take steps to insure the recording of vital statistics. We find this requirement respecting the public health. 42 U.S.C.A. 30:

"To secure uniformity in the registration of mortality, morbidity, and vital statistics it shall be the duty of the Surgeon General of the Public Health Service, after the annual conference required by section 29 of this title to be called, to prepare and distribute suitable and necessary forms for the collection and compilation of such statistics, and said statistics, when transmitted to the Public Health Bureau on said forms, shall be compiled and published by the Public Health Service as a part of the health reports published by said service."

We therefore see that the Federal Government is actively concerned with a proper compilation of information respecting births and deaths. However, they have not been content to entirely leave the preservation of this information to the state and local authorities. We find that the census director is required to keep a detailed record of births and deaths. We refer to 13 U.S.C.A. 101 which reads as follows:

"There shall be a collection of the statistics of the births and deaths in registration areas annually, the data for which shall be obtained only from and restricted to such registration records of such States and municipalities as in the discretion of the director possess records affording satisfactory data in necessary detail, the compensation for the transcription of which shall not exceed 4 cents for each birth or death reported; or a minimum compensation of \$25 may be allowed, in the discretion of the director, in States or cities registering less than five hundred deaths or five hundred births during the preceding year."

Under the provisions of the foregoing section the census director is required to collect statistics of births and deaths in necessary detail, the compensation for the transcription of which shall not exceed four cents for each birth or death reported.

Having in mind that the intent and purpose of the foregoing provision is that complete information may be kept in respect to all births and deaths, it is our opinion that it is as necessary and important that the census director be supplied with a transcription of the certificate of still birth as with any other kind or type of certificate. It could not be said that the record was complete without this information and of course if the transcription is to be made the same compensation should be allowed for such certificate as is allowed for any other birth or death certificate.

We desire to call to your attention the matter of compensation allowed by this section. It is to be noted that the compensation shall be not to exceed four cents for each birth or death reported. This section as originally enacted calls for a compensation not to exceed two cents for each birth or death reported,

Dr. Herman B. Gove.

-3-

February 9, 1934.

however, the amendment calling for a compensation of four cents was made sometime ago. Being familiar with the amount of work necessary to supply these transactions it occurs to us that two cents is insufficient to meet the expense of your department in supplying this information, and while we do not believe that the State should make any profit in supplying these transcriptions we do believe that a charge should be made, not to exceed four cents per transcription, which would compensate the State for the expense of supplying these transcriptions. It is our opinion that as the statute provides the compensation up to four cents for each transcription that the State of Missouri should receive an amount sufficient to pay the cost of furnishing these transcriptions, which cost of course cannot exceed four cents.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

HGW:MM

PUBLIC HEALTH - CONTAGIOUS DISEASES - Power of said Board of Health to alter regulations for exclusion from attendance at public schools on account of.

September 14, 1934



State Board of Health of Missouri,  
Jefferson City, Missouri.

Gentlemen:

Attention Herman S. Gove, M.D.  
Medical Licensure

A request for an opinion has been received from you under date of March 23, 1934, such request being for an opinion on the issues raised by the following letter dated March 17, 1934, from O. P. Hampton, Health Commissioner of University City, Missouri, to Dr. Emmett P. North, President Missouri State Board of Health:

"For some time the University City Board of Health has been concerned with Part C under Duties of School Authorities in Section 4 of Book 4 of Rules and Regulations of the State Board of Health of Missouri which has to do with the control of communicable diseases. For your information I quote this section.

'Diseases in Home -- No teacher, pupil, or employee shall be permitted to attend school while residing in home or institution where there exists any of the following diseases in a communicable stage as defined for each disease in Section VII: Cholera, diphtheria, measles, meningococcus meningitis, plague, poliomyelitis, scarlet fever, smallpox, typhus fever, whooping cough, yellow fever.'

We believe that you will agree that this rule is somewhat obsolete when it is made to apply to Measles and Whooping Cough, especially the former. According to the State Statutes as outlined in the same book of the Rules and Regulations, cities of a population under 75,000 are required to follow the State Board of Health rules and regulations while cities over 75,000 are allowed to make their own rules and regulations for the control of communicable diseases. Therefore we in University City are confronted with the following problem. An immune child, that is, one who has



"previously had Measles or Whooping Cough, may continue to attend school from his own home when one of these diseases exists in that home if he resides in St. Louis (a City over 75,000) but he cannot attend school from his own home and must either live elsewhere or miss school while a case of Measles or Whooping Cough exists in his home, if he resides in University City (a City under 75,000). Under date of January 26, 1934, I corresponded with Dr. McGaugh requesting that he give us permission to disregard the above paragraph and make our own regulations regarding the two above mentioned diseases. In his reply Dr. McGaugh agreed that this rule was obsolete but stated that we must continue to abide by it until the State Board of Health had seen fit to revise it. Therefore you can understand that by abiding by this rule, and we have done so, we are causing needless inconvenience to the citizens of our City.

Therefore the University City Board of Health has instructed me to write to you to request that this rule be revised as soon as possible or that cities such as ours with organized health departments be given permission to disregard it. We would appreciate a reply from you."

Revised Statutes Missouri 1929, Section 9016, provides as follows:

"The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

Since by this statute the Board of Health is allowed to designate such diseases as it considers infectious, contagious, communicable or dangerous in their nature, and since it authorizes the Board to make and enforce rules to prevent the spread thereof, it would seem clear that if the Board of Health had adopted a rule designating the diseases such as measles or whooping cough as contagious to the extent that it seemed necessary to exclude from attendance at public school any pupil in whose home either of such diseases

existed, and if the Board subsequently decided that such exclusion was not necessary on account of the disease not being so contagious in some or all cases, then the Board could amend its rule so as to remove such ban in whole or in part as to cities having populations of 75,000 inhabitants or less. (Revised Statutes Missouri 1929, Section 9029)

Some confusion might be aroused by Revised Statutes Missouri 1929, Section 9208, which provides in part as follows:

"It shall be unlawful for any child to attend any of the public schools of this state while afflicted with any contagious or infectious disease, or while liable to transmit such disease after having been exposed to the same. For the purpose of determining the diseased condition, or the liability of transmitting such disease, the teacher or board of directors shall have power to require any child to be examined by a physician or physicians, and to exclude such child from school so long as there is any liability of such disease being transmitted by the same."

On its face this statute would seem to leave a decision as to what pupils should be excluded from attendance at the public schools on account of the liability of communicating contagious diseases, to the several Boards of Directors of school districts. However, Revised Statutes Missouri 1929, Section 9028, which provides in part as follows:

"All rules and regulations authorized and made by the state board of health in accordance with this chapter shall supersede as to those matters to which this article relates, all local ordinances, rules and regulations and shall be observed throughout the state and enforced by all local and state health authorities."

shows that such local rules and regulations of Boards of Directors of school districts would be superseded by the rules promulgated by the State Board of Health and that the latter would control in case of a conflict.

In conclusion, it is our opinion that as to a rule or regulation of the State Board of Health designating certain diseases as sufficiently contagious to require exclusion from the public schools of any pupil in whose home such diseases might exist, that the Board would have authority under the statutes to alter such rule or regulation so as to remove such ban in whole or in part if it

4. State Board of Health of Missouri.

September 14, 1934

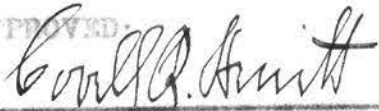
reasonably felt that the facts warranted such removal.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

APPROVED:



(Acting) ATTORNEY GENERAL

(1)

COUNTY WARRANTS: It is permissible to issue county warrants in payment of officers' salaries and accounts when warrants have already been issued to the amount of the anticipated revenue;

(3) Claims against Co. for warrants issued in excess of anticipated revenue can be paid out of surplus of subsequent years.

(2)

Officer who issues warrants in excess of anticipated revenue not civilly or criminally liable  
January 11, 1934.



Hon. O.H. Gramling,  
Clerk of County Court,  
Sullivan County,  
Milan, Missouri.

Dear Sir:

This department acknowledges receipt of your letter relative to county warrants in your county, the contents of same being as follows:

"Will you kindly advise the Sullivan County Court if it would be permissible to issue county warrants, in payment of officer's salaries and accounts due from Sullivan County, when warrants have already been issued to the amount of the anticipated revenue?"

Would any officer who issued warrants in excess of the anticipated revenue be liable on his bond or criminally liable?

What would you advise as to how the claims against the county may be paid?"

I.

It is permissible to issue county warrants in payment of officers' salaries and accounts when warrants have already been issued to the amount of the anticipated revenue.

In discussing the above question, there are a number of statutes which bear indirectly on the same, the most pertinent being Section 12162, R.S. Mo. 1929, which is as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and if any person, being served with such summons, shall not appear according to the command thereof, the said court may compel his appearance by attachment; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue a summons, directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which summons shall be served by the sheriff; and if the person named in such summons refuse to appear with or transmit the accounts, books, documents or papers, or show good cause why he does not, at the time appointed for his appearance, the said court may enforce the delivery thereof by attachment; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and may commit to jail any person who shall refuse to answer any lawful question: Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

We also quote herewith, Section 12171, R.S. No. 1929, which is as follows:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same."

Under Sec. 12162, supra, we find it the duty of the county court to adjust and settle all accounts, and under Sec. 12171, supra, the duties of the county treasurer are set out respecting warrants when there are no funds available for the paying of same.

In the decision in the case of Wilson v. Knox County, 132 Mo. 387, the Court recognizes that the various funds become exhausted, and in the course of the opinion makes the following comment (l.c. 401):

"But those cases bear no analogy to the case in hand, which is an action upon obligations created and imposed upon the county by law, payable out of the revenue to be collected for county purposes. It is a county debt, the fund for the payment of which the county court has power 'to create and replenish by taxation'. That it must be paid out of funds appropriated and set apart for it, like all other demands, or that there is no money in the fund upon which the warrant is drawn, is no reason why the demand should not be established by judgment. 'A warrant lawfully issued in payment of an indebtedness of one year may be paid out of the revenues of a subsequent year'. Reynolds v. Norman, 114 Mo. 509."

A decision which has "weathered the storm" for many years respecting warrants is the case of Kansas City, Fort Scott & Memphis Railroad Co. v. Thornton, 152 Mo. 570, wherein the court says (l.c. 575):

"The result was, overwhelming debts were contracted, which necessarily went unpaid or excessive taxation had to be levied to pay them; The effect of which impaired the credit of the counties and cities, engendered recklessness and extravagance in the management of the public business and constantly oppressed the tax-payers. These were the evils that sections 11 and 12 of article X of the Constitution were intended to remedy, first, by limiting the rate of taxation and, second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is



duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. "

Likewise, we interpret the decision in the case of *Watson v. Kerr*, 312 Mo. 549 as bearing on the instant question. In that case Judge Ragland said (l.c. 560) 279Sw612

"It is quite clear that the county court, in May when it made the levy, estimated that the taxes accruing therefrom together with other sources of income would yield the sum of \$48,000 and that that sum would be sufficient to meet the current expenses of the county for the year. This estimate necessarily included the indebtedness which had at that time been already incurred in the purchase of the infirmity site. The contract of purchase on its face shows that it was intended to be a cash transaction, that is, that the purchase price was to be paid out of funds received into the treasury during the year. From the record facts it is clearly inferrable that the court in estimating the income and expenditures for the year was of the opinion that the indebtedness for the infirmity site could be incurred and the total expenditures still be kept within the income. Its good faith in the matter is not impeached by anything that appears in the record. Mere error of judgment is not



sufficient for that purpose; there must have been fraud or a palpable attempt to evade the constitutional provision."

In the light of the above decisions, it is the opinion of this department that in the absence of fraud, you may continue to issue warrants for valid indebtedness, although your county has already issued warrants equal to or beyond the anticipated revenue. The excess warrants, or deficit, can be taken care of in the manner set out in the case of *Kansas City, Fort Scott & Memphis Railroad Co. v. Thornton*, supra, viz: "the surplus of revenue collected for any one year can be applied to the deficit of any other year."

## II.

An officer who issues warrants in excess of the anticipated revenue would not be liable civilly or criminally.

Under Section 9874, R.S. Mo. 1929 it is made the duty of the county court at the May term thereof to appropriate a portion and subdivide all the revenue collected and to be collected, moneys received and to be received, for county purposes in the following order:

- I. A sum sufficient for the payment of all the necessary expenses that may be incurred for the care of paupers and insane persons of such county.
- II. A sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including the pay of road overseers of such county.
- III. A sum sufficient for the payment of the salary of all county officers, where the same is by law made payable out of the ordinary revenues of the county.
- IV. A sum sufficient for the payment of the fees of grand and petit jurors, judges and clerks of elections, and fees of witnesses for the grand jury of the county.
- V. A sum sufficient for the payment of the other ordinary current expenses of the county, not hereinbefore specially provided for, which shall be known and designated as

the contingent fund of such county; which last sum shall in no case exceed one-fifth of the total revenue of such county for county purposes for any one year."

Section 9874, R.S. Mo. has been amended (Laws of Mo. 1933, p. 351); however, as the levies of your county were made under the old section, we will continue to deal with the same.

Section 9874, supra, making it mandatory on the county court to carry out the provisions of the same, the county court can only use its best and honest judgment and anticipate the revenue for the various funds. It cannot be said that the county court is infallible and can estimate exactly the amount which will be needed. We have no penal statute which would subject any official issuing warrants in excess of the anticipated revenue to a prosecution, and as stated in the case of Watson v. Kerr, supra,

"Here error of judgment is not sufficient for that purpose; there must be fraud or a palpable attempt to evade the constitutional provision."

Such a condition being absent, no officer would be liable civilly.

### III.

Claims against the county for warrants issued in excess of the anticipated revenue can be paid out of the surplus of subsequent years.

Under the Constitution of the State of Missouri, Article X, Section 11, which is as follows:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes, \*\*\*\*\*"

the county is precluded from becoming indebted beyond the revenue provided for in a year unless by consent of two-thirds of the voters.

In view of the section quoted in subdivision I of this opinion, relating to the duty of the county treasurer respecting

Jan. 11, 1934.

protested warrants, these warrants become in the nature of promissory notes, and as was said in the case of Kansas City, Fort Scott & Memphis Railroad Co. v. Thornton, supra, "it was intended by Sections 11 and 12 of Article X of the Constitution to abolish the credit system and establish a cash system in public business. The revenue for any one year must be applied to the payment of the current expenses for that year and only the surplus after these have been paid can be applied to liabilities of other years".

Thus, we see that the surplus of subsequent years can be used to take up the outstanding county warrants. This theory is further strengthened by the decision of the court in the case of State ex rel. v. Johnson, 162 Mo. 621, which adheres to the above decision.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

OWN:AH

COUNTY: Liability for Hospital expense as result of Sheriff's Act.

March 7, 1934

File No. 34



Hon. Harve G. Gray  
Superintendent  
Missouri Training School for Boys  
Boonville, Missouri

Dear Sir:

We are in receipt of your letter dated February 24, 1934,  
which reads as follows:

"The Sheriff from Gentry County started to Boonville last December with Delmer Armstrong, happened to an automobile accident in which the Sheriff was badly hurt and the boy received a fractured left leg. Apparently he did not receive proper medical attention and this boy has been delivered to us with the bone lapped which will make him a cripple for life.

**Question:** Is it possible to compel Gentry County to bear the hospital expense of severing this bone and setting it properly in order to save this boy this physical defect?

I could see no way for me to refuse acceptance of this boy. While the Sheriff stated to me he had three doctors with him, the physical facts show the physicians were very deficient in skill in this kind of work. In case they did properly set the femur of this boy's leg, they failed to put him in a cast, so I understand, and the left leg is approximately four inches shorter than the right.

I am advised by our local physician that a possible result of the present condition of this boy's leg, is tuberculosis of the hip. For your further information will state that unless something is done, this boy will be compelled to serve practically all his time in the hospital because of his physical impairment."

Section 8357 R. S. Mo. 1929 reads as follows:

"In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the county in which the conviction is had. The sheriff, marshal or other person charged with the delivery of any person to the reformatory shall be allowed the necessary traveling expenses of himself and such person, and a per diem of two dollars for the time actually occupied in taking such person to said reformatory and in returning therefrom, to be paid by the state or county, as the case may be."

Section 8358 R. S. Mo. 1929, provides in part as follows:

"There shall be paid to the state prison board the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said reformatory, from the time of his reception into said institution until his discharge therefrom: \* \* \* Provided, that all payments for the support of persons chargeable to a county shall be paid by such county in cash, and for that purpose the county court is authorized to discount its warrants, but the Missouri reformatory (now known as the Missouri Training School For Boys, Laws of Missouri, 1933, Section 8345) shall not receive any county warrants for the maintenance and support of any person committed to such institution."

In Clark v. Adair County, 79 Mo. 537, the Court states:

"\* \* \* Counties are territorial subdivisions of the State, and are only quasi corporations created by the legislature for certain public purposes. As such they are not responsible for neglect of duties enjoined on them or their

officers unless the right of action for such neglect is given by statute. Such has always been the law of this State.\* \* \* \* \*

In Cassidy vs. City of St. Joseph, 247 Mo. 197, 1. c. 205; 152 S. W. 306, the Court states:

\* \* \* \* \*Neither the State nor those quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to the acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so.\* \* \* \*

CONCLUSION.

From the foregoing, we are of the opinion that the County is not liable for the hospital expenses of the boy in the absence of an express statement to the contrary, and there is no provision in our statutes providing for such a liability. We are further of the opinion that the words "and all other expenses" contained in Section 8358 R. S. Mo. 1929, includes all necessary hospital expenses for the safe being and welfare of this boy. The Sheriff was acting ministerially in pursuance of a provision of the statutes, imposing upon him the duty of delivering the boy to the custody of the Missouri Training School for Boys, and he fulfilled his duty by delivering the boy to that institution.

Respectfully submitted,

WM. ORR SAWWERS,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General.



LIQUOR CONTROL ACT: Eagles Lodge must obtain license from Supervisor of Liquor Control to handle 5% beer for sale to its members; restrictions in Sec. 15 and 15-a binding upon Eagles same as any other licensee.  
April 19, 1934.

4-20



Mr. G. Derk Green,  
City Attorney,  
Marceline, Missouri.

Dear Sir:

This department is in receipt of your letter of April 11, 1934 requesting an opinion as to the following state of facts:

"The situation upon which I have been asked to obtain your opinion is this: the Eagles Lodge wishes to handle beer of 5% and less, for sale to their club members only and in the clubroom. They wish to know if they would be required to take out a license from the state for this, and if they would be subject to the regulations with reference to opening and closing hours. No beer would be sold to the public or other than members."

I.

ANY INDIVIDUAL, ASSOCIATION, JOINT STOCK COMPANY, SYNDICATE, CO-PARTNERSHIP, or CORPORATION SELLING INTOXICATING LIQUOR IS SUBJECT TO THE PROVISIONS OF THE LIQUOR CONTROL ACT OF MISSOURI.

Section 18 of the Liquor Control Act of Missouri provides as follows:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license."



Section 22 of the Liquor Control Act provides in part as follows:

"Malt liquor containing alcohol in excess of three and two-tenths (3.2%) per cent by weight and not in excess of five (5%) per cent by weight, manufactured from pure hops and/or pure extract of hops and/or pure barley malt and/or wholesome grains or cereals and wholesome yeast and pure water, may be sold by the drink at retail for consumption on the premises where sold, when the person, partnership or corporation desiring to sell said malt liquor by the drink at retail for consumption on the premises where sold shall have been licensed so to do by the incorporated city and county in which he proposes to operate his business, and has procured a license so to do from the State Supervisor of Liquor Control."

Intoxicating liquor is defined by the Liquor Control Act to mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented malt or other liquors or combination of liquors, a part of which is spirituous, vinous or fermented and all preparations or mixtures for beverage purposes containing in excess of 3.2% of alcohol by weight.

It is apparent from a consideration of these sections of the law that it is mandatory for the Eagles Lodge, in order to sell beer having an alcoholic content of 5% by weight to obtain a license from the Supervisor of Liquor Control.

Section 15 of the Liquor Control Act provides:

"No person having a license under the provisions of this act shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity on the first day of the week, commonly called Sunday, or upon the day of any general or primary election in this state, or upon any county, city, town or municipal election day."

April 19, 1934.

Section 15-a of the Liquor Control Act provides:

"No person having a license under the provisions of this act shall sell, give away or otherwise dispose of, or suffer the same to be done, upon or about his premises, any intoxicating liquor in any quantity, between the hours of twelve o'clock midnight and six o'clock A.M."

These two sections of the law make it mandatory upon any person having a license under the provisions of this Act to comply with the provisions of same.

CONCLUSION

From a consideration of the foregoing, it is the opinion of this department that it is necessary for the Eagles Lodge to obtain a license from the Supervisor of Liquor Control of Missouri in order to sell beer of 5% and less, and having obtained the license, the restrictions imposed by reason of Sections 15 and 15-a of the Liquor Control Act would be binding upon the Eagles Lodge in the same manner as they would restrict any other licensee.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

*Supplemental attached*

MUNICIPALITIES  
CITIES  
INSURANCE :

City does not have authority to insure its property in reciprocal or inter-insurance exchanges where the liability of the city under the policy is contingent or unlimited.

✓-28  
April 20, 1934



Honorable W. W. Graves  
Prosecuting Attorney Jackson County  
Kansas City  
Missouri

Dear Mr. Graves:

Receipt of your letter dated February 28, 1934 is acknowledged, in which you inquire:

"Can a state, or a political subdivision of a state, such as a city, county, school district, etc., protect its properties from loss by fire or other casualty through the medium of reciprocal or inter-insurance exchanges."

Section 47 of Article IV of the Constitution of the State of Missouri, in part, is as follows:

"The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State, \* \* \* to lend its credit \* \* \* to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company \* \* \*."

In Cooley's Briefs on Insurance (2nd Ed.) Volume I, page 70, in reference to reciprocal or inter-insurance associations it is stated:

"Somewhat similar to Lloyd's associations, but differing in many respects, are the reciprocal or inter-insurance associations that have come into existence in recent years. Like Lloyd's associations, they are unincorporated or voluntary associations, organized for a scheme of mutual insurance. As defined by a writer in 58 Central Law Journal, p. 323, the term 'inter-insurance' is applied to 'that system of insurance whereby several individuals, partnerships, and corporations underwrite each other's risks against loss by fire or other hazard, through an attorney in fact, common to all, under an agreement that each underwriter acts separately, and severally, and not jointly with any other.' "

And again on page 72,

"Under the inter-insurance system of insurance, each member is liable for his proportionate share of the insurance granted by policy, and a member sustaining a loss could proceed in a single chancery suit to secure a decree for the aggregate liability of the subscribers and to fix the separate liability of each subscriber, or could proceed in an action at law against the combined members, the method of enforcing the liability being but a procedural matter, over which the Legislature of each state has control within the constitutional limit against impairing the validity of contract (Thomas Canning Co. v. Cannery Exch. Subscribers at Warner Inter-Insurance Bureau, 219 Mich. 214, 189 N. W. 214)."

Section 5966 Revised Statutes Missouri 1929, authorizing statutory reciprocal or inter-insurance contracts, provides:

"Individuals, partnerships and corporations of this state, hereby designated subscribers, are hereby authorized to exchange reciprocal or inter-insurance contracts with each other, or with individuals, partnerships and corporations of other states and countries, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance."

Section 5967 provides that such contracts of reciprocal or inter-insurance may be executed by an attorney in fact designated for that purpose.

Section 5970 reads:

"There shall be filed with the superintendent of insurance of this state, by such attorney, a statement under the oath of such attorney, showing in the case of fire insurance, the maximum amount of indemnity upon any single risk and such attorney shall whenever and as often as the same shall be required, file with the superintendent of insurance a statement verified by his oath to the effect that he has examined the commercial rating of such subscribers as shown by the reference book of a commercial agency having at least one hundred thousand subscribers and that from such examination or from other information in his possession, it appears that no subscriber has assumed on any single fire insurance risk an amount greater than ten per centum of the net worth of such subscriber."

Section 5971, in part, provides:

"There shall be maintained at all times assets in cash or securities authorized by the laws of the state in which the principal office of the attorney is located for the investment of similar funds (of) insurance companies doing the same kind of business, in amount equal to fifty per centum of the net annual advance premiums or deposits collected and credited to the accounts of subscribers on policies having one year or less to run and pro rata on those for longer periods; or, in lieu thereof, one hundred per centum of the net unearned premiums or deposits collected and credited to the accounts of subscribers. Said assets shall not be charged as a liability. \* \* \* \* \*

\* \* \* \* \*

If at any time the amounts on hand are less than the foregoing requirements, the subscribers or their attorney for them shall make up the deficiency: Provided, however, that the guaranty fund or surplus requirements of this section, shall not apply to exchanges which are licensed on or before the date when this section shall become effective until January 1, 1923."

What is undoubtedly meant by Section 5971 is that if the specific and certain funds required to be maintained at any time fall below the required amount, then the subscribers to such reciprocal or inter-insurance exchange may be required to contribute the deficiency, so that under the statutory scheme for reciprocal and inter-insurance the liabilities of the subscribers among themselves are at all times contingent and the amount of such liabilities to be determined according to such hazards as may be incurred and such losses as may occur.

The case of School District v. Twin Falls County Mutual Fire Insurance Company, 164 Pac. 1174, denied recovery on a policy issued by a mutual fire insurance company to a school district. The Constitution of the State of Idaho contains substantially the same provision as the provision in the Constitution of Missouri above set out. The



court holds that the liability imposed by becoming a member of a mutual insurance company amounts to the loaning of the credit of the district in aid of a private enterprise, and also that the contract entered into by means of the policy might violate the Constitution of the State of Idaho prohibiting a school district from incurring indebtedness except as in the Constitution provided. The court at page 1174 of the opinion said:

"In the case of *Atkinson v. Board of Commissioners*, 18 Idaho, 282, 100 Pac. 1046, 28 L. R. A. (N. S.) 412, this court, speaking of sections 2 and 4 of article 8 of the Constitution, said:

Section 2 prohibits the state in any manner ever becoming interested with any individual, association, or corporation in any business enterprise, and it likewise prohibits the state in any manner loaning its credit to the aid of such an enterprise or becoming a stockholder therein; While section 4 makes substantially the same prohibition against any county, city, town, township, board of education, school district or other subdivision of the county or state, ever lending its credit, either directly or indirectly, to any business enterprise in aid of any individual, association, or corporation, Section 4 of article 12 reiterates substantially the same thing with reference to counties and municipal corporations as is provided against in section 4 of article 8. Section 4 of article 13, however, specifically authorizes cities and towns to contract indebtedness for 'school, water, sanitary, and illuminating purposes,' thereby excluding all other purposes not governmental in their character."

(2,3) The sections of the Constitution referred to are self-operative. They are intended to prevent any county, city, town, or other municipal corporation from lending credit to or becoming interested in any private enterprise or from using funds derived by taxation in aid of any private enterprise, with the exceptions provided for in section 4 of article 12."



April 20, 1934

We are not here discussing whether or not there could be recovery on a policy issued by such an exchange to a city or other municipality, but we are only discussing the initial right of such municipality to enter into such a contract.

In the case of *Sergeant v. Goldsmith Dry Goods Company* 10 A. L. R. 742, the Supreme Court of Texas had under consideration the question of the validity of the right to recover on an insurance contract which was essentially a reciprocal or an inter-insurance policy. The court held that the liability of the subscribers to the exchange was limited by the terms of the application for the insurance and that such liability was limited to fixed and stated premiums and a recovery could not be had beyond that amount.

We are of the opinion that a municipality of this state is without authority to insure its property by entering into reciprocal or inter-insurance contracts as those terms are above defined, with an unlimited or contingent liability thereunder, but that such a municipality can only enter into an insurance contract where its liability under the policy is fixed and determined by the contract to stated premiums to be paid by it for such insurance protection.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

SCHOOLS: County Court may not accept Government Bonds in payment of school loan and retain the bond as investment.

4.28  
April 26, 1934



Mr. O. H. Gramling  
Clerk of Sullivan County Court  
Milan, Missouri

Dear Sir:

This is to acknowledge your letter dated April 12, 1934 as follows:

"Will you kindly advise if the County Court can except Government bonds in payment of school fund loans, provided they can cash them at the bank. Thanking you in advance for this information I am, "

Your letter is a bit ambiguous, however, we believe that what you really wish to know is whether one can pay his school loan with Government Bonds and the county retain and keep such bonds as an investment.

Section 9245 R. S. 1929 provides in part as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest at the highest rate of interest that can be obtained, \* \* \* on unencumbered real estate security, worth at all times at least double the sum loaned, \* \* \*."

You will note that the above provision makes it mandatory upon the county court to invest all moneys on unencumbered real estate

security. Consequently, if the county court has moneys belonging to the school fund in investments other than unencumbered real estate it would constitute an investment not authorized by statute.

Therefore, it is our opinion that the county court may not accept Government Bonds in payment of a school loan and retain the bonds. If they accept bonds and immediately convert them into cash, then in effect it would be a receiving of money in payment of the indebtedness.

If we have not answered the question that you had in mind, kindly so advise and we will supplement this ruling.

We are also attaching a copy of an opinion rendered by this department to Honorable J. B. McGuffin, dated December 8, 1933, which concerns this fund.

Yours very truly,

JAMES L. HORNBOSTEL  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

JLH:SW

MUNICIPALITIES

CITIES

INSURANCE-RECIPROCAL:

City has authority to insure its property in reciprocal insurance exchanges where the liability of the city under the policy is not contingent or subject to assessments.

June 5, 1934

Honorable W. W. Graves  
Prosecuting Attorney Jackson County  
Kansas City  
Missouri

Dear Mr. Graves:

As per your request we are supplementing our opinion to you of date April 20, 1934 answering your then question as follows:

"Can a state, or a political subdivision of a state, such as a city, county, school district, etc., protect its properties from loss by fire or other casualty through the medium of reciprocal or inter-insurance exchanges."

On the authority of the cases of,

Wysong et al v. Automobile Underwriters  
184 N. E. 783,

Sergeant v. Goldsmith Dry Goods Company  
10 A. L. R. 742,

we are of the opinion that a city or other political subdivision of the state are legally authorized to insure their properties in reciprocal insurance exchanges, if the liability of the insured under the policy is fixed -

Honorable W. W. Graves

-2-

June 5, 1934

that is - if there is no assessments or contingent liability provided for in such policy.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

BOARD OF PENAL INSTITUTIONS:

Board of convict in Missouri  
Training School for Boys to  
be charged to county where  
first conviction occurs.

June 15, 1934

Honorable ~~Harve~~ <sup>Marve</sup> G. Gray  
Superintendent  
Missouri Training School for Boys  
Boonville  
Missouri



Dear Mr. Gray:

Receipt of your letter dated June 7, 1934 is  
acknowledged. Your letter is as follows:

"On February 17, 1934 William Bruner #7160  
escaped from this institution. He was serv-  
ing a Two Year sentence from the Juvenile  
Court of Jackson County for the crime of  
Delinquency. He was sentenced October 25,  
1933 and was admitted here October 26, 1933.  
In order to make his escape he and four  
other inmates burglarized a house occupied  
by an employee of the institution, stealing  
a pistol with which they held up another  
employee and took his car. While he was  
at large the authorities of Cooper County  
apprehended him and convicted him of  
Burglary & Larceny. He was sentenced to  
this institution from the circuit court  
of Cooper County for a term of Five Years  
for the Burglary and Five years for the  
Larceny. Sentences to run consecutively.  
Sentence to commence April 3, 1934. (which  
was intended to mean that this sentence  
was to run concurrently with the one from  
Jackson County.) The question now arises  
as to whether his board is to be charged  
to Cooper County, or to Jackson County  
until the expiration of that sentence  
and then to Cooper County.

Two of these boys were sent to the peni-  
tentiary and of course we were forced to  
drop them from their sentence here as

June 15, 1934

They were sent down there for about twenty five years. Should Bruner's case be handled in the same manner?"

Section 8359 Revised Statutes Missouri 1929, in part, provides:

"When any boy under seventeen years of age shall be committed to said reformatory or said training school \* \* \* upon conviction of any felony or misdemeanor\* \* \* the expenses of the maintenance of said boy,\* \* \* shall be paid by the county in which he was convicted\* \* \*."

Section 12969 Revised Statutes Missouri 1929, reads:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held; \* \* \*"

We think the words 'any convict' used in the last quoted section refers to a convict whether he be imprisoned in the state penitentiary or in the Missouri Training School



June 15, 1934

for Boys, so that the statute last quoted would be as applicable to a convict who escapes from the Missouri Training School for Boys when he commits a crime and is convicted therefor, as it would to an escaped convict from the penitentiary who also commits a crime and is convicted thereof.

In the case of Ex parte Brunding 47 Mo. 255, the question arose as to the right of a court to sentence a defendant in a criminal case who had escaped from the penitentiary, before his term of imprisonment was completed. The court at page 256 of the opinion said:

"It seems to be settled that a prisoner under an unexpired sentence of imprisonment, where he commits an offense, may be convicted, and that the succeeding period of imprisonment will commence on the termination of the period next preceding. (1 Bish. Crim. Law, Sec. 731, note; 1 Bish. Crim. Pr., Sec. 878)."

We are of the opinion that William Bruner is now serving the sentence in the Missouri Training School for Boys which was imposed on him by the Juvenile Court of Jackson County, Missouri, and that board for the said William Bruner is entitled to be charged against Jackson County.

As to whether a convict should be transferred from the penitentiary to the Missouri Training School for Boys or vice versa, when the same may be legally done, is a matter that rests in the discretion of those who have that authority and as to which it would not be proper for us to express an opinion.

We are returning you your inclosures herewith.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

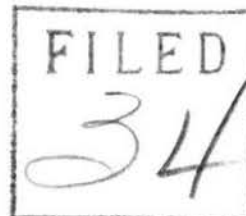
APPROVED:

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ROY MCKITTRICK  
Attorney General.

GL:LC  
Inclosures

August 24th, 1934



Hon. Walter W. Graves,  
Prosecuting Attorney,  
Kansas City, Missouri.

Dear Sir:

This Department is in receipt of your letter of August 16th, relative to an opinion rendered by the writer to Hon. M. E. Montgomery, Prosecuting Attorney of Scott County, in relation to the venue of a possible prosecution under Section 5270, R. S. of Mo. 1929. In order that we may have a complete perspective of the matter, your letter is herewith incorporated:

"My attention has been called to the opinion of your assistant, Mr. Oliver W. Nolen, approved by you, dated September 19th, 1933, and given to M. E. Montgomery, Prosecuting Attorney of Scott County, in relation to prosecution of contract haulers for violation of paragraph (c) of Section 5270, Revised Statutes of Missouri 1929.

I believe you are correct in holding that said paragraph relates only to acceptance and not to transportation and that prosecution under said paragraph would have to be confined to the county in which said acceptance occurred. However, is it not true that Section 5271 makes it unlawful for a contract hauler 'to operate or furnish transportation for persons or property or both for hire over the highways of this State without first having obtained from the Commission a contract hauler's permit'. Fairly construed, does this not mean a haul in accordance with the permit. Section 5275 provides that 'every \* \* \* contract hauler \* \* \* who fails to obey, observe or comply with any order, decision, rule, regulation, direction or requirement of the Commission \* \* \* shall be guilty of a misdemeanor'. It seems to me, therefore, that the contract hauler who hauls where the order gives him no right to haul is guilty of a violation in relation to the hauling, without respect to the acceptance, and can be punished under

August 24, 1934

Section 5275 in any county in which he is thus found hauling in violation of the limitations of his permit. It seems to me that the only possible question which could arise is as to whether he can be thus prosecuted if he has already been prosecuted in the county where the shipment was unlawfully accepted, but if not prosecuted for the latter offense, certainly he can be prosecuted in any county in which he is actually engaged in making that part of his haul that is in violation of the permit. I understand that in northern Missouri several shippers have been prosecuted and fined for employing motor vehicles that were being operated without permit, and in this connection I draw your attention to the interpretation placed by the Commission upon Section 5275 in its 'Interpretations of the Missouri Bus and Truck Laws of 1931', issued December 27th, 1933. In said interpretation the Commission said:

'It is the opinion of the Commission that any person who knowingly employs an unlicensed carrier is engaged in violating the laws and may be punished under Section 5275 or under the general laws as an accessory to a violation of law.'

I would appreciate your advice as to whether my construction of Section 5275 is correct."

The writer is impressed with the logic contained in your letter and agrees with you with respect to prosecutions under Section 5275.

In the very recent case of State v. R. M. Dixon, #32846, as yet unpublished prosecutions under Section 5275 were involved. This case was argued the last term of the Supreme Court, transferred to the Court En Banc and has been recently adopted by the entire Court. The pertinent parts of the opinion are as follows:

" On June 24, 1932, the prosecuting attorney of Jefferson County, Missouri, filed an information in the circuit court of that county charging respondent with the violation of a traffic rule promulgated by the Public Service Commission. Respondent filed a demurrer to the information, the trial court sustained it and the state appealed. Respondent's contention, which the trial court sustained, was that the provisions of sections 5274 and 5275, Laws of

August 24, 1934

Mo. 1931, page 314, so far as those sections authorized a conviction for the violation of an order or rule of the Public Service Commission, were unconstitutional and void."

The concluding part is as follows:

" So in the case at bar, the state legislature did not delegate to the Public Service Commission any legislative authority, neither did the commission exercise such authority when it enacted certain safety rules to be observed by the operators of trucks and buses. It was the legislature that enacted the law declaring the violations of these rules to be misdemeanors and prescribed the penalties to be inflicted. With these matters the Public Service Commission, under the law, had and has nothing to do. It follows that the trial court was in error when it sustained respondent's demurrer to the information.

The judgment of the trial court will, therefore, be reversed and the cause remanded for trial. It is so ordered."

CONCLUSION

We are of the opinion that in view of the above decision, the prosecutions can be instituted in the manner as detailed in your letter and any person who violates Section 5270 irrespective of the place of venue might be prosecuted for violating the rules as prescribed by the Public Service Commission.

With kindest regards, I am

Very truly yours,

OLLIVER W. NOLEN  
Assistant Attorney-General

OWN/mh

APPROVED:

ROY. McKITTRICK

STATE -- LIABILITY OF:

In absence of an express statute the State is not liable for damages either for non-performance of its powers or for their improper exercise by those charged with their execution.

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9-12  
September 8, 1934.



Honorable Harve G. Gray  
Superintendent  
Missouri Training School for Boys  
Boonville, Missouri

Dear Sir:

We are in receipt of your letter dated August 27th, 1934, wherein you state as follows:

"On the afternoon of Monday, August 27th, an inmate of our Institution driving our truck was crossing the bridge over the Missouri River during a shower. When approaching the Howard County side of the bridge, which is on an incline, said inmate applied the brakes which caused the truck to swerve to the left, at which time he was meeting young Martin (son of Professor Martin of Missouri University) in a 1931 A Ford. The cars collided causing considerable damage to both truck and car.

"Both Martin and the truck driver stated to me the accident was unavoidable. Both were driving at a very moderate rate of speed because of the slippery condition of the bridge.

"Please advise me as to what we can lawfully do regarding repairing Mr. Martin's car.

"An early reply will be appreciated."

In Cassidy v. City of St. Joseph, 247 Mo. 197, 1.c. 205, 152 S. W. 306, our court held that in the absence of an express statute to that effect, the State is not liable for damages either for non-performance of its powers or for their improper exercise by those charged with their execution. The court said:

"Neither the State nor those quasi-corporations consisting of political subdivisions which, like counties and townships, are formed for the sole purpose of exercising purely governmental powers, are, in the absence of some express statute to that effect, liable in an action for damages either for the non-exercise of such powers, or for their improper exercise, by those charged with their execution. This applies alike to acts of all persons exercising these governmental functions, whether they be public officers whose duties are directly imposed by statute, or employees whose duties are imposed by officers and agents having general authority to do so. \*\*\*\*\*"

From the foregoing, we are of the opinion that the State is not liable for damages resulting in the negligent operation of a motor car by an inmate of one of its institutions unless there is a statute providing for such a liability. We find no statute imposing such a liability and therefore we are of the opinion that nothing can be done lawfully by the State towards the repair of Mr. Martin's car.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS,  
Assistant Attorney-General.

ROY McKITTRICK  
Attorney-General.

MW/WOS:afj



GAME & FISH: County court has power to rescind order made relating to Sec. 8246, R.S. Mo. 1929 previously made during August term providing no legal rights have accrued thereunder.

October 20, 1934. 10/20



Hon. Joe E. Green,  
Chief of Wardens,  
Game & Fish Department,  
Jefferson City, Missouri.

Dear Mr. Green:

This department acknowledges receipt of your letter of October 19, 1934, submitting three questions on which you desire an official opinion, as follows:

"Where a county court has made an order calling for an election submitting the proposition to the people of different counties, the right to vote on the closing of the county to quail shooting for two years; if that term of court has not been definitely closed but they have been meeting to adjourned sessions from time to time, does the county court have the right to rescind the order?

Where a petition has been submitted to the county court and the order made by the county court to the county clerk ordering said election to be held by petitioners in filing petition use a statute that has been repealed, would this be valid?

Does the county court have a right to change the phraseology of a petition when giving the order to the county clerk concerning the calling of election to be submitted to the voters of the county?"



## I

If an order is made before final adjournment of a term of the county court, the same may be rescinded by the court if no rights have accrued under the order.

This question pertains to the right to petition the county court to vote on the question of having a closed season on quail and the section of the statutes involved is 8246, R.S. Mo. 1929. Omitting the parts which are not pertinent here, it provides:

\*\*\*\*\*Provided, that upon the filing of a petition signed by one hundred or more householders of any county and presented to the county court at any regular or special term thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question as to whether or not there should be a closed season upon quail for the next two years in their said county submitted to the qualified voters, to be voted on by them at the next election. Upon the receiving of such petition it shall be the duty of the county court to make the order as herein recited, and the county clerk shall see that there is printed upon all the ballots to be voted at the next election the following:

For a closed season  
upon quail.        Yes.  
                             No.  
Erase the word you do  
not wish to vote.        "

The right of the county court to rescind an order previously made during a regular term and before final adjournment of the term is decided in the case of Mead v. Jasper County, 305 Mo., l.c. 485, wherein the court said:

"The county court, having made a valid order which was within its power and duty to make at the November term and before January first, exhausted its power in respect thereto for that year and could not set same aside after January first. particularly if

rights became fixed thereby by the ensuing year. In Bayless v. Gibbs, 251 Mo. 1.c. 506, it was said:

'This court, in numerous cases, has repeatedly held that the county courts of the respective counties of the State are not the general agents of the counties of the State. They are courts of limited jurisdictions, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void.'

In Saline County v. Wilson, 61 Mo., 1.c. 239, it was said: 'County courts are only agents of their respective counties in the manner and to the extent prescribed by law. So long as they continue to tread in the narrow pathway allotted to their feet by legal enactment, their acts are valid, but whenever they step beyond their acts are void.'

The general rule is laid down in 15 Corpus Juris, page 470, where it is said:

'Where a county board or court exercises functions which are administrative or ministerial in their nature and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time and manner, it may modify or repeal its action; but in no event has such court or board the power to set aside or to modify a judicial decision or other made by it after rights have lawfully been acquired thereunder, unless authorized so to do by express statutory provision. ....The same is the case after an appeal has been allowed, or where some special statutory power is exercised, the time and mode of the exercise thereof being prescribed by statute. Where the previous action of the board is in the nature of a contract which has been accepted by the

other party, or on the faith of which the latter has acted, it cannot be rescinded by the board without the consent of the other party. Conversely, where the proposition has not been accepted or acted on by the other party, the board may restrict or rescind its action. In the absence of express statutory authority, a county board cannot review or reverse the act of a prior board performed within the scope of authority conferred by law. A county board or court may, however, at the term or session at which an order is made, revise or rescind it, provided this is done before any rights accrue thereunder, but ordinarily they have no power to do such act subsequent to such term or session.'

In *State v. Morgan*, 144 Mo. App., l.c. 40, it is said:

'The rule is well settled that a county court may revise or rescind an order at the term or session at which such order is made provided this be done before any rights have accrued under the order.'

In the case of *State ex rel. v. The County Court of Sullivan County*, 51 Mo., l.c. 529, the court enunciates the principle of law that a county court cannot set aside or rescind its order made at a previous term. The court said:

"It was incompetent for the court to set aside or rescind its order made at a previous term. A final order is in the nature of a judgment, and cannot be set aside at a subsequent term on ground of error."

The terms of the county court are set forth in Section 2083, R.S. Mo. 1929, as follows:

"Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient: Provided, that in counties now containing or that may hereafter

Oct. 20, 1934.

contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county seat and such other place as may be provided for the holding of such court, and each monthly term shall commence on the first Monday in each month."

The present session of the county court in a county of less than 75,000 population would be the August session and any meetings of the county court would be adjourned sessions and the term would not automatically expire until the November Term.

Conclusion

It is the opinion of this department that the county court has the power and authority to rescind the order made relating to Section 8246, R.S. Mo. 1929 which was previously made during the August term, providing no legal rights have accrued thereunder.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AM

PROSECUTING ATTORNEYS:- Prosecuting Attorney may only be removed under Section 7929 when notice to institute suit has been given by a road overseer, county or state highway engineer.

February 16, 1934.



Mr. Joseph L. Gutting,  
Prosecuting Attorney,  
Kahoka, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Calling your attention to section 7929, R. S. Mo. 1929, I wish to make the following statement of facts and would like to have your opinion on the following questions:

The County Court of this County ordered me to give the owners of hedge fences along or near a public road before January 1, 1934. This was in the month of October, I think, and I immediately published the notice in all of the county papers and quoted section 7929.

Now several of the hedge owners have trimmed their fences so that the air and sun can get to the road. I, as well as the County Court, think that this is sufficient and should be good, however, the law plainly says that they must be cut to a height of five feet.

Question No. 1. Will I have to see that these hedge owners cut these hedge posts and make the entire height of said fence five feet or be ousted from office by the Governor?

Question No. 2. Do I have to file the suit required by that section upon the complaint of any person, or do I only have to act when notified by a road overseer, county or state highway engineer, including the County Court, as set forth in the statute?

We would like to let these hedge owners

save their posts as long as they trim them to a good height, and the main question is, can I do this without being ousted from office by the Governor. It would be complying with the intent of the statute (that of keeping the hedge from shading the road and thereby keeping it wet) but would not be complying strictly with the said statute."

Section 7929, R. S. Mo. 1929, provides as follows:

"Every person owning a hedge fence situated along or near the right of way of any public road shall between the first days of May and August of each year cut the same down to a height of not more than five feet, and any owner of such fence failing to comply with this section shall forfeit and pay to the capital school fund of the county wherein such fence is situated not less than fifty nor more than five hundred dollars, to be recovered in a civil action in the name of the county upon the relation of the prosecuting attorney, and any judgment of forfeiture obtained shall be a lien upon the real estate of the owner of such fence upon which same is situated, and a special execution shall issue against said real estate and no exemption shall be allowed. Any prosecuting attorney who shall fail to or refuse to institute suit as herein provided within thirty days after being notified by any road overseer, county or state highway engineer, that any hedge fence has not been cut down to the height herein required within the time required, shall be removed from office by the governor and some other person appointed to fill the vacancy thus created. The cutting of any such fence after the time herein required shall not be a defense to the action herein provided for."

Under the foregoing section it is the duty of each person owning a hedge fence situated along a public road to cut the same down to a height of not more than five feet, and the failure so to do makes the owner liable to forfeit the sum of not less than \$50.00 nor more than \$500.00. The section further provides that if the prosecuting attorney refuses to institute the suit to collect the above forfeit within thirty days after being notified by any road overseer, county or state highway engineer, such failure on the part of the prosecuting attorney would make him liable to be removed by the Governor.



As we interpret the section it is only the failure to institute suit after the prosecuting attorney has received notice from the road overseer, county or state highway engineer that makes him liable to forfeiture of office by the Governor. We do not understand that the Governor may remove the prosecuting attorney from office unless the notice has been given by the road overseer, county or state highway engineer. In other words, if the notice of the failure to cut the hedge is given by some private individual, the failure of the prosecuting attorney to institute suit would not entitle the Governor to remove him under the above section.

It is therefore the opinion of this Department that the prosecuting attorney can only be removed by the Governor for failure to comply with this section when he has failed to institute suit within thirty days after being notified by any road overseer, county or state highway engineer. A notification by some private individual would not lay the foundation for a removal from office by the Governor, although such notice might impose a duty to act upon the prosecuting attorney.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S



- INHERITANCE TAX: (1) Real property, and tangible personal property is subject to tax where located.
- (2) Intangible personal property is subject to tax by the State in which the owner maintained his legal domicile except where such personal property has acquired a "business situs" in the State July 12th, 1934 where located.

7-16  
Hon. Joseph L. Gutting,  
Prosecuting Attorney,  
Kahoka, Missouri.

Dear Mr. Gutting:

This Department is in receipt of your letter of June 21st, 1934 requesting an opinion on the following state of facts:

"A Mr. Willard died in the state of Iowa and he had property in both Iowa and Missouri with more in the latter state. Administration was taken out on his estate in Iowa and then administration was taken out in this county. He left a will which has been filed in both states leaving \$500.00 to each of three people, one being a daughter and the other two disinterested parties and the balance he leaves to his son. The bequests to the first three parties will be paid solely out of the Iowa property by the Iowa administrator and the son will get all the property in Missouri.

Question: In the inheritance tax report of this administrator in Missouri he must show the bequests to the first three above set forth beneficiaries, now will he have to pay inheritance tax on the five hundred dollars to each of said beneficiaries? If so this will make an inheritance tax on said bequests in both states, bearing in mind that the Iowa administrator will pay said bequests out of Iowa property to Iowa people. Also will the son have to pay a tax on what the Iowa administrator delivers to him which is in Iowa, both in Iowa and in Missouri? Or is it a fact that a Missouri inheritance tax should be paid only on what the Missouri Administrator pays out to these beneficiaries."



I.

The State of Missouri may assess an inheritance tax only on property within its jurisdiction.

From the facts as stated in your letter, it is impossible to say whether Mr. Willard was a resident of Iowa or Missouri at the time of his death. However, since his death occurred in Iowa, we shall assume, for the purpose of this opinion that he was a legal resident of Iowa. That being so, the question remaining is as to the power of Missouri to tax property of a non-resident decedent.

It is fundamental that a state has no power to tax the devolution of property of a non-resident unless it has jurisdiction of the property involved. This question of jurisdiction is dependent upon the kind of property upon which the State seeks to impose an inheritance tax.

As to real property located in jurisdictions other than that of the domicile of the owner, or an equitable estate in realty so situated, there can be no inheritance tax assessed in the State in which the owner was domiciled at the time of his death. 61 Corpus Juris, p.1633.

"Real property in another state descends by virtue of the laws of that state and is not subject to the Inheritance Tax Law, whether passing by descent or devise." Peo v. Kellogg, 109 N.E. 304; 268 Ill. 489.

The above statement of the law is also true with respect to tangible personal property. In the case of Frick v. Pennsylvania 45 S. Ct. 603; 268 U. S. 473, the Court said:

"Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states,-- New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts.

In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the states of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer."

We turn now to a discussion of the taxation of intangible personal property. As a general rule, the principle "*mobilis sequitur personam*" applies so as to authorize the levy of an inheritance tax at the domicile of the owner of intangible personal property which is, or the evidence of ownership of which is, actually situated elsewhere. 61 Corpus Juris, p.1632. In the recent case of *Baldwin v. Missouri*, 281 U. S. 586; 74 L. Ed. 1056, Mr. Justice McReynolds, in passing on this point, said:

"So far as disclosed by the record, the situs of the credit was in Illinois where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not elsewhere."

There is one exception to the above statement of the law and that is in a case where intangible personal property has acquired a "business situs" in a state other than that of the domicile of the owner. By "business situs" we mean whenever a non-resident has a local agent in the State of Missouri, and permits that agent to control the investments of the said non-resident, including the buying and selling of stock, bonds, notes, mortgages, and other evidences of indebtedness, the property being present in the State of Missouri under the control and custody of the local agent, then that property has acquired a business situs in the State of Missouri for the purposes of the Transfer and Inheritance Tax Laws of the State of Missouri.

On this point, the Supreme Court of Missouri in the case of *Baldwin v. Missouri*, 323 Mo. 207 (Reversed on other grounds in *Baldwin v. Missouri*, 281 U.S. 586) said:

"It is a reasonable inference that the cash and notes in such large quantities in Missouri, when none of it was held in Illinois, was retained in this State for the purpose of investment. They may

July 12th, 1934

have established a business situs in this state, in which case it would be subject to a general tax as well as the inheritance tax . . . . .

'It (the personalty) possibly acquired a business situs in this state. Whether it did or not it was within the jurisdiction of the state and property subject to the transfer tax. It would have been a proper subject of inquiry by the trial court to determine how and why and under what conditions these evidences of debt were in this state, but whatever the determination of that question the property was legally within the jurisdiction of the probate court of Lewis county in this state and subject to the tax.' (323 Mo. 207, 19 S.W. (2d) 734)."

While this question was left open by the Supreme Court of the United States, we respectfully submit that where intangible personal property belonging to a non-resident has acquired a "business situs" in Missouri, it is subject to inheritance tax in the State of Missouri.

#### CONCLUSION

In view of the foregoing, we submit the following conclusions:

- (1) Real property and tangible personal property is subject to tax where located.
- (2) Intangible personal property is subject to tax by the State in which the owner maintained his legal domicile except where such personal property has acquired a "business situs" in the State where located.

Respectfully submitted,

APPROVED:

JOHN W. HOFFMAN, Jr.  
Assistant Attorney-General

ROY McKITTRICK  
Attorney-General

JWH/mh

SCHOOL DISTRICTS: }

SCHOOL MONEYS: }

DEPOSITORIES: }

Board of education of school district required to select a depository in the same manner as county courts, and treasurer of school district is liable for loss of funds not deposited in such depository.

7/19  
July 19, 1934.



Honorable Jos. L. Gutting  
Prosecuting Attorney  
Clark County  
Kahoka, Missouri

Dear Mr. Gutting:

We acknowledge receipt of your letter dated July 9th, 1934, as follows:

"The Kahoka Public School advertised according to law for bids from banks and banking institutions for a depository of school funds and received no bids. Would you kindly advise if it would be all right for them to select a depository without advertising further due to the fact;

1. They leave their money in the hands of the County Treasurer with exception of enough each month to pay current debts and at the end of each month the County Treasurer writes the school treasurer a check for the approximate amount that the school needs for that month.
2. At no time does the school board and school treasurer have on deposit in any bank more than the banking law guarantee.
3. There is only one bank in this town and as the school deposits are so small the bank will not pay any interest, it appearing that no bank wants the deposits. Therefore we cannot comply with section 12189 R. S. Mo. 1929 in receiving at least one and one-half per centum interest.

July 19, 1934.

"The school treasurer wishes to act according to law on this matter and due to the above we do not see how he can so act as the banks do not want the deposits (even if it were all deposited there. Would section 12132b Laws 1933 page 339 apply and let the school board just select the depository without further advertising of bids?

"Thanking you for your help in this matter, for I imagine the matter might come up as to county monies, I am, "

We are enclosing you herewith copy of an opinion dated July 18, 1934, addressed to Mr. E. A. Allen, Raymore, Missouri, which we think will answer your question.

There does not seem to be any other course to take, except that pointed out by the statutes. Leaving the money in the hands of the county treasurer until the school district treasurer is in need of same is, of course, a protection to the school district treasurer but he would still be liable for whatever sums would come into his hands and not deposited in a legally selected and qualified depository. Neither do we think that the fact that the amount of school funds on deposit in the bank did not equal the National Banking Law guarantee would affect the situation one way or the other. If the depository cannot be selected by virtue of any of the sections of the statutes referred to in the enclosed opinion, then the school district treasurer would hold the school funds subject to whatever losses might follow.

We do not believe that Section 12132b, Laws of 1933, page 339, would be applicable at this time to your situation.

Yours very truly,

GILBERT LAMB  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

GL:EG



TAXATION AND REVENUE METHOD OF COMPUTING BOND OF COUNTY COLLECTOR.

December 27, 1934.



Honorable J. W. Guerrant,  
County Collector-Elect,  
Fulton, Missouri.

Dear Sir:

This department wishes to acknowledge receipt of your request for an opinion dated November 26, 1934, which reads as follows:

"I am writing you in regards to the County Collector's bond for Callaway County. Our County population, the last census taken, was about 19,970. Our last year's tax collection, largest week was approximately \$70,000, largest month \$100,000, total for the year \$125,000. Under the new law, what would be my bond? Who acts and approves my bond, the new County Court or the old County Court? Does the Court have to say in which bank deposits shall be made and should it be deposited to County Collector's fund to come under the new law of 1933? The present Collector's fund is under the name of Ruby Wright Thomasson, Collector."

As you are probably aware, Section 9885 R. S. Mo., 1929, was repealed by the 57th General Assembly in 1933, and a new section 9885 was re-enacted, page 464, Laws of 1933, which reads as follows:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties.



Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184, Revised Statutes of Missouri for 1929, to the credit of a fund to be known as "County Collector's Fund;" provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars (\$100.00); and provided further the collector shall not check on such "County Collectors' Fund" except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

This law contemplates two methods for the collector to make bond and handle the moneys of the county:

The first method is very similar to the old law and requires the collector to give bond and security to the State, to the satisfaction of the county courts, in a sum equal to the largest total collections made during any one month preceding his election or appointment, plus ten per cent of said amount. Thus if \$100,000.00 was the largest monthly tax collection for the year preceding your election, then your bond would be \$100,000.00, plus ten per cent thereof, or a total of \$110,000.00.

The second method which applies to counties of less than 75,000 inhabitants, of which your county is one, the county court may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such county court pursuant to the provisions of Section 12184 R. S. Mo., 1929, to the credit of a fund to be known as "County Collector's Fund." The use of the verb "may", as is underlined above, makes this method of procedure optional upon the part of the county court. If the county court sees fit to follow this portion of the statute, then it may also require that the bond of the county clerk in such counties be in a sum equal to the largest collections made during any calendar week of the

December 27, 1934.

year immediately preceding his election or appointment, plus ten per cent of said amount. Thus in concrete terms, the county court may require in lieu of the bond above mentioned, a bond in the sum of \$70,000, the largest tax collection of any one week of last year in your county, plus ten per cent of that sum, or \$7,000.00, which makes a total bond in the sum of \$77,000.00.

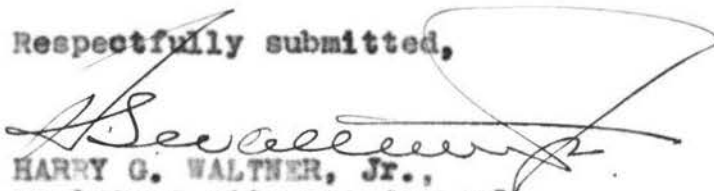
If you and the county court proceed under the first method as provided by statute, then handle the county moneys in the manner they have been handled in the past, making your monthly accounting to the county and state.

If you proceed under the second method, as provided by statute, then daily deposits will have to be made in the county depository selected by the county court and deposited to the credit of a fund to be known as "County Collector's Fund." This is true if the county court required such to be done.

The county court, as it is constituted, at the time you take office and present your bond for approval, is the court vested with the authority to prove or disapprove the bond you submit.

It is therefore the opinion of this office that your bond should be computed under either one of the two above methods set forth, depending upon which method the county court requires you to pursue; that the county court sitting at the time you take office is the proper body to approve said bond; that the county court, if it requires you to follow the second method, may at its option require you to deposit daily collections of money in the county depository selected by said court; that if such is done, the deposit must be made to the credit of a fund to be known as "County Collector's fund."

Respectfully submitted,

  
HARRY G. WALTNER, Jr.,  
Assistant Attorney General

Approved:

\_\_\_\_\_  
ROY McKITTRICK,  
Attorney-General.

HGW:MM

DENTAL BOARD - Construction of Section 13569 R. S. Mo. 1929.

4-20  
March 28, 1934.



Dr. George E. Haigh, Secretary  
Missouri Dental Board  
Jefferson City, Missouri

Dear Sir:

Your request of March 14, 1934, for an opinion has been received, and contains the following inquiries:

- "1. Is it lawful for any person or persons to operate a Dental office in this State and use the name of any company, association, corporation, trade name or business name.
2. Has an association, corporation, trade name or business name the right to employ license Dentists."

This opinion involves the construction of Section 13569 R. S. Mo. 1929. The apparent intent of this section was to protect the public from fraud and quackery.

This section makes it unlawful for any person, under any name except his or her own proper name, to practice or offer to practice or to hold themselves out as practicing dentistry or dental surgery. Clearly, a dentist could not do business under a fictitious name, but is required to reveal his true identity to the public. This section also makes it unlawful for any person (a physician or layman) to form a corporation, association, or business under a trade name and employ dentists to render professional services to the public. It is also made unlawful for any licensed dentist to operate, manage, or be employed by any such company for the purpose of rendering professional services in the name of the company to the public. The relationship of physician and patient is highly confidential, and this statute prohibits anyone under a fictitious name, or any association, corporation or company

from occupying a position ordinarily occupied by a doctor, and no such corporation can contract with a patient to furnish such professional services to the patient. So long as the contract of employment for professional services is made between the doctor, in his own true name, and the patient, then there is no violation of this statute. It is immaterial from the standpoint of this statute who pays for the services.

It is, therefore, the opinion of this office that it is unlawful for any person to operate a dental office in this state under any name other than his own.

There is no prohibition against an association, corporation, or a business from employing dentists. However, the contract of employment which any dentist is authorized to make wherein the dentist is to render professional services, must be made between the patient and the dentist. A corporation may employ a dentist to do work for the corporation's employees, and may pay for such work, so long as such work is done at the request and under a contract made between the patient and the dentist.

As set out in answer to your first inquiry, no corporation has the right to employ a dentist for the purpose of engaging in a dental business under a corporation name. Such an act is prohibited under the above statute.

I trust the above and foregoing answers your inquiry.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

~~NOT RECORDED~~  
Attorney General

FER:FE

RELATING TO THE NECESSITY OF HAVING AN AUDIT OF THE  
BOOKS OF THE SECRETARY-TREASURER OF THE DENTAL BOARD  
AS REQUIRED BY LAW.

September 19th, 1934



Dr. George E. Haigh  
Sec. & Treas. Missouri Dental Board  
Jefferson City, Missouri

Dear Sir:

We acknowledge your letter of date September 6th,  
1934, in which you inquire as follows:

"I will appreciate an opinion from your  
office relative to making the annual  
report of the Missouri Dental Board.

Will it be necessary for the Board to  
have the books audited by the Board and a  
report made to the Governor owing to the  
fact that the Dental law has been amended  
and our funds are now handled through  
the State Treasurer and a report made to  
the State Auditor."

I.

The books, papers, accounts, receipts and  
expenditures of the State Dental Board,  
should be audited each year by committee  
appointed by the chairman of the board.

Section 13573 Revised Statutes, 1929, provides  
in part as follows:

"...All expenses and salaries provided for in  
this chapter shall be paid from the fees  
received by the board under the provisions  
of this chapter and no part of said salaries  
or expenses shall at any time be paid out  
of any funds in the state treasury. All  
moneys received in excess of said per  
diem allowance and salaries and expenses  
herein provided for shall be held by the  
secretary-treasurer of said dental board  
for the purposes of this chapter until the  
30th day of September of each year, at  
which time the funds unused and unappro-



priated by said board shall revert and be paid to the state treasurer for the use of the general revenue fund of the State of Missouri."

Section 13574, Revised Statutes, 1929, provides as follows:

"The fiscal year of said dental board shall begin on the first day of October of each year and end on the 30th day of September thereafter. On the 30th day of September of each year the books showing receipts and expenditures of said board shall be closed, and all moneys not paid out or appropriated by order of the board under the terms of this chapter shall on that date be payable to the state treasurer for the benefit of the general revenue fund. The books, papers, accounts, receipts and expenditures of the secretary-treasurer shall be audited in each fiscal year within ten days after the close thereof by a committee appointed by the president of the board. Said committee shall report to the president within the time herein stated, after the close of the fiscal year during which they were appointed to audit. Said committee shall report in writing and the president shall cause a copy of said report to be filed with the secretary-treasurer and shall include the same in the annual report to the governor."

It appears section 13573 (Supra) provides that all expenses, provided for in chapter 106 Revised Statutes 1929, are to be paid from fees received as provided therein by the board, and from no other funds in the state treasury.

Section 13574 Revised Statutes 1929, provides that the fiscal year begins on October 1st of each year and ends September 30th thereafter. It further provides that all the books, papers, accounts, receipts and expenditures, made by the secretary-treasurer, shall be audited by a committee to be appointed by the chairman of the Dental Board; a written report shall be made by said committee to the said chairman, who in turn shall cause a copy thereof to be filed with the secretary-treasurer of the board, and a copy shall be included in the annual report of the board to the governor.

Section I Laws 1933, page 415, provides in part as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer....."

Section 13559 Revised Statutes 1929, provides in part as follows:

"....At the request of the secretary-treasurer of said board the board shall designate in writing a depository, being a banking corporation of Missouri, where the funds belonging to said board shall be kept and deposited by the secretary-treasurer, and after the depository is so selected said secretary-treasurer shall keep all moneys belonging to said board in said depository agreeable to the orders and directions of said board,....."

It appears by virtue of the provision in the act of 1933 (Supra), that by implication, it repealed that part of section 13559 (Supra) which had to do with the handling of the funds received by the board. That is to say that the board now no longer holds the funds in their possession, but must pay them into the State Treasury, at stated intervals.

However there is nothing in said act of 1933 (Supra), which in anywise repeals the provisions



Mr. Geo. E. Haigh

-4- September 19th, 1934

provided in section 13574 relating to the responsibility of said board in having the books, papers, accounts, receipts and expenditures of the secretary-treasurer audited.

Very truly yours,

W. W. Barnes

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Assistant Attorney General

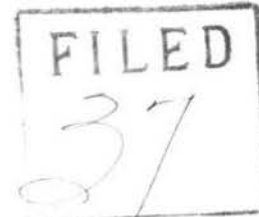
APPROVED:

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(Acting)  
Attorney General

BOARD OF PERMANENT SEAT ) Approval of contract for modernization  
OF GOVERNMENT. ) of elevators in Capitol Building.

3-9  
March 9, 1934.



Hon. Sid J. Hamilton  
Commissioner  
Board of Permanent Seat of Government  
Jefferson City, Missouri

My Dear Sir:

Upon an examination of the proposal of the Otis Elevator Company for the modernization of the Senate and House Elevators, we suggest that the three following paragraphs be added to the proposal:

"We waive the following condition found on the back hereof:

'Should damage occur to our material or work on the premises by fire, theft or otherwise, if not our fault, the purchaser is to compensate us therefor.'

We understand that proposals two (2) and three(3) are to be carried out only upon the written authorization of the Commissioner of Permanent Seat of Government.

We warrant that the modernization of these elevators shall be done by experienced, skilled workmen, and that all materials used will be free from defects; that upon the completion of the necessary work herein above set out the elevators will be in good serviceable condition, capable of delivering satisfactory continuous service for a period of \_\_\_\_\_ years."

Hon. Sid J. Hamilton

-2-

March 8, 1934.

If the wording of these paragraphs is not satisfactory to the Elevator Company they might be varied so as to still carry out the intent, but in our opinion the contract should contain these provisions.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM

**COSTS.**

**PRELIMINARY HEARING** - Neither state nor county liable for costs of preliminary hearing when defendant is discharged.

January 12, 1934.

Hon. T. J. Harper  
Prosecuting Attorney  
Stone County  
Galena, Missouri



Dear Sir:

We have your request for an opinion as to whether the State of Missouri or Stone County is liable for the costs of a preliminary hearing of one Clayton charged with murder upon complaint made by the prosecuting attorney of Stone County, and who was discharged at the preliminary hearing.

In this case we call your attention to Section 3828 R. S. Mo. 1929, which provides that the state shall pay the costs in all criminal cases where the defendant is acquitted "in which imprisonment in the penitentiary is the sole punishment for the offense", and the county shall pay the costs in all other cases of acquittal. This section of the statute specifically deals with the trial of cases on indictments or informations, and is silent as to the disposition of costs of a preliminary hearing. This statute is to be strictly construed. State ex rel. v. Wilder, 197 Mo. 27 (1906).

It appears that the only section specifically dealing with the costs of a preliminary hearing wherein the defendant is discharged is Section 5832 R. S. Mo. 1929, which reads as follows:

"If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution was instituted, and the officer taking such examination shall enter judgment against such person for the same,

and issue execution therefor immediately; and in no such case shall the state or county pay the costs."

From the above statute it might be made to appear that since the complaint was filed with the prosecuting attorney in his official capacity, that he is the "prosecutor, or person on whose oath the prosecution was instituted" within the meaning of the above statute and therefore would be personally liable for such costs. However, in this connection we call your attention to Section 3444 R. S. No. 1929 and Section 3510 R. S. No. 1929, which are as follows:

Section 3444:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor, but in no case shall the prosecuting attorney

be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Section 3510:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

The general rule as to the necessity for specific authority to tax costs is found in the quotations from the two following cases:

State ex rel. Wilder, 197 Mo. 27, 1.c. 32 (1906):

#4 - Hon. T. J. Harper

"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows."

City of Greenville v. Farmer, 195 Mo. App. 209, 1. c. 211 (1917):

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous."

It is, therefore, the opinion of this office that neither the state nor county is liable for the costs of the above preliminary hearing wherein the defendant was released.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General



OPINION: COUNTY COURTS - SALARIES OF COUNTY COURT JUDGES, ELECTED  
in 1930, 1932 and 1934 - HOW ASCERTAINED.

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7.02  
V-31  
January 26, 1934.

Honorable Chas. M. Hardin  
County Court Judge  
De Soto, Missouri.



Dear Sir:

We have your inquiry of January 17,  
stating:

"I am writing you for an opinion on Sec. 7892 relating to County Courts constituting Board of road overseers in certain counties. Jefferson County has about five times the required mileage of hard surfaced roads and prior to last year had more than 25 million dollars of taxable wealth. The population according to the last U. S. census was about 28000. However prior to that census all other Jefferson County officers were serving a population determined by Sec. 11808. which ran the population as high as sixty five thousand. My question, your Honor, is whether or not the county court could use the same Sec. for determining the counties population for proof of our claim for the salary provided for in Sec. 7892. \* \* \*

For convenience, we will divide this opinion into the following divisions:

1. Salaries of County Judges elected in 1930.
2. Salaries of County Judges elected in 1932.
3. Salaries of County Judges elected in 1934.

- \* -

I

SALARIES OF COUNTY  
JUDGES ELECTED IN  
1930.

County judges, elected at the general election in 1930, took office on January 1, 1931 - Section 2073, R. S. 1929. The district judges under this section were elected for two year terms and the presiding judge for a four year term.

The salary of each county judge for his entire term is to be determined by the law in force at the time he took office, January 1, 1931. Briefly these statutes are as follows:

Section 2093 - R. S. 1929,  
Section 7892 - R. S. 1929.

These statutes definitely fix the compensation a county judge is entitled to receive for his full term. In counties with a population of less than fifty thousand, he shall receive a salary of five dollars per day for each day necessarily engaged in holding court. In all counties containing a population of more than fifty thousand and less than sixty thousand, and which under the terms of Section 7892, R. S. 1929, also contain more than two hundred miles of macadamized or rock public roads, and which also had a total taxable wealth of over twenty-five million dollars and not containing a city of the first class, the county judge shall receive five dollars per day for each day necessarily engaged in holding court, plus a salary of twelve

hundred dollars per year as a member of the Board of Road Overseers. In all counties containing a population of over sixty thousand and less than ninety thousand inhabitants, the county court judge is to receive the salary provided for in Section 2092, R. S. 1929.

The method of determining the population, under either of the above statutes, is found in Section 11808, which reads as follows:

"For the purpose of determining the population of any county in this state, as a basis for ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants, the highest number of votes cast at the last previous general election, whether heretofore or hereafter held in such county, for any office, shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county.

The law fixing the salary of a county judge cannot be altered or changed so as to increase or decrease his salary during his term. Article VI., Section 36 of the Missouri Constitution provides:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Article VI., Section 33, of the Missouri Constitution provides:

"The judges of the Supreme, Appellate and Circuit Courts, and of all other courts of record receiving a salary, shall, at stated times, receive such

compensation for their services as is or may be prescribed by law; but it shall not be increased or diminished during the period for which they were elected."

While the law fixing the county court judge's salary cannot be so altered or changed so as to increase or diminish his compensation during the term of office, his salary is primarily determined by the size of his county, and his county may pass from one class to another in population; that is, the population of the county may be increased or decreased by an intervening general election held during his term of office. Under such circumstances, the compensation of the county judge may be changed - either raised or lowered due to the fact that his county has passed from one population to a higher or lower population. This principle is fully recognized in *State ex rel. Moss v. Hamilton*, 260 S. W. 466 (1934).

- \* -

## II.

### SALARIES OF COUNTY JUDGES ELECTED IN 1932.

County judges, taking office January 1, 1933, are drawing compensation under Section 7892, R. S. 1929, and Laws of 1931, page 190. The 1931 Legislature repealed Section 2092, R. S. 1929, and enacted a new section in lieu thereof, the only change made was the substitution of seventy-five thousand inhabitants for the figure sixty thousand inhabitants in the old section. These two sections definitely fix the law for the compensation of county judges during their entire term of office.

Under these sections, in counties of less than fifty thousand population, the compensation is fixed at five dollars per day for each day necessarily engaged in holding court. In counties of fifty thousand population and less than seventy-five thousand population, and which have more

than two hundred miles of macadamized or rock public roads, and a total taxable wealth of over twenty-five million dollars, and not containing a city of the first class, the compensation is fixed at five dollars per day for each day necessarily engaged in holding court, plus a salary of twelve hundred dollars per year as member of the Board of Road Overseers. And, in all counties containing a population of seventy-five thousand and less than ninety thousand inhabitants, a specific salary of twenty-five hundred dollars per year is fixed by the Laws of 1931, at page 190.

The population is to be ascertained under the provisions of Section 11808, R. S. 1929, set out in full above. The total votes cast in the general election of 1932 would be used to determine the salaries for the years 1933 and 1934.

- \* -

### III.

#### SALARIES OF COUNTY JUDGES ELECTED IN 1934.

These officers will take office January 1, 1935, and their compensation will be fixed by Section 7892, R. S. 1929, and Laws of 1933, page 304, page 309, and page 370.

Under these statutes, in counties of less than fifty thousand population, a county judge would be entitled to the five dollar per diem. In counties containing fifty thousand and less than seventy-five thousand population, with two hundred miles of macadamized or rock public roads, and with an assessed valuation of twenty-five million dollars, and not containing a city of the first class, the compensation of the county judge is fixed at twelve hundred dollars per year, in addition to the five dollar per day paid him for each day necessarily engaged in holding court. In all counties containing seventy-five thousand and less than ninety thousand inhabitants, the county judge will receive a salary of twenty-five hundred dollars per year.

The population for paying the county judge is fixed

by Section 2092-A, Laws 1933, page 209, which is as follows:

"Sec. 2092a. Last decennial census to determine population. - That the number of inhabitants of any county for the purpose of the above section 2092 shall be ascertained by the last decennial census of the United States."

The previous section, 11808 - R. S. 1929, basing the population upon five times the last general election vote has been repealed and a new section enacted in lieu thereof, common laws of Missouri, 1933, page 370, which reads as follows:

"Sec. 11808. Last decennial census to determine population. - The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants.

- \* -

#### CONCLUSION.

It is therefore the opinion of this office that the method of determining the population for the purposes of Sections 7892 and 2092, R. S. 1929, for the purpose of ascertaining the amount of compensation the county judge is entitled to receive for the years 1931, 1932, 1933 and 1934, is to be determined under the provisions of Section 11808, R. S. Mo. 1929, namely by multiplying the total number of votes cast at the last preceding general election by five;

that the compensation of county judges for the years 1935 and 1936, is to be based upon a population ascertained by the last (1930) decennial census of the United States.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney-General.

APPROVED:

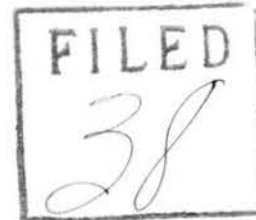
ROY MCKITTRICK  
Attorney-General.

FER/J



ELECTIONS: City election not a general election within  
the meaning of the Constitution

2-2  
January 31, 1934.



Hon. Robert W. Hawkins,  
Prosecuting Attorney,  
Caruthersville, Missouri.

Dear Sir:

This department is in receipt of your request for an  
opinion as to the following state of facts:

"I am greatly concerned and in fact  
have had many and divers inquiries  
relative to the construction of  
section 44-A-1 of Senate Bills Nos.  
6, 21, 22, 23, 24 and 25 and particu-  
larly that part of said section be-  
ginning with line 25 on page 23 of  
said act as follows: 'Provided, that  
no such election held under the pro-  
visions of this section shall take  
place on any general election day,  
or within sixty days of any general  
election held under the constitution  
and laws of this state, so that such  
elections as are held under this section  
shall be special elections, and shall  
be separate and distinct from any other  
election whatever.'

I request that your office construe the  
above for me and state in your opinion  
whether or not a city election is under  
the constitution and laws of this state  
a general election within the meaning of  
the constitution and law, and other further  
construction which you may desire to offer  
upon the above said section set out, will  
be duly appreciated by me."

## I.

A city election is not under the Constitution and Laws of this state a general election.

Article VIII, Sec. 1 of the Constitution of Missouri provides:

"The general election shall be held biennially on the Tuesday next following the first Monday in November of each even year; but the General Assembly may, by law, fix a different day--two-thirds of all members of each house consenting thereto."

Section 655, R.S. Mo. 1929, providing for rules for construing statutes, provides in part:

\*\*\*\*\*the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially.\*\*\*\*\*

Fortunately, the case of *The State v. Searcy*, 39 Mo. App. 393 construes a similar provision of the local option law of 1888. The court said (l.c. 405-6):

"It is next objected that, whereas, according to the law in force at the time when this election was ordered and held, a general school election in all the counties of the state was required to be held on the first Tuesday in April, which was the second day of that month, and whereas the election ordered by the county court on the question of local option was held on the eleventh of February, which was within sixty days of the election of school directors, the election on the question of local option was void under the terms of the statute. The provision of the statute relating to elections on the question of local option outside of the corporate limits of any city or town are 'that no such election, held under the provisions of this act, shall take place on any general election day, or within sixty days of any general election held under the constitution and laws of this state, so that elections as are held under this act shall be special elections,

and shall be separate and distinct from any other election whatever.' The Revised Statutes of 1879 contain this general provision: 'The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute. \*\*\*\*\*Sixteenth, the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November biennially.' Rls. 1879, section 3126. This shows that the school election required to be held in April was not a 'general election' within the meaning of the local option statute, and this disposes of this assignment of error."

#### CONCLUSION

In view of the foregoing, we conclude that a city election is not within the meaning of the Liquor Control Act providing "that no such election held under the provisions of this section shall take place on any general election day or within sixty days of any general election held under the Constitution and laws of this state. \* \* \*

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

OPINION: SPECIAL ROAD COMMISSIONERS:

County Court without authority to elect commissioners, after City in District has ceased to exist as such.

---

February 14, 1934. 2-17-34

Honorable Robert W. Hawkins  
Prosecuting Attorney  
Pemiscot County  
Caruthersville, Missouri.



Dear Sir:

We have your request of January 26, 1934, for an opinion concerning Article 9, Chapter 42, R. S. Missouri, 1929, and election of Commissioners for Special Road District. Your request is as follows:

"For the past four or five years the City of Bragg City has ceased to function as a municipality, that is, it has ceased to elect a mayor and has ceased to elect any other city officials, and at the present time has no one acting as mayor or members of the board of aldermen.

"The question now arises: How are the Commissioners of Bragg City Special Road District to be elected? You will observe Section 8026 says that the members of the county court, together with the mayor and members of the city council of the city shall meet and elect the commissioners. The county court now takes the position that since there is no city council in Bragg City that the county court is without power to appoint these commissioners.

"There are several thousand dollars of bonded indebtedness owing by Bragg City Special Road District. It is therefore very necessary that its functions be continued by the election of commissioners."

It appears that the road commissioners elected by the mayor and council of Bragg City and the County Court hold office until their successors are elected and qualified under the provisions of Section 8026 R. S. Mo. 1929.

A mayor and councilman of a city each has one vote in the election of road commissioners. State ex inf. v. Meyer, 12 S. W. (2d) 489. Since the county court is composed of three members, the mayor and city councilman as a general rule constitute a majority of the electing tribunal which elect the road commissioners under and by virtue of the provisions of Section 8026, supra.

The road district over which the road commissioners exercise their authority is composed of territory which includes the city, town or village of less than 100,000 inhabitants. This requirement is found in Section 8024, R. S. Mo. 1929.

We find no authority transferring the power of the mayor and city council to the county court upon the termination of the offices of Mayor and Council.

It is therefore the opinion of this office that the county court is without authority to elect road commissioners. Those already in office, as heretofore pointed out, hold office until their successors are elected and qualified. Under this provision of the law, there can be no vacancy in the office of road commissioner and it is now well settled that a term of office which runs for a specified time and then "until the successor is elected and qualified" is a valid provision. State ex rel. Robinson, 38 Mo. 192; State ex inf. Crow v. Smith, 152 Mo. 512; State ex rel. v. Boecker, 56 Mo. 17; State ex rel. v. Blakemore, 104 Mo. 340.

Insofar as the outstanding bonds are concerned, road commissioners are not necessary for the payment of either principal or interest on those bonds since a complete scheme for the payment of such bonds, even after the termination of a special road district, has been

Hon. Robt. W. Hawkins

-3-

2/14

provided in Section 8058, R. S. Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK  
Attorney-General.

FER/J

TAXATION: \*Taxpayer, through his mistake, paying taxes on land which he does not own, may not recover back such taxes paid voluntarily.

35  
March 3, 1934.



Mr. Will H. Hargus,  
Prosecuting Attorney,  
Harrisonville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would appreciate a ruling on the following facts.

A has paid drainage district tax on three acres of land for a period of fifteen years without protest. He now learns that the land prior to the drainage district tax was condemned for road purposes and he has never been the owner of same. The tax money which has been collected was deposited in a fund to be used entirely and exclusively for principal and interest on the bonds of the district and it has all been expended for such payments.

Will you please advise as to whether or not A can set off this overpayment of taxes against his current taxes and future taxes?"

In 37 Cyc. page 1178, the rule regarding the recovery of taxes paid voluntarily is stated as follows:

"Whatever may be the ground upon which objection to a tax or to the assessment of it may be made, it is a well settled general rule that if the tax is paid by the person assessed voluntarily and without compulsion it cannot be recovered back in an action at law, unless there is some constitutional or statutory provision expressly or impliedly giving him such right although the tax is paid without compulsion.

A payment is voluntary, in the sense



that no action lies to recover back the amount, not only where it is made willingly and without objection; but in all cases where there is no compulsion or duress nor any necessity of making the payment as a means of freeing the person or property from legal restraint or the grasp of legal process. Hence a payment made in pursuance of a bargain or compromise between the taxpayer and the state or municipality is voluntary, and so is a payment of taxes levied under a void statute, since the citizen should know that its invalidity is a complete defense and that he could not be coerced into making payment. So also where there has been no demand for the taxes, no steps taken to enforce them, and no pressure exerted to compel their payment. A payment made merely to save the property from being returned delinquent is voluntary, and so is one made to prevent the sale of land for an illegal tax. On the other hand, money illegally exacted as a condition of redeeming lands from tax-sale is not paid voluntarily, and a payment by a bank of illegal taxes upon the shares of its stock, without consent of the owners, is not voluntary.

Taxes voluntarily paid under a mistake of law cannot be recovered back, whether the mistake be as to the validity of the statute under which they are levied, the legality of the assessment, or the legal liability of the person or property. But it is sometimes held that there may be a recovery if the mistake is one of fact, particularly if made by the revenue officers in the form of a statement to the taxpayer or in taking some official action on the correctness of which the latter has a right to rely, although it is otherwise where the mistake is made by the taxpayer himself, and is the result of his neglect of some legal duty, or where the facts which would have shown the mistake were within his own possession or within his reach."

In *Mathews v. The City of Kansas*, 80 Mo. 236, our Supreme Court has the following to say about the recovery of taxes paid by the mistake of the taxpayer:

"Under the statute then in force the assess-

ment of taxes on real property was not a personal tax against the owner. The assessment was made on the land itself by its numbers, regardless of who was its owner. It was not the duty of the collector to look up the owner or apply to him for the taxes. The tax by law became due and payable at certain prescribed periods, and it was the duty of the owner to go to the collector, or send some one, and pay this tax assessed on the land as such. So the collector in his testimony but stated a legal truth in saying that he had no concern as to who was the owner of a given lot or tract of land. He was receiving the tax imposed on the given lot as such. It may be conceded that if Harriman had gone to the collector and stated that he had come to pay the tax assessed on plaintiff's land, trusting to the collector to look up the numbers, and this the collector undertook to do, and furnished the wrong numbers, and the agent had thereupon made payment on the belief of the correctness of the lots, this would have been a case of mutual mistake, or at least one in which the plaintiff would have a clear equity of restitution. But the proof here is that without any word or act of the collector inviting thereto, the agent of plaintiff, not depending on the collector for the land assessed against his principal, presented his own prepared list to the collector and told him to make out a receipt for the taxes due upon said list. In such a case the collector had to look simply to the numbers of the lots thus furnished to ascertain the amount of taxes assessed thereon. This he did as invited by the plaintiff, and received the money without question, as it was due the city. Where is the evidence in all this to give color even to any mistake or misrepresentation as to any material fact on the part of the collector? He was pursuing the statute receiving the tax due on the lots as such, regardless of who the owner was. The money received was justly owing to the city, was a charge on the lots, and, therefore, it cannot be affirmed that it is unconscionable for the city to hold it."

Nothing appears in your letter which indicates that the collector in any way contributed to the mistake. It

Mr. Will H. Hargus,

4  
March 3, 1934.

apparently was the mistake of the taxpayer and the payment must be deemed voluntary. Under the foregoing authorities, taxes paid voluntarily by a taxpayer may not be recovered. Since the taxpayer could not bring an action to recover this money from the county, he, of course, would have no right to offset the amount paid against taxes which he now owes. In order for him to offset he must have a valid claim, which he does not have on the facts in your letter.

It is therefore the opinion of this Department that where the taxpayer, through his sole mistake, voluntarily pays taxes upon land which he does not own, he may not recover the amount paid, nor may he offset the amount paid against present or future taxes owed by him.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

COUNTY BUDGET ACT: LIQUOR CONTROL ACT: Funds derived from sale of county licenses to be paid into General Revenue Fund and appropriated to the different classes according to requirements of the budget.

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3-22

March 19, 1934



Honorable Robert W. Hawkins  
Prosecuting Attorney Pemiscot County  
Caruthersville, Missouri

Dear Mr. Hawkins:

This Department is in receipt of your letter of March 12, 1934, in which you request an opinion as to the following state of facts:

"The County Court is desirous of knowing how the License money collected under and by virtue of the Liquor Control Act shall be used? That is, could the court apply the money to the fund or class most in need; or would the County Court have to pro-rate the money to the various funds or classes?"

Under the new Budget Law as passed by the 57th General Assembly of the State of Missouri, Laws Missouri 1933, page 340, all receipts of the County are credited to the general fund with two exceptions. Section 10 of the Budget Act provides in part:

"That the annual budget of any county shall present a complete financial fund for the ensuing budget year."

It further provides:

"That all receipts of the county for operation and maintenance shall be credited to the general fund."

The two exceptions to this are, the special fund for the special tax levy for roads and bridges, and

the different funds for receipts from the sale of bonds or for the retirement of bond issues.

The financial set-up under the Budget law begins with a General Revenue Fund. The county court then, by virtue of Section 2 of the Budget Act, sets aside sufficient sums for the proposed expenditures in the different classes.

**Class Six provides:**

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes, together with any expense incurred under class six."

The Liquor Control Act of the State of Missouri went into effect January 13, 1934. The County Budget Law requires that on the first day of February of each year the clerk of the county court shall prepare certain information of which the following is a part:

**"Estimated receipts:**

Other revenue (each source shall be stated separately) estimated.

Total estimated county revenue for the current year from all sources.

Ten per cent shall be deducted from total for delinquent taxes to get the net amount estimated for purposes of budget.

The court must balance its estimated budget for the year from the first five classes on the net estimate."

March 19, 1934

Section 8 of the Budget Law provides,

"That it is the duty of the county court at its regular February term, to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government."

Section 10 of the Budget Act provides in part,

"That the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures."

Inasmuch as the Liquor Control Act of Missouri became law on the 13th day of January, 1934, the income to the county by reason thereof must have been included in the budget required of each county as anticipated income.

It is therefore impossible for this department to say for which class of proposed expenditure the county court intended in its budget to use the funds derived from the sale of county licenses. However, there is no doubt but that this money should be paid into the General Revenue Fund and appropriated from that source to the different classes according to the requirements of the budget.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

JWH:AH

SCHOOL ELECTIONS: Persons qualified to vote at annual school elections should possess same qualifications as those voting in county and state elections; Laws of 1933, p. 381 regulate the manner of conducting elections; persons kept in county poorhouse, or asylum at public expense cannot vote.

4-20  
April 6, 1934.



Hon. C.C. Hayward,  
Representative Shelby County,  
Shelbina, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of April 5 wherein you request an opinion regarding three questions pertaining to school elections. Your letter is as follows:

"I would appreciate it very much if you would render an opinion on the following questions:

(1) Who are regularly qualified voters in an annual school election?

(2) What are the regulations and conditions under which school elections are held, by whom conducted, how are the judges appointed, place of voting, etc.?

(3) Can residents who are county indigents, i.e., persons receiving assistance, aid or contributions from the county legally vote?"

I.

The persons qualified to vote at the annual election of school directors and school propositions should possess the same qualifications as the persons permitted to vote in the county and state elections.

We shall proceed to answer your questions in the order presented, the first one being "who are regularly qualified voters in an annual school election?"



Sec. 9287, R.S. Mo. 1929, Art. 3, Chap. 57 under the title of "Laws Applicable To Common Schools", provides as follows:

"The government and control of the district shall be vested in a board of directors composed of three members, who shall be citizens of the United States, resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding his, her or their election, and who shall have resided in this state for one year next preceding his, her or their election or appointment, and shall be at least twenty-one years of age. Said directors shall be chosen by the qualified voters of the district at the time and in the manner prescribed in section 9283 of this article, and shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, except those elected at the first annual meeting held in the district under the provisions of this chapter, whose term of office shall be for one, two and three years, respectively. A qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote."

We call your attention to that portion of the statute above quoted which states "a qualified voter within the meaning of this chapter shall be any person who, under the general laws of this state, would be allowed to vote in the county for state and county officers, and who shall have resided in the district thirty days next preceding the annual or special meeting at which he offers to vote." Although the above section is under the laws applicable to common schools, your question deals with the qualifications of a voter in city, town and consolidated school districts, and the fact that the statute uses the expression "within the meaning of this chapter", it is applicable to a qualified voter in a city, town or consolidated school election in as much as Chap. 57 also includes city, town and consolidated school elections. It is further applicable to Secs. 9328 and 9341, Laws of Mo. 1933, which will be set out under your Question #2.

Having determined by Sec. 9287, supra, that a person to be qualified to vote in the annual school elections should have the same qualifications as a voter in the county and state elections, we must look for the qualifications of such voter in the county and state elections. Sec. 10178, R.S. Mo. 1929 sets out the qualifications and is as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

CONCLUSION

According to Sec. 10178, supra, a person qualified to vote in an annual school election in city, town and consolidated school districts should possess the following qualifications, and no others:

- (1) He shall reside within the State one year immediately preceding the election;
- (2) He shall reside in the county, city or town sixty days immediately preceding the election;
- (3) He shall vote in the town or city in which he resides;
- (4) If an officer, soldier or marine in the Army or Navy of the U.S. he shall not be entitled to vote;
- (5) He shall not be entitled to vote while kept in any poorhouse or asylum at public expense, except soldiers' homes;
- (6) He shall not be entitled to vote if convicted of felony or other infamous crime.

There seems to be no qualifications as to property or the payment of taxes.

II.

Laws of Mo. 1933, p. 381, Sec. 9341  
prescribes the manner of conducting  
elections in city, town and con-  
solidated school districts.

Your second question asks "what are the regulations and conditions under which school elections are held, by whom conducted, how judges are appointed and place of voting". Sec. 9341, R.S. Mo. 1929 was repealed and a new section known as Sec. 9341, Laws of Mo. 1933, p. 381 enacted in lieu thereof, which is as follows:

"The qualified voters of such town, city or consolidated school district shall vote by ballot upon all questions provided by law for submission at the annual school meetings, and such election shall be held on the first Tuesday in April of each year, and at such convenient place or places within the district as the board may designate, beginning at 7 o'clock A.M. and closing at 6 o'clock P.M. of said day. The board shall appoint three judges of election for each voting place, and said judges shall appoint two clerks; said judges and clerks shall be sworn and the election otherwise conducted in the same manner as the elections for state and county officers and the result thereof certified by the judges and clerks to the secretary of the board of education, who shall record the same, and, by

order of said board, shall issue certificates of election to the persons entitled thereto; and the results of all other propositions submitted must be reported to the secretary of the board, and by him duly entered upon the district records. All propositions submitted at said annual meeting may be voted for upon one and the same ballot, and necessary poll books shall be made out and furnished by the secretary of the board; Provided, that in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants, in counties containing not less than two hundred thousand nor more than four hundred thousand inhabitants according to the last national census, said elections may at the option of the board be held at the same time and places as the election for municipal officers and in all cities and towns having a population exceeding two thousand and not exceeding one hundred thousand inhabitants in other counties, said elections shall be held at the same time and places as the election for municipal officers, and the judges and clerks of such municipal election shall act as judges and clerks of said school election, but the ballots for said school election shall be upon separate pieces of paper and deposited in a separate ballot box kept for that purpose. Should such school district embrace territory not included in the limits of such city or town, the qualified voters thereof may vote at such voting precinct as they would be attached to, provided the ward lines thereof were extended and produced through such adjoining territory; Provided, that if there shall be any other incorporated city or town included in such school district, there shall be at least one polling place within such other incorporated city or town and said school election shall be conducted within the limits of such other incorporated city or town in the same manner as hereinbefore provided for cities or towns having a population exceeding 2,000 and not exceeding 100,000 inhabitants. All school districts in cities, towns and villages in this state which are now or which may hereafter be under special charter shall hereafter hold their annual school elections on the first Tuesday in April, and the members of the boards of education now serving in such districts shall continue to serve until the first Tuesday in April next following the expiration of the terms for which they were



elected or appointed, and until their successors are elected and qualified."

Section 9328, R.S. Mo. 1929 deals with the election of directors in city, town and consolidated school districts, and provides as follows:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

The two sections above quoted, namely, 9341 and 9328, supra, by their provisions determine that elections for directors and school questions and propositions shall be held on the same date, i.e., the first Tuesday in April.

The attitude of the Supreme Court on questions relating to the conduct of elections is set out in the decision in the case of Nance v. Kearbey, 251 Mo. 374. The Court said (l.c. 382, 383-384):

"It is right well in setting out to remind ourselves of some fundamentals, viz: While the right to vote is not a vested, natural right in a strict sense, yet it is a constitutional right in those citizens possessed of enumerated constitutional qualifications. (Constitution, art. 8, sec. 2). It may be regulated by statute but not lightly denied or abrogated. (Cass v. Evans, 244 Mo. l.c. 350; Bowers v. Smith, 111 Mo. l.c. 55). 'No power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.' (Constitution, art. 2, sec. 9). So jealous is the law in that behalf that voters are privileged from arrest at, or going to or coming from the polls except for treason, felony, or breach of the peace. (Constitution, art 8, sec. 4.)

\* \* \* \* \*

"The very taproot and reason for any election at all among a free people, is that the

the majority may rule; hence there are two main settled and uniform rules of interpretation, thus:

First: Election laws must be liberally construed in aid of the right of suffrage. (State ex rel. v. Hough, 193 Mo., l.c. 651; Hale v. Stimson, 198 Mo. 134). The whole tendency of American authority is towards liberality to the end of sustaining the honest choice of electors. (Stackpole v. Hallahan, 16 Mont. 40). The choice of electors must be judicially respected, unless their voice is made to speak a lie, or a result radically vicious, because of a disregard of mandatory statutory safeguards.

Second: The uppermost question in applying statutory regulation to determine the legality of votes cast and counted is whether or not the statute itself makes a specified irregularity fatal. If so, courts enforce it to the letter. If not, courts will not be astute to make it fatal by judicial construction. (Gass v. Evans, 244 Mo. l.c. 353; Hehl v. Guion, 155 Mo. 76). 'Such a construction', (says this court, speaking through Barclay, J., in Bowers v. Smith, 111 Mo. l.c. 55) 'of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other. (Wells v. Stanforth, (1885), 16 Q.B. Div. 245)' Again (pp. 61-2): 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command irrespective of their views of the importance of the requirement. (Ledbetter v. Hall (1876), 62 Mo. 422). In the absence of such declaration, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence on the proceedings as probably prevented a free and full expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise it is considered immaterial.'

#### CONCLUSION

In view of Sec. 9341, supra, the regulations covering the election shall be as follows:

- (1) The election shall be held the first Tuesday in April of each year;
- (2) The place of holding the election shall be at a convenient place or places within the district to be designated by the board;
- (3) Voting shall be from 7:00 o'clock A.M. until 6:00 o'clock P.M.;
- (4) The board shall appoint three judges of election for each voting place, and the judges shall appoint two clerks;
- (5) In all other respects the election shall be conducted in the same manner as the election for state and county officers, and the results thereof certified by the judges and clerks to the Secretary of the Board of Education.

### III.

Persons kept in the county poorhouse, or other institution or asylum at public expense are disqualified to vote at school elections.

We have partially, if not entirely, answered this question under the authorities cited in your Question #1. Referring to Sec. 10178, R.S. Mo. 1929, quoted under Question #1, you will note again the qualifications of a voter. One of the exceptions mentioned in said section, and the only one which might relate to our question here is: "Provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the Confederate home at Higginsville \*\*\* shall be entitled to vote at any election under the laws of this state."

This portion of the statute is discussed in a decision rendered in the case of Hale v. Stimson, 198 Mo. 134. The Court said (l.c. 159-161):

"In this connection, it will be seen that the person must be kept at a poorhouse or other asylum at public expense. And can it be said, broadly and nobly, that old soldiers are kept at public expense? The determination of this case does not require an answer to this question; but, in leaving it, matters and memories obtrude themselves of no light significance. In the first place, a consideration was paid the State on the part of the Woman's Relief Corps of the Grand Army of the Republic under the act making the St. James Soldiers' Home a state institution.



The question of 'public expense' must, furthermore, be viewed in the light that the privilege of a home in the evening of their days, of a chimney-corner, of a hearthstone (and the right to vote) was bought and paid for with a great price by the inmates and their comrades in arms. Who at this late day, in a piping time of peace, will measure that price or care to bring it within the precision of a legal formula? Those men and their comrades in arms, stalwart then, marched and counter-marched, mined and countermined, dug, starved, froze, planned, dared and fought through four years of civil war under Lee, Johnson and Stonewall Jackson--under Grant, Sherman and Logan. Some of their comrades perished in battle, on the lone picket, on the long march, of wounds, in prisons, by burning fever, by sickness of soul, or by deadly miasma. The grave since has swallowed up many a gallant survivor, hurried under the sod by privations and exposures of war."

#### CONCLUSION

In view of Sec. 10178 and the decisions herein quoted, it is the opinion of this department that in order for a person to be disqualified from voting, it will be necessary for such person to be kept in a county poorhouse or other institution or asylum at public expense, but the fact that a person is receiving assistance, aid, charity or dole from the county, city or state would not disqualify that person from voting.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN: AH

**TAXATION:** City Collector entitled to two per cent commission on delinquent tax collections.

April 9, 1934.

4/11



Hon. H. H. Harris, Jr.  
City Attorney  
Bank of Saline Bldg.  
Marshall, Missouri

My Dear Mr. Harris:

Acknowledgment is made of your request for an opinion of this office on the following matters:

"I am writing in regard to Taxation and Revenue Relating to collection of delinquent and back taxes, and providing for foreclosure, sale and redemption of delinquent property--as was passed by the Fifty-seventh General Assembly.

First, please advise me as to whether or not this is mandatory with Cities of the third class.

Second, Section 9969 (Fees of Collector) sets the rate at 2% for collection of delinquent taxes. Our City Collector gets 4%. Will the ordinance have to be changed in regard to per cent collected?

Third, Section 9952 (Shall record delinquent tax property) (page 429 of 1933 laws) seems to be in conflict with the same section passed by the same assembly and printed on page 465 of the 1933 Laws. Please advise me as to which one to follow or can they be reconciled.

Furthermore, does the last Session Act passed just recently in regard to the remission of penalties and interest effect the sections passed on page 425 and there after of the Laws of 1933." \* \* \* "

April 9, 1934.

We shall deal with your inquiries in the order above set out.

I.

IT IS MANDATORY UPON THE COLLECTOR  
TO SUBJECT ALL DELINQUENT PROPERTY  
TO SALE EACH YEAR.

We have heretofore held in an opinion to the Tax Commission of this State, that under the procedure as established by Senate Bill 94 it is mandatory upon the Collector to subject to sale all property upon which there remain delinquent and unpaid taxes. This conclusion is inescapable when considering the obvious purpose of this new delinquent tax law. So that you may be advised as to the basis of this decision I herewith forward you a copy of the pertinent part of that opinion.

II.

CITY COLLECTOR ENTITLED TO TWO PER  
CENT COMMISSION ON DELINQUENT TAXES.

Section 9969 Laws of Missouri 1933, p. 429, reduced the commission allowed Collectors for the collection of delinquent taxes from four per cent to two per cent. This section reads as follows:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two percent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lost, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

It is entirely probable that the city ordinance referred to in your inquiry was enacted in conformity with the state law upon the subject, i. e. at the time the ordinance was passed the state law provided for a four per cent commission. However, the state law being changed, it would be in order to amend the city ordinance

to conform to the state law. It is the recognized rule in this state that city ordinances must be consistent with the federal and state constitutions and the statutes on the subject. In the case of Wood vs. Kansas City, 162 Mo. 303, the Court considered an ordinance providing that no notary public fees should be received by any clerk in the city treasurer's office except such as were turned into the credit of the general fund of the city. The Supreme Court states the general rule, l. c. 309:

"\* \* \* But the power to enact ordinances by defendant city can only be exercised within the limits of its charter, and in harmony with the Constitution and statutes of the State. (Town of Paris v. Graham, 33 Mo. 94.) 'In this country, the courts have always declared that ordinances passed in virtue of the implied power, must be reasonably consonant with the general powers and purposes of the corporation, and not inconsistent with the laws and policy of the State.'  
\* \* \*"

In this case the Court held the ordinance void and stated, l. c. 310:

"\* \* \* The ordinance provides that no fees shall be received by said notary except such as are turned into the city treasury to the credit of the general revenue fund of the city, while by express provision of the statute he is entitled to charge and receive for his services the fees therein prescribed. It, therefore, seems impossible to conceive of an ordinance which would in its effect be more directly in conflict with the statutes referred to than this one.\* \* \*"

In the later case of St. Louis vs. Dreisoerner, 243 Mo. 217, the rule is again applied, l. c. 222:

"Tower Grove Park is a benefaction of Henry Shaw. It was created and is governed by statute. (Laws 1867, pp. 172-175.) It is not under the control and supervision of the park commissioner of St. Louis. (Charter of St. Louis, art. 8, Sec. 1). To protect it from contiguous nuisances

April 9, 1934.

enumerated therein, an act of the Legislature has been enacted forbidding their erection within the limits of one quarter of a mile in any direction from the exterior lines of the park. (Laws, 1871, p. 189, sec. 1.) This city ordinance includes five of the callings mentioned in the legislative act and sixteen other callings not referred to in the act, and prohibits the existence of any of the occupations described in the ordinance within a radius of six hundred feet of Tower Grove Park. As far as the ordinance is inconsistent with the act it is invalid, since all ordinances of the city of St. Louis must conform to relevant state laws.\* \* \* \*

We apply this rule in this case upon the presumption that your city is not operating under any special charter granting the city the exclusive control of fees and commissions, to be paid the collector and assessed against delinquent taxpayer. If your city is operating under such a special charter the foregoing rule would not necessarily apply, as special charters are construed to be special laws and therefore exceptions to the general laws on the same subject.

It is the opinion of this office that your charter provision allowing a different rate other than that established by the state law would be in conflict therewith and should be revised so as to conform with the state law, absent special charter provisions hereinbefore referred to.

### III.

SECTION 9952 p. 429, LAWS OF MISSOURI  
1933, SUPERSEDES SECTION 9952, page  
465 LAWS OF MISSOURI, 1933.

We have heretofore held in an opinion to the State Tax Commission of this State that the purpose of House Bill 44 found at page 465 Laws of Missouri, 1933, was to provide that the Prosecuting Attorney of Greene County act as delinquent tax attorney and that after July 24, 1933, Section 9952 as contained in Senate Bill 94 superseded Section 9952 as contained in House Bill 44 for all other purposes. We are herewith enclosing to you a copy of the pertinent parts of our opinion to the Tax Commission covering this

Hon. H. H. Harris, Jr.

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April 9, 1934.

particular point and trust that these satisfactorily answer your inquiry.

IV.

HOUSE BILL 124 EXTRA SESSION  
57th GENERAL ASSEMBLY.

From your last inquiry we are unable to determine the remission statute to which you refer. There were two remission statutes passed at the extra session, one of them Senate Bill #40, which expired January 1, 1934, the other, House Bill #124, which is a permanent measure. We have recently issued an opinion to the Comptroller's Office of the City of St. Louis dated April 4, 1934, expressing our views upon this enactment. We trust this covers the problem with which you are confronted.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM  
Encls.



TAXATION: Collection of delinquent city taxes under Senate Bill 94 in cities.

5-14  
May 10, 1934

*See 1933 Finance  
No. 63 to State  
Tax Commission  
date 8-8-1933.*



Hon. Roy W. Harper  
Attorney at Law  
Steele, Missouri

Dear Mr. Harper:

Acknowledgment is herewith made of your communication of April 13, 1934, requesting an opinion of this office. Your letter reads as follows:

"Would you please advise me if under the new tax law, it is necessary for cities to file their delinquencies with the County Collector, and that be made a part of the amount due when the tax sales are held in November, or if the cities will handle their tax collection as heretofore, or in line with the drainage district, and levee districts? \* \* \*"

In our opinion the answer to your inquiry depends upon the classification of the city involved. If it is a city of the first class, delinquent taxes are to be collected as prescribed by Section 6206 et seq. R.S. Mo. 1929. If it is a city of the second class the provisions of Section 6605 et seq. R. S. Mo. 1929 must be complied with. The collection of delinquent taxes in cities of the third class is governed by Section 6780 et seq. R. S. Mo. 1929. The fourth class cities collect their taxes by reason of the provisions of Section 6995 et seq. R. S. Mo. 1929, while towns and villages are governed by the provisions of Section 7109 et seq. R.S. Mo. 1929.

We have heretofore prepared an opinion for the State Tax Commission wherein we state reasons for our conclusions. I am glad to transmit to you a copy of that portion of this



Hon. Roy W. Harper.

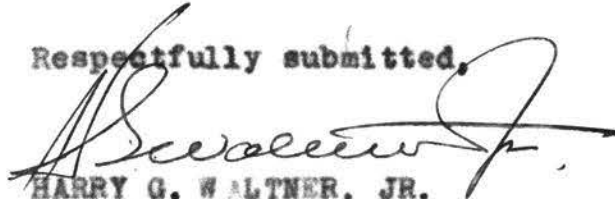
-2-

May 10, 1934.

opinion dealing with the collection of city taxes.

We trust that this will solve your problem.

Respectfully submitted,



HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM  
Enc.

2262  
COUNTY FUNDS: Transfer under Sec. 7891, R.S. Mo. 1929 permissible if County Court has control over same; if not, transfer cannot be made.

5/31

May 29, 1934.



Hon. Ralph W. Haselwood,  
Clerk of County Court,  
Edina, Missouri.

Dear Sir:

This department acknowledges receipt of your letter requesting an opinion on the following question:

"May the County Court transfer a balance derived from a levy under Sec. 7891, R.S. 1929 to another fund which is no longer needed for the purposes for which it was raised (Sec. 12167 & 12168, R.S. 1929?"

The Section referred to in your letter, namely, Sec. 7891, R.S. Mo. 1929, is as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be:

provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

The question arises as to whether or not any balance under the above section can be transferred as provided in Sec. 12167, R.S. Mo. 1929, which is as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Section 12168, R.S. Mo. 1929 provides as follows:

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

Sections 12167 and 12168, supra, appear to be general in their scope; there are no restrictions on any balances in any fund except the condition "which is no longer needed for the

purpose for which it was raised" and "excepting balances of funds of which the objects of their creation are and have been fully satisfied". However, we must be guided in our ultimate conclusion by the decisions of our courts.

In the case of Carthage Special Road District v. Ross, 192 S.W., 1.c. 978, the Court, speaking on this question, said:

"The respondent cites section 3786 of the revised statutes 1909 in support of its contention that the county court had the power to transfer this fund to other uses than those connected with roads and bridges. It provides that:

'Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance.'

The succeeding section limits this right of transfer to 'balances of funds of which the subject of their creation are and have been fully satisfied.' These sections have stood upon our statute books since their enactment in 1897, without change, except as modified by subsequent legislation, charging the road districts, agencies of the state expressly created for such purposes, with control and expenditure of this fund. In so far as these laws are inconsistent with the provisions we have mentioned they must yield to the last expression of the legislative will, which as we have already shown, is definite and unmistakable. These sections are still living laws in their application to all revenue of the county remaining within the control of the county court. The particular fund has plainly been removed from its control and intrusted to other hands to be expended by other agents, while leaving ample resources at its command for application to any road and bridge purpose which may still remain within the range of its duties. These old provisions cannot stand with these definite and inconsistent expressions of a later legislative

policy, and must therefore yield to them.

We are cited by the respondents to the cases of Holloway v. Howell County, 240 Mo. 601, 144 S.W. 860; and Decker v. Diemer, 229 Mo. 296, 129 S.W. 936, to sustain the right of the county to transfer this fund. The first of these cases was a suit for accounting to ascertain the balance in the county treasury of road funds collected by the county upon the property of the special road district for several years prior to 1909 and long before the bringing of the suit, for which no demand had been made. The case went off on that ground, and is consequently no authority in this case. The Decker Case was a suit for road taxes levied by the county court in 1905, 1906, 1907 and 1908, and appropriated to the road and bridge fund. The suit was brought May 11, 1909, more than three months before the act of 1909 upon which, with its amendment of 1913, the right to recover in this suit is principally founded. Neither the constitutional amendment of 1908 nor the acts passed in pursuance of it were involved. This case is one of first intention, and the controlling questions are now before us for the first time."

In the decision in the case of Holloway v. Howell County, 240 Mo., 1.c. 612-614, the Court, in commenting on the power of the county court to transfer funds, said:

"The bill alleges that the share of the district is still in the county treasury, but the proof shows nothing of the sort. Whatever mere theory be indulged by way of inference, one way or the other, the actual fact is, as shown by the proof, the money levied for county purposes was used for county purposes, presumably for paupers, insane persons, the salaries of officials, the expenses of running the courts, jury fees, expenses of elections, criminal costs and roads and bridges elsewhere. (Vide, R.S. 1909, sec. 11423) It was not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing

years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied. (State ex rel. v. Johnson, 162 Mo. 621; State ex rel. v. Appleby, 136 Mo. 408; Decker v. Diemer, 229 Mo. 296).

This view of the law but establishes a sensible and practical working plan for transacting the business affairs of the county. In the Decker case the legality of a court house fund made up in part of the odds and ends of unused funds was sustained. There is in that case an extensive discussion of the statutes relating to the administrative details in handling county funds. We will not repeat what is there said.

The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. (Decker v. Diemer, supra, l.c. 330). Running in debt is easy and pleasant while it lasts. Paying is 'another story'. The pleasure of debt making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year. (State ex rel v. Railroad, 169 Mo. l.c. 574-5). The road fund claimed in this case, as said, was levied as county revenue. It was county revenue; any part of it not called for, for current year purposes, became, under the facts of this case, an unexpended and unused part of the county revenue, subject to be disposed of as indicated in the Decker, Johnson and Appleby cases, supra. As near as we can make out it was so used. It would throw into needless confusion the whole cash scheme of county government to permit a special road district long after events it apparently acquiesced in to hark back to past years and recover judgment against a county for alleged past deficiencies, which, under the cash system, presumably the county has no present ability to pay. Especially so where no timely and statutory application was made for the fund as here. Something is made of the fact that in September, 1908 (at the time of the trial), there were several thousand dollars in the county



treasury to the credit of the county revenue fund. We see no logical connection between that fact and defendant's liability.

We are cited to many interesting cases in other States, of which The Village of Oneida v. Madison County, 136 N.Y. 269, and Spidell v. Johnson, 128 Ind. 235, are samples. Their actions for money had and received were allowed against counties that had used funds collected for a specific purpose and belonging to other public corporate bodies to pay their debts. But the facts in those cases are dissimilar to those here in obvious particulars, and we are not familiar with the statutes of those States which may have lent color to those decisions."

In the case of Deckör v. Diemer, 229 Mo., 1.c. 336, a portion is herein quoted as it bears upon a different situation:

"We shall not write the law so that county courts may make excessive levies for county purposes for the very purpose of evading the statutes and creating a surplus to build a courthouse, thereby, under the seeming forms of law, evading the spirit and intent of the law. We have already disposed of the features of this case in that particular, and shall proceed to determine the question now up by assuming that the levies were honestly made from year to year, and that the surpluses were honestly accumulated as indicated.

The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer the question in the affirmative. We are of the opinion that the force of the Cottey Act is spent in another direction, as the history of the times of its enactment well shows, and that it ought not to be construed as prohibiting such transfer of funds. We are further of the opinion that the various statutes providing for the transfer of funds, when practically construed, lend substance and countenance to the view we have expressed. We are further



of the opinion that sections 6723 to 6729 inclusive, supra, now a part of article 2 of chapter 97, entitled 'counties', is a live law though old. The chapter and article have been revised and amended from time to time and brought down for every day use. The Cottey Act was not intended to repeal it and the provisions of the two are not antagonistic or inconsistent. Repeals by implication are not favored. It is our duty to harmonize and preserve the whole body of the law, when we can. We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

An early decision bearing on the right of a county to transfer funds is the case of *State ex rel. v. Appleby*, 136 Mo. l.c. 412. The Court said:

"We do not think section 7663 can be given such a construction. We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenues and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should go unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which it was appropriated, from which it can be paid. When it is found that there is a surplus in one fund, and a deficiency in another, there is nothing in the law, or

May 29, 1934.

other reason, why the court may not transfer the surplus in order to make up the deficiency. Indeed sections 3189 and 3190 expressly provide for such transfer."

CONCLUSION

It is the opinion of this department that the transfer of funds under Sec. 7891, R.S. Mo. 1929 is permissible in the event the county court still has control over the funds mentioned in said section, but if the county court no longer has possession of the funds and the same are no longer in its control, as stated in the decision in the case of Carthage Special Road District v. Ross, then, in that event, the transfer cannot be made.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General

APPROVED:

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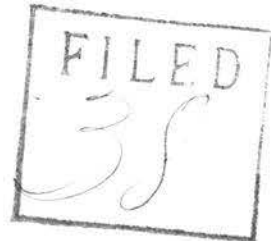
ROY McKITTRICK,  
Attorney General

OWN:AH

COUNTY COURT - Working county prisoners - Discretionary - What  
PRISONERS - - Compulsory. Prisoners subject to be worked -  
type of work. Employment of Guards. Board of  
Prisoners and liability therefor.

June 14th, 1934.

6-19



Honorable T. J. Harper  
Prosecuting Attorney  
Stone County  
Galena, Missouri

Dear Sir:

We have your request of June 6th, 1934 for  
an opinion on the following facts:

"If a prisoner, being held in jail,  
unable to give bond, is taken from  
the jail and kept on a farm for a  
period of days and is used as a  
laborer, then is later convicted  
in criminal court - Does the county  
or state stand responsible for a  
board bill during his absence from  
the jail?"

For the purposes of this opinion, we will sub-  
divide it as follows:

- I. Working County Prisoners.
  - A. When Prisoners Number Less Than Ten - Discretionary.
  - B. When Prisoners Number Ten or More - Compulsory.
  - C. Prisoners Excepted From Work.
    - (1) Those not convicted, but awaiting trial.
    - (2) Females and persons incapable of manual labor.
    - (3) Persons Convicted of Felony.
- II. Contract For Working Prisoners.
  - A. Period of Work - Duration of Time.
  - B. Employment of Guards.
  - C. Kinds of Work.

III. Board of County Prisoners.

Conclusion.

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I.

WORKING COUNTY PRISONERS.

A - When Prisoners Number Less Than Ten - Discretionary.

Section 12114, Revised Statutes of Missouri, 1929, provides:

"The county court of any county in this state may, in their discretion, order the sheriff or marshal to cause all such persons mentioned in the preceding section to be put to work and perform labor on the public roads, highways, turnpikes or other public works or buildings of such county for such purposes as they may deem necessary: \* "

The above quoted part of the statute applies in all cases where the number of prisoners subject to work numbers less than ten. Under such circumstances, the county court may or may not work such prisoners, and the entire matter rests within the discretion of the county court.

B - When Prisoners Number Ten or More - Compulsory.

When there are ten or more prisoners capable of performing manual labor, not including those hereinafter excepted from work under I C of this opinion, it is the mandatory duty of the county court to provide work for such prisoners. Section 12114, Revised Statutes of Missouri, 1929, in part, provides:

" \*when there shall be confined in the jail of any county such persons to the number of ten or more, it shall be obligatory on the county court to cause all said persons, \*

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to be worked as aforesaid, and to be kept at work during such period as they would otherwise be confined in the common jail of such county; \* "

C - Prisoners Excepted From Work.

(1) Those not convicted, but awaiting trial.

Section 12113, Revised Statutes of Missouri, 1929, relating to the prisoners who may be worked, is limited to those under conviction. In part it provides as follows:

"The county courts in this state are hereby authorized and empowered to cause all persons who have been convicted and sentenced, by a court of competent jurisdiction, for crime, the punishment of which is defined by law to be a fine, or by imprisonment in the county jail for any length of time, or by both such fine and imprisonment, or by fine and imprisonment until such fine be paid, to work on the public roads or break rock for macadamizing purposes; \* "

The Legislature has therefore seen fit to limit the right of the county court to work prisoners, and to confine the forceful working of prisoners to those who have been convicted of crime, and have prior to the working, been sentenced. Section 12113, Revised Statutes of Missouri, 1929, also provides that the working of such prisoners shall be made a part of the sentence of the prisoner.

Some question may be raised as to when a person is convicted. In the event a person has been convicted and sentence pronounced, and an appeal has been taken, it may be urged that the appeal suspends the right of the county to work the prisoner in the event such prisoner is unable to give bond. In State v. Shelton, 284 S. W. 433; 314 Mo. 333, five judges of the Supreme Court held that a

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person was convicted immediately upon the pronouncing of the sentence in the trial court and that an appeal did not, in any way, set aside or change the prisoner's status of being a convicted person.

(2) Females and persons incapable of manual labor.

Among the persons exempted from working, under Section 12114, are females. Section 12114, in part, provides:

" \*it shall be obligatory on the county court to cause all said persons, except females and except persons incapable of performing manual labor, to be worked \* "

As to whether a person is capable of performing manual labor, the determination of such question is to be determined by the county court. However, it is the duty of the county court to make allowances for compensation for medical services given to prisoners. - Section 3840. Similar authority is also given to the sheriff or jailer to furnish the prisoners such medical attention as is necessary. - Section 8533. Therefore, in the determination of the physical fitness of any prisoner for work, the county court should be largely guided by the opinion of the attending medical officer.

(3) Persons convicted of felony.

Section 12112, Revised Statutes of Missouri, 1929, provides:

"The county courts \* shall have the power to provide for the employment,\*  
~~of~~ all persons convicted of misdemeanor \* and who may be sentenced to imprisonment in the county jail, or who may be committed to the county jail for

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nonpayment of fine; \* "

Persons who have been convicted of a felony are exempted from the provisions of the above statute, and this is true even though the punishment for such felony may be imprisonment in the county jail. - State ex rel. v. Johnson et al (1909) 138 Mo. App. 306, l.c. 316.

## II.

### CONTRACT FOR WORKING PRISONERS.

#### A - Period of Work - Duration of Time.

Section 12112, Revised Statutes of Missouri, 1929, provides that the county court shall have the power to provide for the employment of prisoners,

" \*under such rules and regulations and under such terms as they may prescribe, \* "

As heretofore pointed out, in Section 12114, supra, provision is made by the county court for the working of a prisoner as a part of the sentence. Said section, relating to the duration of such employment of prisoner, provides that such prisoner shall be worked,

" \*and to be kept at work during such period as they would otherwise be confined in the common jail of such county; \* and the sheriff or marshal shall have power and is hereby required to have or cause all such persons as may be directed by the county court to work out the full number of days for which they may have been sentenced \* and if the



punishment be by fine and the fine be not paid, then for every dollar of such fine the prisoner shall work one day, and shall also work for such period of time as he would otherwise be required to remain in jail in order to be released from the payment of any costs in such case. \* "

It may be urged that the working of a prisoner for one day for each one dollar of his fine is in conflict with Section 3859, which provides that such prisoners confined for the nonpayment of fine and costs shall not be imprisoned for more than one day for each two dollars (\$2.00) of such fine and costs, with a limit of twenty days actual imprisonment for the nonpayment of costs in all cases where the prisoner is insolvent. A close examination of the two sections will reveal that it was the intention of the Legislature to limit the confinement of insolvent prisoners, when kept in jail one day for each two dollars (\$2.00) of fine, and in no event could such prisoner be kept in jail for more than twenty days for the costs.

The mere confinement of a prisoner in jail, under Section 3859, does not in any way pay the fine or costs; there is only a limitation upon the time he may be imprisoned for his failure to pay such, because Section 3872 provides:

"The estate, property and effects of such petitioner at the time of his discharge, and all he shall thereafter acquire, shall be liable to execution for the payment of such costs and expenses."

An insolvent discharged criminal is entitled to the statutory civil exemptions. - *Betterton v. O'Dwyer* (1907) 124 Mo. App. 306. The evident intent of the Legislature was, under Section 12114, that the working of a prisoner outside, in the open air, and under more healthful conditions, jus-

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tified the working of prisoner one day for each one dollar (\$1.00) of his fine. Even though no change was made in the provision allowing the prisoner to discharge himself from imprisonment for costs upon the serving of a maximum of twenty days for costs which amount to more than forty dollars (\$40.00), or in the event the costs amount to less than forty dollars (\$40.00), the prisoner may discharge himself from such imprisonment for costs by serving one day for each two dollars (\$2.00) of costs. There is no conflict between the two above statutes. In Re: Joseph Lorkowski (1902) 94 Mo. App. 623.

B - Employment of Guards.

In order to effectively carry out the provisions for working prisoners, Section 12114 in part provides:

"it is hereby made the duty of said county courts to employ a suitable guard or guards and to pay them reasonable compensation therefor out of the county treasury to take charge of such persons, receiving them from the sheriff or marshal of such county, and keeping them in custody \* and such guards shall have full power and authority of a deputy sheriff to restrain and keep such prisoners in custody \* "

C - Kinds of Work.

It appears to be the first intention of the Legislature that all such prisoners should be worked on public roads, highways, turnpikes or other public works or buildings in such county, but in the event that the county does not have such need for prison labor and where there are ten or

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more prisoners subject to be worked in the county jail, then,

" \*the county court is authorized in its discretion to procure a lot of ground by purchase or rental at such place and of such size as they may select, and may authorize the sheriff or marshal to buy perch rock to be delivered on said lot; but such persons shall not be put at work breaking rock when they can be worked on the public roads and highways, turnpikes or other public works or buildings of such county; \* "

In the event that the prisoners are placed on road work, the county court may direct road overseers or road commissioners to superintend or direct the working of such prisoners, because under Section 12114, Revised Statutes of Missouri, 1929, it is provided:

" \*it shall be the duty of the road overseers or road commissioners of each and every road district or township in this state to direct the work of such persons when so ordered by the county court; \* "

If the county court deems it necessary and proper, it may employ such overseers to direct the work of such persons. - Section 12114.

### III.

#### BOARD OF COUNTY PRISONERS.

It was the clear intention of the law makers to have the "board" of a prisoner in a county jail taxed as

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costs in the case. This is apparent from the following statutes, quoted in part:

Section 11794:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county \* "

Section 11795:

"It shall be the duty of the county courts of each county \* at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, \* "

Section 3825:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Under Section 12115 it is made the duty of the jailer or sheriff to make out and present to the county court at its regular session a bill for board due him for such working prisoners, and it is the duty of the county court to order and pay such bill. If a prisoner is placed out on work under the conditions and rules heretofore pointed out, the employment is to be under,

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" \*such rules and regulations and  
under such terms as they (county court)  
may prescribe, \* "

The question of the board of the prisoners may  
or may not be a part of the terms under which the prisoners  
are compelled to work.

It is the opinion of this office that the county,  
in any event, is liable for the board of such prisoners,  
especially where no provision has otherwise been made in  
the working of a prisoner.

CONCLUSION.

The conclusion expressed in the above and foregoing  
divisions of this opinion, without reiteration, is the  
opinion of this office.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

*Escheat-*  
ASSIGNMENT OF LAND TO THE STATE:

Relating to manner in which  
it may be disposed of.

June 19, 1934

6-25



Honorable Will H. Hargus  
Prosecuting Attorney  
Cass County  
Harrisonville, Missouri

Dear Mr. Hargus:

This Department is in receipt of your letter  
and enclosure of April 6.

Your letter states in part as follows:

"Re: Walker Land.

Relative to the above mentioned 102  
acre farm in Cass County which I  
talked to you about several days ago  
when I was in Jefferson City, I en-  
close statement of facts. I have had  
this matter up with the state auditor,  
state treasurer and Gov. Park."

Your enclosure states as follows:

"Re: Walker Land.

STATEMENT OF FACTS

About 1918 E.J. Walker, resident of  
Cass County, died intestate and ap-  
parently with no living heirs.  
Litigation to which the State of  
Missouri was a party was brought  
by parties claiming to be heirs  
in the form of a quiet title suit.  
There was an action brought by the  
then acting prosecuting attorney  
of Cass County under the provisions  
of Article I, Chapter 3. This case

was taken on change of venue to Jackson County and tried, the parties claiming to be heirs attempting to establish that fact. Trial resulted in a hung jury.

After the trial of the case the suit was settled in the following manner, to-wit: A decree was entered vesting title solely in the plaintiffs (those claiming heirship) and after the decree and the vesting of title these parties conveyed the 102 acres in question by warranty deed to the State of Missouri, subject to the life estate of a Mrs. Berry. You will note by this that title to this land did not come to the State of Missouri by escheat but by deed. In December some three or four months ago Mrs. Berry died and the land is now property of the state.

Questions to answer are these:

- (1) What department should have charge of this Land?
- (2) What does the party in charge desire to do with it?
- (3) In what manner can it be conveyed?
- (4) Do they desire to rent or sell it?  
I have had parties approach me on both propositions"

Laws of Missouri, 1915, Section 1, at page 409, provided that a commission be created to accept devises, bequests, donations, gifts, etc., made to the State and which read as follows:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal, or mixed, shall be made or offered to be made



to this state, the governor, attorney-general and state treasurer, constituting a commission for that purpose, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said commission, so that the right and title to shall pass to and vest in this state; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct."

The above section has been amended abolishing the Commission and transferring their duties to the State Board of Education.

Laws of Missouri 1933 Article II, Section 643, at page 252 provides that the State Board of Education is to accept devises, bequests, donations, gifts and assignments made to the State and reads as follows:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the State Board of Education, as constituted by law, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said Board, so that the right and title shall pass to and vest in this State; and all such property so vested in this State and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct. The intention of this act is to abolish the commission heretofore created to ac-

cept devises, bequests, donations, gifts or assignments of money, bonds or choses in action, or of any property, real, personal or mixed, and to transfer such duties to the state board of education."

Article I, Section 639, R. S. Mo. 1929, provides that whenever any real estate shall have escheated and title thereto taken in the State, the court may order a sale, and reads as follows:

"Whenever any real estate shall have escheated and the title thereto vested in the state, the circuit court of the county in which such estate is situate shall, upon the application of the prosecuting attorney of said county, order and direct said real estate to be sold; which sale shall be made by the sheriff of said county and shall be advertised and conducted in the same manner as shall by law be provided for the sale of real estate under execution."

As set out in the statement of facts, the conveyance of the land in question by warranty deed, subject to the life estate of a Mrs. Berry, has upon her death passed title to the State of Missouri.

At the time of settlement in question Laws of Missouri, 1915, supra, were in effect and particularly Section 1 thereof which provides in part that "whenever any \*\*\*assignment\*\*\* of any property, real, personal or mixed, shall be made\*\*\* to this State\*\*\* a commission for that purpose, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the\*\*\*, assignor of said property and said officials constituting said commission, so that the right and title to shall pass to and vest in this state; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the Legislature may direct."

At the present time, (Laws of Missouri 1933 Article II, Section 643, supra) the above section has been amended abolishing the Commission, and transferring their duties to the State

Board of Education. However, such an amendment has no particular bearing on the questions presented before us in that the present Section 643, Laws of Missouri 1933, supra, still provides as it did at the time the settlement was made that "\*\*\*\* all such property so vested in this State and the proceeds thereof, when collected, may be appropriated for educational purposes or for such other purposes as the Legislature may direct."

No question is raised or issue made as to whether at the time of settlement, the commission authorized to receive and accept the same did so in fact, and we assume that they did receive and accept same.

Section 639 R. S. Mo. 1929, dealing with escheats provides that the court may order the sale of any real estate which has escheated and the title thereto vested in the State. Section 643 of the Laws of Missouri 1933, supra, merely states in part, that "\*\*\*\* all such property so vested in this State and the proceeds thereof when collected\*\*\*\*" and nothing is stated as to how the proceeds are to be collected. In determining what the Legislature meant, it is necessary for us to construe that phrase with the general purport of the whole statute in order to carry out the object which the law-givers sought to reach.

In the case of Dahlin v. Missouri Commission for the Blind, 262 S. W. 420, 1. c. 424, the Court said:

"Where certain terms of a statute are ambiguous, resort may be had to its title as a clue or a guide to its meaning. \*\*\*\*"

In the case of Glaser v. Rothschild 120 S. W. 1, 1. c. 11, 221 Mo. 180, our Supreme Court said:

"The law is well settled that doubtful words of a statute may be enlarged or restricted in their meaning to conform to the intent of the law-makers when manifested by the aid of sound principles of interpretation.\*\*\*\* The authorities hold that a statute should not be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall

be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to finish in itself all the light needed for its construction. \*\*\*\*

"Under that rule, where the language of a statute leads to a manifest contradiction of the apparent purpose of the enactment, a construction may be placed upon it which will modify the literal meaning of the words thereof.\*\*\*\*

"We might also add in this connection that under the provisions of our Constitution the title of a statute is necessarily a part thereof, and in construing the statute we should take the title into consideration, also."

#### CONCLUSION.

In the light of the foregoing cases and sections, we are of the opinion that whenever any land is assigned to this state and is received and accepted on the terms as agreed upon by the assignor and authorized Board (now Laws of Mo. 1933, Section 643, supra) and the title passes to and vests in this State then, \*\*\*\* the circuit court of such county in which such estate is situate shall, upon the application of the prosecuting attorney of said county, order and direct said real estate to be sold; which sale shall be made by the sheriff of said county and shall be advertised and conducted in the same manner as shall by law be provided for the sale of real estate under execution. (Section 639, R. S. Mo. 1929, supra.)

It is true that Article I, Section 639 R. S. Mo. 1929, supra, stated "whenever any real estate shall have escheated and the title thereto vested in the State \*\*\*\*", but we are of the opinion that the remainder of the above section applies as well to Article II, Section 643, Laws of Missouri 1933, supra, which states that "\*\*\*\* all such property so vested in this state and the proceeds thereof when collected may be appropriated for educational purposes, or for such other purpose as the Legislature may direct.\*\*\*\*"

June 19, 1934

We find nothing in Article II, Section 643, *supra*, stating how the property is disposed of, how the proceeds are to be collected, etc., and therefore in order to clear up this ambiguity, we must look to the title of the act, and not to the section as it stands alone.

As held in the case of *Glaser v. Rothschild*, *supra*, "\*\*\*\* the authorities hold that a statute should not be construed as if it stood solitary and alone, complete and perfect and isolated from all other laws,\*\*\*\*. The title of a statute is necessarily a part thereof and in construing the statute, we should take the title into consideration also\*\*\*\*". As stated previously, the title of Chapter III, is not limited merely to escheats but also includes devises and bequests and further research is shown to also include donations, assignments, etc.

We are of the opinion that all four questions, as set out in the statement of facts, may be answered by complying with that portion of Section 639, R. S. Mo. 1929, which is applicable. The Circuit Court of the county in which such estate is situate should upon the application of the Prosecuting Attorney of said county, order and direct the real estate to be sold and the proceeds when collected held in the State treasury to be appropriated for educational purposes or for such other purposes as the Legislature may direct.

Respectfully submitted,

COVELL R. HEWITT  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

MW/CRH:LC



TAXATION and REVENUE:

Page 465 Laws of Missouri, 1933, not effective  
after 7-24-33 except as to delinquent tax attorney.

June 23, 1934.

6-28



Hon. Robert W. Hawkins  
Prosecuting Attorney  
Pemiscot County  
Caruthersville, Missouri

Dear Mr. Hawkins:

Acknowledgment is herewith made of your letter of June 9, 1934, requesting an opinion on the following matters:

"Mr. Chas. G. Ross, Collector of the Revenue within and for Pemiscot County, desires an opinion from your office concerning the legislative enactments of 1933 for the collection of state and county taxes.

On page 429 of the Session Acts of 1929, it is provided among other things, that Sections 9952, 9953, 9954, 9955, 9956, 9957, 9958, 9960, 9962 and 9963, Article 9, Chapter 59, Revised Statutes of Missouri, 1929, entitled "Taxation and Revenue" and relating to delinquent and back taxes, be and the same are hereby repealed and fifty-one new sections enacted in lieu thereof pertaining to the same subject.

The legislative enactments beginning on page 425 and extending to page 449 of the Session Acts of 1933, being Senate Bill #94, completely changes the method of collecting taxes in this state, but to the mind of our Collector the question is very much complicated by House bill #44, beginning on page 465 of the Session Acts of 1933 by which enactment Section 9952, Article 9, Chapter 59 of the Revised Statutes of 1929 seems to be again repealed and a new section enacted in lieu thereof, making it the duty of the Collector to proceed to enforce the payment of taxes charged against the land by suit in a court of competent jurisdiction of the county where the real estate is situated, which said court shall have jurisdiction without regard to the amount sued on to enforce the lien of the state and cities.

\* \* \* \* \*

Such being the case, the Collector is at a loss to understand the method he should pursue in collecting taxes that are delinquent now and become delinquent in the future.\* \* \* \* \*

By the provisions of Senate Bill 94 a new and comprehensive system of enforcing the payment of delinquent taxes was enacted and the old method of enforcing the payment of delinquent taxes by suit was abandoned. Section 9952 R. S. Mo. 1929 was repealed by this law and a new section enacted providing for certain things that are indispensable to the system inaugurated by Senate Bill 94. However, Senate Bill 94 did not contain an emergency clause.

House Bill 44 found at page 465 Laws of Missouri, 1933, also purported to repeal Section 9952 of the 1929 revision, and thus enacted a new Section 9952 in lieu thereof. The Section as reenacted in House Bill 44 is identical with the Section found in the 1929 Revision except that this proviso was added:

"PROVIDED, HOWEVER, that in all counties of this State that now have or may hereafter have a population of not less than 80,000 nor more than 95,000 according to the last decennial census of the United States, the Collector shall have no power or authority to employ such attorneys, that the Prosecuting Attorney of such counties shall be the back tax attorney, and that all fees collected as such by the Collector shall be paid into the County Treasury; and each of the Prosecuting Attorneys in such counties shall be entitled to such additional temporary clerk and deputy hire as in the judgment of the Prosecuting Attorney and the County Court may be deemed necessary, for such time and at such salary as may be fixed by the Prosecuting Attorney and the County Court."

House Bill 44 was both passed by the General Assembly and approved by the Governor subsequent to Senate Bill 94. We find these two Sections 9952 as apparently valid and effective laws, the section in House Bill apparently authorizing a procedure that was repealed by and is entirely repugnant and contrary to the entire intent and purpose of Senate Bill 94. There can, of course, be no question as to the intention of the Legislature in enacting Senate Bill 94. If we can determine the legislative object of House Bill 44, we may be able to construe these acts so as to give full effect to both. The only change in Section 9952 as contained in House Bill 44 and as contained in the 1929 Revision is the addition of the proviso above set out. This change only affected Greene County, and authorizes and requires the Prosecuting



Attorney of said County to act as delinquent tax attorney. No change of any kind was made as to any other provision of said Section. Accordingly, it is a reasonable conclusion that as Senate Bill 94 repealing Section 9952 was not effective till ninety days after adjournment and as said original Section 9952 was valid and a subsisting law until that time, and as House Bill 44 made no change in that Section except as above pointed out, the whole intent and purpose of House Bill 44 was to effect this change in the mode of the selection of the delinquent tax attorney, such change applying only to Greene County, Missouri. An examination of the emergency clause supports this conclusion. This clause is found on Page 467, Laws of 1933 and reads as follows:

"Section 2. EMERGENCY.—The financial condition of the counties and of the people therein, to which this act applies, and relief of the same being imperative without delay, creates an emergency in the meaning of the Constitution and this act shall be in force and effect upon its passage and approval."

As the only part of said act which was not already operative was the added proviso, the "relief" creating the "emergency" referred to must have been the added proviso. That the emergency clause may be considered in determining legislative intent is well settled. The Supreme Court in this matter stated as follows in the case of State vs. Bengsch, 170 Mo. 81, 1. c. 109:

"Now, if laws passed at remote period, laws in pari materia, or cognate-subject laws, laws that have expired or been repealed, unconstitutional laws, may have the shell of their legislative nuts cracked by the hammer of judicial investigation, in order to extract the kernel of their intention, then a fortiori, may a similar result be reached where the shell of the legislative nut has been cracked by the legislators themselves, and the kernel of their intention extracted and spread on the platter of an emergency clause ready for immediate use. We hold the emergency clause in this instance as conclusive evidence of the legislative purpose, \* \* \* \* \*"

Having concluded that the sole intent of House Bill 44 was to provide that the Prosecuting Attorney of Greene County also act as Delinquent Tax Attorney, we are of the opinion that House Bill 44 was only operative as enacted up to July 24, 1933, and now has no application, so far as affecting the mode of procedure set up by Senate Bill 94.

Hon. Robert W. Hawkins

-4-

June 22, 1934.

The foregoing construction is further supported by the rule that acts relating to the same subject, passed at the same session must be treated as part of the same act and construed together. The Supreme Court en banc stated in *Gasconade County vs. Gardin* 441 Mo1 569 as follows:

"Especially is it true that legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as part of the same act.

We have not overlooked the fact that House Bill 44 was enacted subsequent to Senate Bill 94, or that it is in fact a special law, but are of the opinion that any other construction would render said House Bill 44 repugnant to the intent and purpose of Senate Bill 94.

Respectfully submitted,



HARRY G. WALTNER, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

422  
She riff:

1. To charge a person with carrying concealed weapons under the statute concealment is the gravamen of the offense whether such concealment is on, or near to, person.
2. Where person is intoxicated concealment not necessary.
3. Weapon found in car with illegal liquor, general law applies.

8-23  
August 17th, 1934.

Mr. Sterling V. Harness,  
Sheriff of Henry County,  
Clinton, Missouri.



Dear Sir:-

We have your letter of June 20, 1934, in which is contained a request for an opinion as follows:

"We would like to get your opinion on the law on carrying concealed weapons, especially when a gun is found in an automobile either in the car pocket or lying in the open as on the seat or within easy reach of the person or persons in the car. Also in case where an arrest is made for drunkenness and a gun is found, how should the gun be confiscated.

"Then where illegal liquor is found in an automobile and a gun is also found in the car lying within reach, can we take the gun and file on the person for carrying concealed weapons. I am referring to pistols and revolvers in the above cases."

Section 4029, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 4029. Carrying concealed weapons.--If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, or shall go into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, political, literary or social purposes, or to any election precinct on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose other than for militia drill, or meetings called under militia law of this state, having upon or about his person, concealed or exposed, any kind of firearms, bowie knife, spring-back knife, razor, metal knucks, billy, sword cane, dirk, dagger, slungshot or other similar deadly weapons, or shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner, or shall have any such weapon in his possession when intoxicated, or, directly or indirectly, sell

August 17th, 1934.

or deliver, loan or barter to any minor any such weapon, without the consent of the parent or guardian of such minor, he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment. Provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."

On reading the above section, we are immediately faced with construing what is meant by the terms "upon or about his person". In this connection, the case of State vs. Conley, 280 Mo. 21, well states the law as construed by our courts. In that case, Justice Walker at page 23, uses the following language:

"Under the statute (Sec. 4496, R. S. 1909) defining this offense, the concealment, although not actually on the person, may be in such close proximity to the accused as to be within his easy reach and convenient control; and upon proof of this fact the offense is made out."

And again at page 24:

"This instruction correctly declares the law in that it contains all the essentials necessary for the jury's consideration in determining as to the guilt or innocence of appellant under the evidence. The refused instruction does not do this but attempts by its terms to limit the words 'on or about his person' to a concealment by the accused of the weapon in his wearing apparel. The fact of concealment constituting the gravamen of the offense, a construction which would limit the law as contended by appellant would defeat its purpose and render convictions in cases of this character difficult if not impossible."

The statute referred to is the same section as the one quoted earlier in this opinion.

The above case and language were cited with approval in the case of State vs. Renard, 273 S. W. 1058 and State vs. Hogan, 273 S. W. 1060.

Sterling V. Harness--#3

August 17th, 1934.

Since, therefore, the concealment is regarded as the gravamen of the offense, we can readily answer your first question by saying that if the gun in the automobile within easy reach of the person in question is in any way concealed, then the offense is within the statute. If said gun is lying in open view, considering the circumstances, there is no concealment and hence the situation is not within the statute. An example of how far the courts of Missouri have gone is the case of State vs. Renard, cited above, where the gun was on the floor of the automobile beside the feet of defendant. In that case, it was a dark night and this, no doubt, strengthened the element of concealment. The offense was there held within the statute.

As to your second question concerning the gun on or about an intoxicated person, a different situation arises. The statute there uses the words "or shall have any such weapon in his possession when intoxicated".

In the case of State vs. Goldsmith, 300 S. W. 677, the court at page 678, referring to the same section of Revised Statutes of Missouri, 1919, states as follows:

"Under section 3275, it is a felony, while intoxicated, to have in possession a deadly weapon. It is not necessary that the weapon be concealed."

Since concealment is not a necessary part of the offense where the offender is intoxicated, the mere possession is enough, the gun may be confiscated by the arresting officer and the offense is within the statute.

Concerning your question as to a gun found in a car also found to contain illegal liquor, we are of the opinion that the offense would be the same and subject to the same limitations as in the situation stated in your first question.

It is true that formerly there was a statute (Section 4517, Revised Statutes of Missouri, 1929) with reference to carrying deadly weapons in a conveyance with illegal liquor. That section was, however, part of Chapter 31, Revised Statutes of Missouri, 1929,

Sterling V. Harness--#4

August 17th, 1934.

which chapter was repealed by section 44 of the Intoxicating Liquor statute, Laws 1933-1934, Extra Session, page 92. The general law, as stated earlier in this opinion, would therefore apply.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

APPROVED:

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Attorney-General



TAXATION: Senate Bill<sup>1 94</sup> modified by House Bill 44 Extra Session authorizing  
proceedings to be instituted within five years.

9-4  
September 4, 1934.



Hon. Charles M. Hay,  
City Counsellor  
City of St. Louis,  
St. Louis, Missouri

Dear Mr. Hay:

We acknowledge your communication of recent date to General McKittrick requesting an opinion of this office respecting Senate Bill 94 of the Regular Session of the 57th General Assembly. We have also received communications from various officials respecting this law and what effect, if any, House Bill 44 of the Regular Session and Senate Bill 54 of the Extra Session of the 57th General Assembly have upon the operation of this new tax law. We are answering all of these inquiries in this opinion.

I.

DUTY OF THE STATE TAX COMMISSION  
AND THE ATTORNEY GENERAL OF MISSOURI  
TO CONSTRUCT SENATE BILL 94.

Under general statutory provisions it is the province of the Attorney General to advise and render official opinions to the heads of the State Departments and certain other officials. However, in addition to these general provisions the Legislature directed the State Tax Commission, with the advice of the Attorney General to decide all questions arising under the provisions of Senate Bill 94:

"\* \* \*with reference to the powers and duties of county or township tax officers, and such decision shall have force and effect until modified or annulled by the judgment or decree or a court of competent jurisdiction"



It is by virtue of the general statutory duties aforesaid and the foregoing provisions of Section 9960d, page 443 Laws of Missouri, 1933, that the following opinion is adopted as a true interpretation of the portions of Senate Bill 94 hereinafter considered.

## II.

SENATE BILL 94 OF THE REGULAR SESSION  
AND SENATE BILL 54 OF THE EXTRA SESSION  
OF THE 57th GENERAL ASSEMBLY OF MISSOURI  
MUST BE CONSTRUED TOGETHER.

Senate Bill 94, as passed by the 57th General Assembly of Missouri in Regular Session, was a complete scheme of procedure for the enforcement of the collection of delinquent taxes in this State. By its provisions it repealed all of the sections of the Revised Statutes of Missouri of 1929 which had to do with and authorized a suit before a judicial tribunal for the enforcement of the collection of delinquent real estate taxes and enacted in lieu thereof some fifty-one sections setting up the new procedure minutely and in detail.

The Attorney General in an opinion to the State Tax Commission, date August 8th, 1933, shortly after the effective date of Senate Bill 94 and prior to the passage of Senate Bill 54 of the Extra Session, held that the provisions of Senate Bill 94 were mandatory, requiring a sale each year of all lands and lots upon which there were any delinquent and unpaid taxes. Clearly, Senate Bill 94 as enacted required the offering for sale each year of all tracts and lots for delinquent and unpaid taxes. In this opinion it was held that the mandatory provisions of Senate Bill 94 were not in any way affected or modified by Section 9961, Revised Statutes of Missouri 1929, which Section was neither repealed nor amended by Senate Bill 94. This Section provided as follows:

"No action for recovery of taxes against real estate shall be commenced, had or maintained, unless action therefor shall be commenced within five years after delinquency, excepting taxes now delinquent, on which suit may be commenced at any time within five years after this chapter shall take effect, but not thereafter."

However, the General Assembly in Extra Session repealed Section 9961 of the 1929 revision and enacted a new Section in lieu thereof, page 154, Laws of Missouri, Extra Session 1933-34. This Section reads as follows:

"No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, provided that proceedings for the sale of lands and lots on which taxes are delinquent for the year 1928 may be commenced at any time prior to December 31, 1934. Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

That the foregoing enactment was intended to apply to the procedure provided in Senate Bill 94 cannot be questioned. The history of the enactment itself clearly shows the intent. Considering the wording of the act, more definite terms could not have been used. It does not refer to an action or suit as did the original Section 9961 and which terms would have clearly indicated an application to suits or actions at law for the collection of the taxes. Instead this act applies to "proceedings for the sale of lands and lots for delinquent taxes." This quoted phrase is used innumerable times in Senate Bill 94 and refers distinctly to the sale as authorized by that law. We direct attention to the message of the Governor delivered December 4th, 1933 to the House and Senate in joint session (p. 165, S. J. Extra Session of the 57th General Assembly). In this message His Excellency stated:

"The subjects and purposes to be considered by the 57th General Assembly are hereby enlarged and supplemented to include the consideration of enactment of such legislation as may to the

General Assembly seem proper concerning the following subjects and purposes.\* \* \*

(c) AN ACT to repeal Section 9961 of Article 9, Chapter 59 of the Revised Statutes of Missouri, 1929, relating to limitation of actions in connection with delinquent and back taxes, and to enact a new section in lieu thereof, to be known as Section 9961, relating to limitation of sales for delinquent taxes and validity thereof."

In authorizing the General Assembly to consider the subject matter of House Bill 54, the Governor plainly indicated that any enactment passed under this authorization was to apply to the proceedings contemplated by Senate Bill 94. His message authorized the repeal of the law relating to limitation of actions and the enactment of a law relating to limitation of sales. That the message of the Governor delivered to the General Assembly in Extra Session may be considered in the construction of a law then enacted is settled law in this and other states.

23 Corpus Juris p. 103

25 B. C. L. p. 903.

State vs. Adams, 19 S. W. (2d) 1. cl 673.

No confusion should arise because of the use of the term "under the provisions of Chapter 59, R. S. of Mo. 1929" in Senate Bill 54. When Senate Bill 94 was passed it repealed certain Sections of Chapter 59, R. S. Mo. 1929 and "enacted in lieu thereof" certain new sections. Senate Bill 94 then became a part and parcel of Chapter 59 of the 1929 revision and was properly referred to in Senate Bill 54. The rule that amendments to the Revised Statutes take the place of and are to be construed after their enactment as being inserted in lieu of the repealed sections is laid down in State v. Schenk, 238 Mo. 1. c. 444:

"Defendant claims that the amendment of 1907 was not repealed by the Act of 1909, and that said amendatory Act of 1907, extending the right of preliminary examination to all felony cases, is still in force. We cannot agree to this contention. The Act of 1905, by its terms, created a new section to be incorporated in the Revised Statutes of 1899, said section to be known as section 2476a, and to be regarded

thereafter as if actually written into said Revised Statutes. The Act of 1907 by its terms amended this section, 2478a, which thereafter was to be regarded as if written into the revision as thus amended."

It is therefore conclusive that Senate Bill 54 of the Extra Session was intended to operate directly upon Senate Bill 94 of the Regular Session. Unquestionably these laws are pari materia, each referring to the collection of delinquent taxes and the one operating directly upon the procedure prescribed by the other. They must therefore be construed together and harmonized so that a workable law will result and all parts thereof be given a meaning. As stated in State vs. Fulks, 247 S. W. 1. c. 132:

"The canons of construction require that the two statutes relating to the same subject should be harmonized and read together and construed as one law." . . . "

House Bill 54 provides that initial proceedings for the sale of lands and lots may be commenced at any time within five years of delinquency. This provision is certain and must be given effect or the entire statute will be meaningless. This provision is to operate directly for the benefit and advantage of the taxpayer. It is remedial in nature and intended to modify the harsh requirements of Senate Bill 94, to-wit, the requirement that all lands and lots upon which taxes are delinquent be offered for sale each year. If the new Section 9961 does not have this effect it is entirely meaningless, for if all lands and lots are to be sold each year, initial proceedings will then be instituted the first year of delinquency (after the sale this November) and no taxpayer will be granted the grace given by Senate Bill 54. Every law passed by the General Assembly must be given effect if possible to do so.

Home Insurance Co. vs. Wickham, 219 S. W. 961.

As the mandatory character of Senate Bill 94 cannot be retained if the act of the Extra Session is to be given any effect, we conclude that those provisions of Senate Bill 94 affected by Senate Bill 54 have become directory insofar as is necessary to give effect to the latter, and full benefit of this remedial law is to be given the taxpayer.

It is therefore the opinion of this office that the provisions of Senate Bill 94, passed by the 57th General Assembly in Regular Session have been modified by the passage of Senate Bill 54 of the

57th General Assembly in Extra Session, so as to permit initial proceedings to be instituted at any time within five years of the date of delinquency.

III.

HOUSE BILL 44 DOES NOT MODIFY OR  
AFFECT SENATE BILL 94 AND THE PRO-  
VISO THEREOF IS UNCONSTITUTIONAL.

House Bill 44 was a reenactment of Section 9952, Revised Statutes of Missouri 1929, with a proviso affecting Greene County, Missouri. This House Bill did not refer to or consider any of the other fourteen sections which were repealed by Senate Bill 94 and which had heretofore been considered an integral part of the system of collecting delinquent real estate taxes by suit.

In the opinion of August 8th, 1933 to the State Tax Commission, hereinbefore referred to, the effect of House Bill 44 upon Senate Bill 94 and whether or not the former Act had any place in the scheme for the collection of delinquent taxes in this state after the effective date of Senate Bill 94 was considered. It was determined at that time that in view of the complete and detailed system for the collection of delinquent taxes provided for in Senate Bill 94 and the fact that the evident purpose of House Bill 44 was to provide that the Prosecuting Attorney of Greene County should act as delinquent tax attorney; that House Bill 44 was operative as enacted up to July 24th, 1933; that there was no intention that this House Bill should modify or affect the plan laid out in Senate Bill 94 and that House Bill 44 was void after July 24th, 1933, insofar as it conflicted with or was repugnant to Senate Bill 94. At that time no consideration was given to the constitutionality of any part of House Bill 44. As the efficacy of House Bill 44 has been so strongly urged, we have reexamined this law and its possible effect upon Senate Bill 94 and have determined that our former ruling is correct and should be adhered to and that the proviso of House Bill 44 is unconstitutional. Before taking up the constitutional questions we direct your attention to the following points in support of our former ruling.

Senate Bill 94 presents a detailed plan for the collection of delinquent real estate taxes. House Bill 44, at its best, is general, leaving all matters of detail to conjecture. Under these circumstances, Senate Bill 94 must be held to supersede House Bill 44. 59 Corpus Juris, p. 1055:



"Where statutes passed at the same session are necessarily inconsistent, a statute which deals with a common subject matter in a new and particular way will prevail over one of a more general nature" \* \* \*."

A more apt situation for the application of the foregoing rule could not possibly be presented. On the one hand we have fifty-one sections of law enacted with a certain and definite intention clearly discernible from the law itself. The procedure has been laid out from the day the tax becomes delinquent to the day the landowner redeems his property or the purchaser obtains his deed which under certain circumstances may be nine years later. On the other hand, we have a single section, general in terms, obscure in meaning and from the terms of which we can deduce no intention to modify or affect Senate Bill 94.

House Bill 44 reenacted Section 9952, R. S. Mo. 1939, verbatim with the following proviso, (Laws of Mo. 1933, p. 466.)

"Provided, however, that in all counties of this State that now have or may hereafter have a population of not less than 80,000 nor more than 95,000, (according to the last decennial census of the United States,) the Collector shall have no power or authority to employ such attorneys, that the Prosecuting Attorney of such counties shall be the back tax attorney, and that all fees collected as such by the Collector shall be paid into the County Treasury; and each of the Prosecuting Attorneys in such counties shall be entitled to such additional temporary clerk and deputy hire as in the judgment of the Prosecuting Attorney and the County Court may be deemed necessary, for such time and at such salary as may be fixed by the Prosecuting Attorney and the County Court."

In our former opinion, we held that the nature of the proviso distinctly indicated the intention of the Legislature in passing the entire act to-wit, that it was only intended to provide that the Prosecuting Attorney of Greene County be the delinquent tax attorney and that there was no intention to modify, affect or change Senate Bill 94. As additional proof of this legislative intent we direct your attention to the legislative proceedings concerning their enactment. House Bill 44 was introduced by Representatives McGee of Greene

County and Warren of Stone County. On January 17th, 1933, the time of its introduction, Section 9952 of the 1929 revision was in effect and there was no bill pending before either branch of the General Assembly which would modify or change this Section. Therefore, the bill rightly and properly was entitled "An Act to repeal Section 9952 R. S. of Mo. 1929, and to reenact a new Section in lieu thereof relating to the same subject." (H. J. p. 82) This bill was referred to the Committee on Ways and Means on January 20th (H. J. p. 83). On the other hand Senate Bill 94 was not introduced in the Senate until January 35th, 1933 (S. J. p. 103) and was referred to the Committee on Ways and Means on January 26th, 1933, (S. J. p. 111). If dates can mean anything in interpreting legislative intent, these dates indicate conclusively that House Bill 44 was not intended to modify or affect Senate Bill 94 as Senate Bill 94 was not before any legislative body at the time of the introduction of House Bill 44. It has been suggested that the following rule is applicable to the instant discussion. 59 Corpus Juris, p. 1056:

"It is also a general rule that \* \* \* statute passed later but going into effect earlier will prevail over one passed earlier but going into effect later; \* \* \*".

In our opinion this rule is not applicable to the instant situation (A) because the rule heretofore referred to in this opinion is clearly appropriate, is more generally recognized and in our opinion takes precedence over the above quoted rule, (B) because House Bill 44 did not in fact become effective before Senate Bill 94 as the Emergency Clause was void and ineffectual. We shall only consider the latter proposition as this opinion is now of some length. The Emergency Clause of House Bill 44 reads as follows:

"The financial condition of the counties and of the people therein, to which this act applies, and relief of the same being imperative without delay, creates an emergency in the meaning of the Constitution and this act shall be in force and effect upon its passage and approval."

This Emergency Clause is ineffectual, first, because it can only operate to bring the proviso of Section 9952 into immediate effect and that proviso being unconstitutional and void the Emergency Clause has nothing upon which to operate; second, the emergency clause is insufficient itself in that the act does not correct any condition which endangers the immediate preservation of the peace, health or public welfare and does not state facts sufficient to constitute a legislative finding of such condition.



FIRSTTHE PROVISIO OF HOUSE BILL 44  
IS UNCONSTITUTIONAL.

House Bill 44 is a local or special law and as such conflicts with subdivisions 15, 32 and 33 of the Constitution of the State of Missouri. For some forty years the delinquent tax attorneys in each county of the State have been appointed by the County Collector and approved by the County Court. This has been the general and uniform practice over a long term of years. House Bill 44 in effect exempted Greene County from this general and universal law. By the provisions of this bill, the Prosecuting Attorney of Greene County is required to be delinquent tax attorney while in the other hundred and thirteen counties the uniform method of appointing a delinquent tax attorney is retained. This exact situation has heretofore been presented to the courts of our State, and condemned as unconstitutional. In 1877 the Legislature passed an Act, Section 13 of which provided "the judge of probate shall receive such fees for his services as now are or will hereafter be allowed by law for probate business." In 1897 that Section, which had become Section 3407 of the 1889 revision, was repealed and reenacted to read as follows:

" 'Section 3407. 'The judge of probate shall receive such fees for his services as are now or may hereafter be allowed by law for probate business.)' Provided, that in all cities which now have or may hereafter have a population of three hundred thousand inhabitants or more, the judge of probate shall receive such compensation as now is or may hereafter be provided by law to be paid to judges of the circuit courts in such cities out of the city treasury. Provided further, that this act shall not apply to any judge now in office.' \* \* \* "

By the foregoing amendment a proviso was added to the existing law by which the judge of the probate court of the City of St. Louis was to be paid a salary out of the City Treasury rather than to receive the fees allowed by the general law for the acts performed. The constitutionality of that proviso was before the Supreme Court in the case of Henderson v. Koenig, 188 Mo. 356. The Court held the proviso unconstitutional and stated, l. c. 371:

"Section 3407, as it originally stood in the revision of 1889, provided that: 'The judge of probate shall receive such fees for his services as now are or may hereafter be allowed by law for probate business.' This law as it thus and then stood applied to every judge of probate in the State of Missouri. And if the Legislature, then, without repealing in terms the statute just quoted, had enacted into a law the proviso section 1764 now contains, no one, it seems, could doubt that such additional enactment would have amounted to the partial repeal of a general law, and the consequent enactment of a special or local law. Because, in such cases, the partial repugnancy would accomplish the partial repeal (Potter's Dwarrr., 113, 155, and cas. cit.; Sutherland Stat. Constr. Secs. 137, 138, and cas. cit.)

But the case is in no wise altered by reason of the fact that such repeal was in reality accomplished by the pretended and formal amendment by enacting as a part and parcel of section 1764 the proviso aforesaid, which declares the old law intact save in the City of St. Louis, and save in regard to the then incumbent of the office of judge of probate in that city. If such legislation as this can be sustained, then there is neither force nor efficacy in the constitutional prohibition which forbids that the Legislature (indirectly enact such special or local law by the partial repeal of a general law. . . . .

The situation in that case and in the instant case is identical and must be considered as binding upon us. Other decisions could be cited to show the conflict of this proviso with other sections of the constitution but we deem these unnecessary. As the proviso of House Bill 44 is unconstitutional there is nothing left upon which the emergency clause added to that bill can operate. This is certain, as Section 9952 of the 1929 revision was operative without further legislation during the emergency period and the only change made upon this section by House Bill 44 was to add the proviso heretofore referred to as being unconstitutional. No emergency clause was necessary to put <sup>the contents of</sup> House Bill 44, exclusive of the proviso, in ~~immediate~~ effect, because the same law was in effect by virtue of Section 9952 R. S. Mo. 1929

SECOND

HOUSE BILL 44 WAS NOT IN FACT  
EFFECTIVE PRIOR TO SENATE BILL  
94. THE EMERGENCY CLAUSE IS  
VOID AND INEFFECTUAL.

Because of the Emergency Clause it is said that House Bill 44 became effective before Senate Bill 94. Any law to be immediately effective must be of such a character as exempts it from the referendum provisions of the Constitution. The emergency clause attached to such an act must clearly state the facts constituting the emergency and the finding of the legislature that the instantaneous operation of the bill is necessary for the immediate preservation of the "public peace, health and safety."

As the only portion of this act which was not in effect at the time of its passage was the proviso, we must conclude that the proviso offers the relief which was considered imperative. Let us examine the law in this light. So far as the taxpayer is concerned, the proviso states "that the prosecuting attorney of such county shall be the back tax attorney and all fees collected as such by the collector shall be paid into the county treasury." So that, so far as the taxpayer is concerned he will continue to pay all the penalties and costs which he was required to pay prior to the enactment of this proviso hence no relief is afforded him.

Insofar as the counties are concerned the proviso provides "each of the prosecuting attorneys \* \* \* shall be entitled to such additional temporary clerk and deputy hire as \* \* \* may be deemed necessary." So that, insofar as the county is concerned it will be required to hire such additional assistants as would be necessary to effect the collection of the delinquent taxes. To presume that this would effect a financial saving to the county would be to hold that the Legislature for forty years has fostered and maintained an inefficient and extravagant system for the collection of back taxes. We cannot accuse the General Assembly of any such action. From the foregoing examination it is apparent that no financial relief will result to either the counties or the taxpayers from the adoption of this proviso; that on the one hand the taxpayer will be required to pay the same penalties and costs as before, and on the other the county must hire additional attorneys to collect the taxes. The bill shows on its face that the relief afforded is but mythical and a jest. It totally and wholly fails to show any emergency whatsoever involving the public peace, health or safety. The measure itself must bear out the declaration that its immediate operation is necessary for the immediate preservation of the public peace, health and safety.  
State v. Sullivan, 224 S. W. 327, 1. c. 338;

" \* \* By the referendum provision of our Constitution, as we have construed it, supra, no measure subject to the referendum can be withdrawn therefrom by a mere emergency clause. Nor should the people be denied their constitutional right of referendum by a mere declaration of 'immediate preservation of the peace, health or safety' unless such declaration is borne out by the face of the measure itself. The courts have the right to measure the law by the yardstick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration." \* \* \*

In this case the Court considered the following emergency clause which was attached to the act adopting the Workmen's Compensation system in this State. This emergency clause reads as follows:

" 'Sec. 81. Emergency.--It being necessary for the commission herein created to be fully organized and make preliminary preparations, and there being an immediate necessity therefor, creates an emergency within the meaning of the Constitution, and except as in this act otherwise provided, this act shall take effect from and after the date of its approval."

The Court in passing upon this stated, l. c. 334:

" \* \* The emergency clause to the measure under consideration does not attempt to declare such measure to be of the excepted class in the constitutional provision named. It only declares in a way, the legislative reason for the conceived emergency. It does not declare that the measure is 'necessary for the immediate preservation of the public peace, health, or safety.' If it had so declared the declaration would have been false on the face of the measure itself. But for our present purpose it suffices to say that the emergency clause does not bring the measure within the excepted class named in the Constitution." \* \* \*

Hon. Chas. M. Hay.

-13-

September 4, 1934.

These emergency clauses are identical in that each states, "creates an emergency within the meaning of the constitution," and likewise in our opinion, had the clause stated that it was necessary for the immediate preservation of the public peace, health or safety it would have been false upon its face.

We conclude that the emergency clause of House Bill 44 is void and therefore that Bill became effective on the same date as Senate Bill 94. As these acts are irreconcilably inconsistent, Senate Bill 94 being the latest expression of the Legislature of a complete plan for the enforcement of the payment of delinquent taxes must prevail over House Bill 44.

Respectfully submitted,

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GILBERT LAMB  
Assistant Attorney General

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HARRY C. WALTHER, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General.

The foregoing opinion adopted as a true construction of Senate Bill 94, page 425 et seq. Laws of Missouri, 1933.

STATE TAX COMMISSION

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CHAIRMAN.

HGW:MM



RECORDER OF DEEDS: It is not lawful for parties to nominate  
a candidate for office at this time.

October 5, 1934.

10-22



Hon. T.J. Harper,  
Prosecuting Attorney,  
Galena, Missouri.

Dear Sir:

This department is in receipt of your letter of  
September 4, 1933, which is as follows:

"In as much as a complication has  
arisen relative to the action of the  
Republican Committee in nominating a  
person to be placed on the ticket  
for Recorder of Deeds in this and  
other South Missouri counties for the  
coming election, when in fact all par-  
ties nominated a candidate for Circuit  
Clerk and Ex-officio Recorder of Deeds  
as the law directs in counties of  
20,000 or less, it seems that in an-  
ticipation of a hearing of the court  
on the law in question, they are trying  
to take the 'bull by the horns' as we  
might say and place a man in nomination  
at this time when no vacancy occurs.  
So I would ask the question and your  
opinion on the law.

Is it lawful for any party to at this  
time nominate and place on the ticket  
for election in the fall election for  
Recorder of Deeds and if after the  
election the law should be held uncon-  
stitutional and the person elected and  
commissioned as Circuit Clerk and  
Recorder? Would they hold or what would  
be the condition of the office?

## I.

It appears that many officials in the various counties of the state have the impression that the legislative acts of 1933 consolidating the office of circuit clerk and recorder of deeds in counties of less than 20,000 inhabitants are unconstitutional. We will not undertake to pass on the constitutionality of the law and for the purposes of this opinion will assume that it is constitutional.

Section 11526, Laws of Mo. 1933 p. 360 is as follows:

"There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.'"

Section 11534, Laws of Mo. 1933, page 361 is as follows:

"That in the event any person has been elected or may hereafter be elected to the office of recorder of deeds in a county in which the office is a separate office at the time of such election, such office shall remain a separate office for the entire term for which such person has been or may be elected."

We shall not deal with the other sections as they pertain to consolidation in counties of more than 20,000, and as your county, namely, Stone, is less than 20,000, the two above sections are applicable thereto.

Section 10249, R.S. Mo. 1929 pertains to the duty of the county clerk in regard to publishing the names of the various candidates and offices to be filled and is as follows:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is



Oct. 5, 1934.

issued before the election. Provided that no higher rates shall be paid per inch than is provided by section 13773, Chapter 114, R.S. 1929, as amended."

We call your attention to the fact that in all probability the County Clerk of your county did not include in the notice under said section the office of Recorder of Deeds due to the fact that sections 11526 and 11528, R.S. Mo. 1929 and other sections had been repealed by the last legislature and the new sections, quoted supra, enacted in lieu thereof. Therefore, there is no office of Recorder of Deeds existing after January 1, 1935 and no notice has been published stating that nominations are open for this particular office.

#### CONCLUSION

It is therefore the opinion of this department that it would not be lawful or of any force or effect for either or both parties to nominate candidates at this time for the office of Recorder of Deeds of Stone County.

We do not pass, nor do we express an opinion, as to the constitutionality of this law for the reason that every reasonable presumption should be indulged in favor of the constitutionality of an act of the Legislature. A settled rule of construction on this point has been uniformly declared by the courts of this state to be that a statute will not be declared in conflict with the Constitution where by adopting another equally admissible construction its constitutionality can be upheld.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

COUNTY CLERK: Compensation of Clerk and Deputy limited  
by law and cannot be increased during term.

10-15  
October 11, 1934.



Honorable T. J. Harper  
Prosecuting Attorney  
Stone County  
Gallena, Missouri

Dear Sir:

Your request for an opinion dated September  
5, 1934, is as follows:

"I am asking for an opinion on the  
following law or ruling:

" 'In a County of 11,614 population  
according to the last dec. census,  
what is the deputy county clerk's  
hire.'"

Your letter of the same date stated the facts  
as follows:

"In asking the foregoing question o  
of the First sheet is because the  
County Clerk and the Court is in a  
squabble over the rights of the  
Court in the matter. The facts are  
the Court in 1932 made an order  
allowing the pay of the Deputy Co.  
Clerk the sum of \$62.50 per month,  
and all along has approved his  
settlement on that basis, and paid  
him, and each quarter has so settled,  
and made it of record. Is the Court  
within their rights and can any fur-  
ther claim be made for more salary  
by the Clerk under the law? Can  
he go back of the record of the  
Court in asking these settlements?

"He is claiming the law allows him  
more money, but in his budget claim  
he only asks \$750.00 for Deputy hire  
and did not raise the question until

October 11, 1934.

after the state audit started. So please send an opinion as soon as possible."

Section 11811, R. S. Mo. 1929, provides in part as follows:

"\* \* \* \* In all counties containing fifteen thousand inhabitants or less the clerks shall be permitted to retain twelve hundred and fifty dollars for themselves, and be allowed to pay for deputies or assistants not exceeding six hundred dollars: Provided, that the county court in all counties in this state having a population of seven thousand and less than forty thousand may allow the county clerks and circuit clerks of such counties, or either of them, to retain in addition to the amount now allowed them for deputy or assistant hire a further sum not to exceed five hundred dollars per annum, to be determined by the county court of such county: Provided, that the county court shall determine that the work required to be done by such clerk or clerks demand or require such extra remuneration and that the fees collected and taken in by such clerks is sufficient to pay the same, but in no event shall any such allowance be made by the county court where the fees collected by such clerk or clerks is not absolutely sufficient to meet such demand. In all counties having a population of less than seven thousand persons, the clerks shall be permitted to retain all fees earned by them for themselves and deputies. For the purpose of articles 2 and 3 of this chapter, the population of any county shall be determined by multiplying by three and one-half the total number of votes cast in such county at the last presidential election prior to the time of such termination: \* \* \* \*."

Article XIV, Section 8 of the Missouri Constitution provides as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of Callaway County v. Henderson, 119 Mo. 32, 1. c. 40; 24 S. W. 437, our Supreme Court said while adjudicating a false claim of a county clerk:

"The acts of the twenty-first of March, 1883, of the thirtieth of March, 1887, and of the twelfth of April, 1889, all limit the amount of fees which a clerk may retain for one year to the sum of \$1500.00, and the amount which he may pay out for deputies and assistants to \$1250.00, in counties of the population before mentioned. Under section 8, of article 14, of the the constitution, the compensation of the clerk cannot be increased during his official term. The amounts, therefore, which he may retain for 1890 are \$1500.00 for himself and \$1250.00 for deputy hire."

Our Supreme Court said in Givens v. Daviees County, 107 Mo. 603, 1. c. 608; 17 S. W. 998:

"To what compensation was plaintiff entitled for his services as treasurer from January 24, to April 1, 1887? The principal contention, and the chief difficulty, lie in the proper solution of this question. Some general principles which underlie the question are well settled and well understood.

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and is an incident to the office."

In the case of *Folk v. City of St. Louis*, 157 S. W. 71; 250 Mo. 116, 1. c. 135, the Court said:

"It was to prevent persons while possessed of the prestige and influence of official power from using that power for their own advantage that the framers of our organic law ordained that salaries of public officers should not be increased during the terms of the persons holding such offices."

Thus we see that if your county clerk is entitled to any compensation, it is because he is able to cite to you some statute where clerk hire is incidental to his office, and we believe the only legislative act on the subject is to be found in Section 11811, set out supra.

The County Court has no legal right to disregard this law, and allow him a hire in excess of the compensation that the Legislature provided. Then too, his right to compensation is expressly limited by the Constitution, the fundamental laws of Missouri, and cannot be increased during his official term. In fact any allowance by order of the County Court contrary to the Statutes and the Constitution, cannot be made the basis of a legal binding obligation in favor of your County Clerk or his deputy.

In the budget allowance for deputy county clerk's hire, the county court had no right to disregard, (and we do not think they did) the provisions of Section 11811 supra providing for and stipulating the limitations of compensation to county clerks and deputy county clerks in Stone County. By said section, when the legislature said "that the county court shall determine that the work required to be done by such clerk or clerks demand or require such extra remuneration

October 11, 1934.

and that the fees collected and taken in by such clerks is sufficient to pay the same," the Legislature was intending to make the county clerk's office pay its own way. The recent budget law was also intended to place counties on a cash basis. Both the budget law and Section 11811 should be construed together and given force when determining the compensation of a county clerk and his deputy in Stone County.

Although your letter does not so state, we are assuming that the fees collected by the county clerk of Stone County are absolutely sufficient to meet this Twelve Dollar and fifty cent (\$12.50) extra monthly budget allowance for extra clerk hire, but it must be remembered, if the county clerk's collected fees are not absolutely sufficient to meet this added demand after all other legal demands against his office are deducted, then this Twelve Dollars fifty cents (\$12.50) extra monthly allowance is illegal and should not be paid, even though it be provided for by court order and was anticipated in the provisions of the annual budget. Any compensation allowance by order of the county court, even though anticipated by in the annual county budget, if it be made contrary to the provisions of the above statute, cannot be made the basis of a legal binding obligation in favor of your county clerk or his deputy.

Assuming that the extra remuneration order of your County Court made in 1932, anticipated in the 1934 budget, allowing Sixty Two Dollars and fifty cents (\$62.50) per month, or Seven Hundred Fifty (\$750.00) Dollars per year as compensation for the County Clerk's deputy, to be made after the court had determined that the work of the office justified extra remuneration, and assuming that the Twelve Dollars fifty cents (\$12.50) extra monthly remunerations is justified by the county clerk's collections; the next question presented by your query for determination is the right of the county clerk to a compensation for deputy hire in excess of the amount determined and allowed by order of the County Court and the 1934 budget allowance.

You state that the amount of compensation allowed by order of the County Court and anticipated by county budget is Sixty Two Dollars fifty cents (\$62.50) monthly, or Seven Hundred Fifty (\$750.00) per year. You state that your county clerk demands more money for clerk hire, claiming that the County Court has the right to give him more money for clerk hire in the face of this prior court order and the budget allowance.



The Missouri Constitution quoted supra, provides that compensation of county officers cannot be increased during their term of office. The reason for such a constitutional inhibition is well stated in *Folk v. City*, supra. Because of this constitutional inhibition the deputy clerk, for past services, is limited to Sixty Two Dollars fifty cents (\$62.50) monthly, the hire which was provided for by court order. It is within the power of the County Court to change the present order for future services of deputy clerk hire up to Eleven Hundred (\$1100.00) Dollars annually. If such an order be made in an effort to increase the hire for the remainder of the fiscal year 1934, for future services during 1934, such an order would have the effect of nullifying the very purpose of the recent county budget law. Without setting out the county budget law in full, it suffices to say that its purpose was to place counties on a sound financial basis of operating within anticipated and collected revenues by budgeting and setting aside definite amounts for definite purposes. This was done in Stone County when Seven Hundred Fifty (\$750.00) Dollars was set aside for deputy county clerk hire for the year 1934. For said fiscal year the clerk's hire is fixed and cannot be increased beyond the budget allowance without making the officers liable who participate in the issuance and payment of hire contrary to provisions of the county budget law.

In the County Budget Laws of 1933, page 346, where the Legislature was commanding sanction of budget estimates in Section 8, they said:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

#### CONCLUSION.

The County clerks in Stone County may be allowed up to Eleven Hundred (\$1100.00) Dollars for deputy



Honorable T. H. Harper

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October 11, 1934.

county clerk's hire, but this extra allowance above Six Hundred (\$600.00) Dollars yearly must be justified by collections of said office and by a need for extra work, and then only upon a County Court order for future services. Any allowance of hire by the County Court must be provided for in the annual county budget and it is not within the power of the County Court to increase the deputy clerk's hire beyond the budget allowance during a fiscal year. Any increase in deputy clerk's compensation must be provided for when preparing the fiscal budget.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

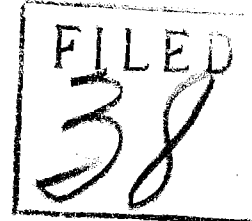
ROY MCKITTRICK  
Attorney General.

WOS:H

COUNTY BUDGET LAW: Expense of erecting shelves for law books in Prosecuting Attorney's library should be paid out of Class 5, Sec. 2; expense of purchasing chairs for circuit court room should be paid out of Class 2, Sec. 2.

November 14, 1934.

2-25



Mr. James P. Hawkins,  
Attorney at Law,  
Buffalo, Missouri.

Dear Sir:

This department is in receipt of your letter of October 16, 1934, making the following inquiries relative to the County Budget Act now in effect in Missouri:

"As the incoming prosecuting attorney of Dallas County, Missouri, I would like to have an immediate ruling on how to classify under the budget plan, a certain expenditure. The county court wishes to place in the office of the prosecuting attorney, which is the jail shelves to hold the law books of the county. These shelves are to be permanently annexed to the building and to become a part thereof. Of course, this county cannot issue any warrants under Class 6 and expect them to ever be paid.

Another problem that has been before the court is that of purchasing chairs for the circuit court room. We do not have any chairs for the jurors or for even the representing counsel. I would appreciate an early reply and ruling on this matter."

I

It is the opinion of this department that since Class 4, Laws of Mo. 1933, Sec. 2, page 341 contains the limitation, "Only supplies for current office use and of an expendable nature shall be included in this class - furniture, office machines and equipment of whatever kind shall be listed under class six" - the expense of erecting shelves for the books of your library

could not be placed therein. Class 5 of Sec. 2 of the County Budget Law (Laws of Mo. 1933 p. 342) provides:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

Since you state that the shelves in question are to be permanently annexed to the building and are to become a part thereof, the same might be said to be repairs on public buildings, which it is possible might come within the terms of Class 5; therefore, we are of the opinion that the expense of the shelves in question, they being in the nature of repairs for the court house, could be termed "contingent and emergency expense of the county" and same may be paid out of Class 5.

## II

With regard to your problem of purchasing chairs for the circuit court room, which is confronting your county court, we must determine whether or not the scope of Class 2, Sec. 2 of the County Budget Law (Laws of Mo. 1933, p. 341), which is as follows:

"Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1."

is broad enough to include the expense of purchasing the chairs in question. The clause "the cost of holding circuit court in the county where such expense is made chargeable by law against the

county" is further explained under Section 5 of said Act "Classes of Expenditures", in Class 3 thereof, which provides:

"Expense of conducting circuit court and election, not to include the salary of any officer or employee on a yearly salary, nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 3 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expenses of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years."

The phrase "and other incidental court costs", we think, refers solely to costs arising through litigation or court action and is not broad enough in its scope to include physical equipment for the court room, especially when we consider the sentence in class 4: "furniture, office machines and equipment of whatever kind shall be listed under Class 6."

#### CONCLUSION

In view of the above sentence under Class 4, it is the opinion of this department that the chairs in question cannot be purchased out of the funds of any other class than Class 6, and in spite of the fact that, as you mention, the funds in Class 6 are depleted, it will be necessary, if the chairs are purchased, to take the cost thereof from the funds in Class 6.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

CIRCUIT CLERK: Not entitled to fee of 50¢ for attaching the court seal to each jury script under Secs. 8763, 8764, 8765 and 8766, R.S. 1929.

December 27, 1934.



Hon. Will H. Hargus,  
Prosecuting Attorney,  
Cass County,  
Harrisonville, Mo.

Dear Sir:

We are in receipt of your letter of December 15 requesting the official opinion of this department regarding the following question:

\*\*\*\*\*as to whether or not the Circuit Clerk is entitled to a fee of fifty cents (\$.50) for attaching the court seal to each jury script. I refer you to sections 8763, 64, 65 and 66 Revised Statutes of Missouri 1929; also, section 11785 Revised Statutes, 1929.

As you know, beginning January 1, the office of Circuit Clerk goes on a fee basis. His compensation in our county, at best, will be small and if he is entitled to this additional fee, I would appreciate a ruling by the first of January."

The statutes mentioned in your letter are referred to in the opinion of the Court, which will hereinafter be quoted; we will, therefore, not set them out in full in this opinion. The sections in question were fully discussed in the case of Ford v. K.C., St. J. & C.B. Ry. Co., 29 Mo. App. 616, wherein the Court said (l.c. 622-625):

"The real question, therefore, is, is the compensation allowed by the section above set out, compensation for all the services mentioned therein or compensation only for the service

rendered by the clerk in issuing scrip when required by said section? Since the compensation allowed by the statute is the same compensation 'as is now allowed by law for like service in issuing scrip to grand jurors', in order to answer the question last suggested, it is necessary to consider the statute allowing compensation for the 'like service' rendered by the clerk in issuing scrip to grand jurors. Section 2790, Revised Statutes, provides the 'pay and per diem' for grand and petit jurors.

Section 2791 is as follows: 'The clerk of the court shall keep a book, in which he shall enter, upon the application of each juror, the number of days such juror shall have served, and the number of miles necessarily traveled in obedience to the summons to serve on the jury, and such entry shall be verified by the oath of such juror.'

Section 2792 is: 'Upon the demand of such juror the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury.'

Section 2793 is: 'The clerk shall receive one dollar and fifty cents for his services at each term of the court in complying with the provisions of the two preceding sections.'

The compensation thus allowed the clerk for his services in issuing scrip to grand jurors is, not only for the services performed in actually issuing the scrip, but also for all the services mentioned in section 2791 rendered by the clerk, necessary and preliminary to the issuing of the scrip. Those services, necessary and preliminary to issuing scrip, are exactly the same as the services for which the charge in controversy here was made, and which, by the provisions of section 5621, are necessary before the issuance of scrip in those cases where its issuance is authorized. All the services mentioned in section 5621, in other words, are like

those required in issuing scrip to grand jurors. The compensation provided by section 5621 is the same compensation as that allowed for like service in issuing scrip to grand jurors. Since the services required in issuing scrip to grand jurors are like and in fact the same as the services mentioned in section 5621, it is clear that the compensation is intended to be in full for all the services so mentioned. The compensation is the same for like services. The services in the two cases are like. Whatever is the compensation in one case is the compensation in the other. This conclusion may be supported by other considerations. After setting out the various services to be performed by the clerk in civil and criminal cases alike, on the application of any witness to have his fees allowed, section 5621 makes a distinct provision for the issuance of scrip to witnesses attending before the grand jury, and then provides compensation, to use the words of the section 'for said services.'

Unless the provision allowing compensation limits it to certain of the services mentioned before in the section, the compensation is, as a matter of course, for all of said services. The compensation allowed is, by the terms of the section, declared to be the same as that allowed 'for like service in issuing scrip to grand jurors'. Certain it is, whatever services the clerk must perform in issuing scrip to grand jurors for a fixed compensation, he must perform in issuing scrip to witnesses attending before the grand jury, if necessary, for the same compensation.

It must be conceded that no charge could have been lawfully made for the services in controversy had the witnesses been attending before the grand jury. The statute, however, makes no distinction between such witnesses and witnesses summoned in civil and other criminal proceedings; therefore, what is true in reference to witnesses attending before the grand jury is also true in reference to witnesses in all proceedings, both civil and criminal.



The action of the clerk in making the charge in controversy was based upon section 5603, Revised Statutes, which provides that the clerks of the circuit courts of this state shall receive in all civil proceedings fees for their services as therein prescribed. Among the fees prescribed by said section is the fee of twenty-five cents 'for oaths and certificate to affidavit.' Section 5604 prescribes the fees for services rendered by clerks of courts having criminal jurisdiction in criminal proceedings. Among the fees fixed by that section is the fee of fifteen cents 'for certificate to affidavit.' The two services, although the words defining them are not exactly the same, are in fact one and the same service. The words defining the first service are in the conjunctive, but since there cannot be a certificate to an affidavit without an oath, the word, 'oaths' adds nothing to that service; the service after all being the making of a certificate to an affidavit. The rule in the construction of statutes, in reference to costs is, that they must be construed strictly, 'and that an officer cannot legally claim remuneration, unless the state has expressly conferred the right.' *Shed v. Railroad*, 67 Mo. 690. By section 5621, the clerk is required to swear the witness to the truth of the facts contained in the entry made by the clerk, but he is not required to preserve the oath in the form of an affidavit. If we bear in mind that section 5621 makes no distinction between witnesses in civil and in criminal proceedings, this conclusion is strengthened by the provisions of section 5605, which are: 'No fee shall be charged by any clerk, in any criminal case, against the state or any county, unless it is expressly allowed in the foregoing section.' In obedience to this declaration of the legislative will, it must be held that the oath of the witness need not be preserved in the form of an affidavit, so far as concerns criminal cases, because section 5621 does not expressly require it, and as before said there is no distinction made by that section between civil and criminal cases. The clerk was not entitled, under the statutes cited, to the fees charged."

CONCLUSION

It is very plain from the above decision that the Circuit Clerk is not entitled to a fee of 50¢ for attaching the court seal to each jury scrip under Sections 8763, 8764, 8765 and 8766, R.S. Mo. 1929, nor in view of the foregoing opinion do we construe the Circuit Clerk to be entitled to the 50¢ fee under Section 11785, R.S. 1929.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

STATE CHILDREN'S BUREAU - Abandonment defined

3-2  
March 1, 1934.



Mrs. W.W. Henderson, Director,  
State Children's Bureau,  
Carrollton, Missouri.

Dear Mrs. Henderson:

This department acknowledges receipt of your letter of January 24 enclosing copy of an opinion rendered by former Attorney General Shartel during his administration, in which you ask if the opinion is acceptable to this department at the present time. Your letter in full reads as follows:

"Enclosed is copy of an opinion rendered by Stratton Shartel which we ask that you examine and see if it is upheld by your administration.

If this is satisfactory to maintain as cause for our action in adoption cases we shall be glad to have you advise us at your earliest convenience."

We have read the opinion carefully and agree in the conclusion reached; however, we desire to augment same with a more comprehensive definition of the word "abandon". 1 Corpus Juris, p. 1387 defines "abandon" as follows:

"To constitute such an abandonment by a parent as will deprive him of the right to prevent the adoption of his child, and dispense with the necessity of his consent, there must be some conduct on his part which evinces a settled purpose to forego all parental duties. But merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment. Whether or not a parent has abandoned his child is a question of fact."

Mrs. W.W. Henderson

-2-

March 1, 1934.

With this addition to the opinion of General Shartel, we consider the same as properly declaring the law.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

RELATING TO CERTIFICATE OF APPOINTMENT AND NOTICE OF  
JUDGES OF ELECTION.

4-28  
April 26th, 1934



Mr. Emil F. Helmendach  
Union, Missouri

Dear Sir:

This department acknowledges receipt of your letter dated April 21st, 1934, in which you state and inquire as follows:

"There has been some discussion in this county as to who is required by law to notify the judges of elections of their appointment. Shall the sheriff notify those appointed or is that the duty of the Clerk of the County Court?

If the County Clerk is to notify these judges of their appointment what is the amount of fees the County Clerk shall be allowed for these services?

If the County Clerk is to certify the names of the appointees to the sheriff what is the amount of fees allowed the Clerk for such services?

I should like a definite explanation to these questions and thank you in advance for information you may be able to give me."

I.

It is the duty of County Clerk's to certify appointment of judges of elections.

It does not appear that any definite provision is made in our statutes for notifying judges of election of their appointment as such judges in their respective precincts.

However, under section 11781 R.S. 1929 may be found authority to County Clerk to make a charge for entering every appointment of judges of election and issuing certificates thereon. Also under said section is found authority

Mr. Emil F. Helmendach

April 26th, 1934

for the County Clerk to make charge for every certificate and seal not otherwise provided for.

From this it may be presumed the County Clerk is to certify the appointment of the judges of election and mail said certificate of appointment to each of such judges. No where does it appear that any provision is made for fees to the sheriff, in serving said certificate of appointments, and it is a fundamental principal of law that no officer is entitled to fees not specifically provided by law, therefore it could not be presumed that the sheriff could be expected to render such a service where no provision is made for fees.

It is therefore our opinion that it is the duty of the County Clerk to certify under seal to each judge of election, his appointment, and serve such judges with such an appointment by mailing same to said judges in the usual course of mail, as provision is made for fees to such clerk for such service.

Respectfully submitted,

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W. W. BARNES  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

PRIMARY ELECTIONS: Candidates on Socialist ticket can file by paying five dollars to the County Treasurer if no county organization for Socialist party exists in the County.

June 5, 1934.

6-5



Hon. Emil F. Helmendach  
Clerk of the County Court  
Franklin County  
Union, Missouri

Dear Mr. Helmendach:

This department acknowledges receipt of your letter of May 26, 1934, requesting an opinion of this office on the following matter:

"We have in this county a man who is to file for State Representative in the Legislature on the Socialist ticket. The Socialist party has no organization in this county; therefore, I should like to know how to proceed in taking this man's declaration. If he should pay the regular filing fee into the county treasury, should his name be placed on the Socialist ticket even though there is no county organization?

I should like to know just how to handle this man's candidacy and thank you in advance for an opinion of the legal way to do so."

Section 10257 R. S. Mo. 1929, reads as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:



I, the undersigned, a resident and qualified elector of the (\_\_\_\_\_) precinct of the town of \_\_\_\_\_), or (the \_\_\_\_\_ precinct of the \_\_\_\_\_ ward of the city of \_\_\_\_\_) county of \_\_\_\_\_ and state of Missouri, do announce myself a candidate for the office of \_\_\_\_\_ on the \_\_\_\_\_ ticket, to be voted for at the primary election to be held on the first Tuesday in August \_\_\_\_\_, and I further declare that if nominated and elected to such office I will qualify.

(Signed) \_\_\_\_\_."

follows:

The following Section 10258 R. S. Mo. 1929 reads as

"Each candidate, except for a township office, previous to filing declaration papers, as in this article prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he proposes as a candidate and seeks nomination, a certain sum of money, as follows, to-wit: To the treasurer of the state central committee--one hundred dollars, if he becomes a candidate for a state office, or judge of either of the courts of appeals; fifty dollars, if he be a candidate for representative in congress; twenty-five dollars, if he be a candidate for circuit judge or state senator. To the treasurer of the county central committee--five dollars, if he be a candidate for state representative or any county office;\* \* \* \* \*

You state in your letter that the Socialist party has no county organization, hence, there is apparently no one to whom the Five Dollar filing fee can be paid. We must therefore be guided by Section 10259 R. S. Mo. 1929 which is as follows:

"Any person desiring to file declaration papers, or propose as a candidate on any independent or nonpartisan ticket, who does not announce by declaration papers as a candidate for any political party as defined by this article, and is not a member of a political party having a state and county committee, or treasurer thereof, shall pay the sum of money required by this article to be paid by the candidate for the office for which he proposes to the state or county treasurer, as the

June 5, 1934.

case may be; take a receipt therefor, and file said receipt with his declaration papers; said sum of money, so paid, shall go into the general revenue fund of the State or county."

CONCLUSION.

It is the opinion of this Department that you should accept the candidate's declaration on the form as set out in Section 10257; that he should pay the required fee of Five Dollars (\$5.00) as directed in Section 10258, and should pay the same to the County Treasurer and file his receipt with the declaration papers as directed in Section 10259. Said Section 10259 contains the phrase "and not a member of a political party having a state or county committee or treasurer thereof," and hence, as the statutes say, in that event the filing fee should be paid to the County Treasurer. If the candidate complies with the above sections he is entitled to have his name printed upon an official ballot designating his party the same as other candidates whose names are printed on the official ballot of the major parties.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

OWN:MM

VOTING: Citizens temporarily on relief rolls are not disfranchised.

7-16  
July 12, 1934.



Mrs. W. H. Henton, President  
Ripley County Women's Democratic Club  
Doniphan, Missouri

Dear Madam:

This Department is in receipt of your request for an opinion wherein you state in part as follows:

"A few months ago a St. Louis daily paper carried a lengthy editorial on elections relative to voters who are on the Relief rolls. In this editorial it brought out that Missouri was one of the fifteen states having a law to bar voters from voting, if they had been receiving relief, within so many months prior to election. They pointed out the needed change in this legislation because elections can be won by this method, which is unfair to some of our best citizens who for no fault of their own have had to accept State aid.

"I would be glad if you would give me your opinion on this?"

Section 2, Article VIII of the Missouri Constitution was adopted February 26, 1924, and reads as follows:

" All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 10178 R. S. Mo., 1929, provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of right of suffrage, he shall be forever excluded from voting."

Section 1 of the 19th Amendment of the U. S. Constitution reads as follows:

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

A "poorhouse" is a refuge for aged, infirm, lame, blind or sick persons who are unable to support themselves, and has a superintendent, who has the power to coerce persons kept at such house to perform labor.

Section 12951 R. S. Mo. 1929 defines poor persons and reads as follows:

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons."

Section 12958 R. S. Mo., 1929, provides for the appointment of a person to superintend a poorhouse and reads as follows:

"Whenever such poor-house or houses are erected, the county court shall have power to appoint a fit and discreet person to superintend the same and the poor who may be kept thereat, and to allow such superintendent a reasonable compensation for his services."

Section 12959 R. S. Mo., 1929, sets out his powers and reads thus:

"Such superintendent shall have power to cause persons kept at such poorhouse, who are able to do useful labor, to perform the same by reasonable and humane coercion."

Section 10178, supra, disqualifies persons "kept at a poorhouse" or some "other asylum" as the same class as a "poorhouse" at public expense, for upon the principle of ejusdem generis, the term "other asylum" being a general term following particular words, will be confined in its application to asylum of the same class as a "poorhouse".

As stated in the case of State v. Krueger, 134 Mo. 262, 1. c. 269, the rule of ejusdem generis is as follows:

"In construing Statutes, where general words

Mrs. W. H. Henton

-4-

July 12, 1934.

follow particular ones \* \* \* \* the rule is  
\* \* \* \* as follows: 'Where a particular  
class is spoken of, and general words fol-  
low, the class first mentioned is to be  
taken as the most comprehensive, and the  
general words treated as referring to  
matters ejusdem generis with such class.' "

Persons maintained as inmates of a "poorhouse" or  
"other asylum" are disqualified from voting, but since the per-  
sons referred to in your letter are not inmates of a "poorhouse"  
or "other asylum" at public expense they are not disqualified to  
vote if otherwise qualified.

It is the opinion of this office that the Statutes  
and Constitution of our State should not be construed to mean  
that a citizen on the relief roll is a pauper as defined by the  
Statutes, and the fact that a citizen is temporarily on the  
relief roll does not disfranchise such citizen from voting.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK.

MW:H



ELECTIONS: Candidate for Circuit Judge should file his affidavit in detail regarding expenses of primary with Secretary of State.

10-12

October 11, 1934.



Mr. George E. Heneghan,  
418 Olive Street,  
St. Louis, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of September 13 in which you request the following questions to be answered:

"(a) With whom should a candidate for the office of Circuit Judge file his affidavit in detail regarding expenses of primary election?

(b) When does the time expire for filing such expense account for expenses incurred in primary elections?"

I

The section relating to the filing of expense accounts by candidates is Section 10482, R.S. Mo. 1929, the pertinent part of which is as follows:

"Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place,



and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money \*\*\*\*\*"

We call your attention to the phrase "make out and file with the officer empowered by law to issue the certificate of election to such office or place", bearing in mind that you have been nominated as Judge of the Circuit Court of the Thirteenth Circuit. We shall next determine as to whose duty it is to issue to you the certificate of nomination. This will be found in Section 10234, R.S. Mo. 1929, which is as follows:

"Certificates of nomination shall be filed with the secretary of state for the nomination of candidates for offices to be filled by the electors of the entire state, or any district or division of a greater extent than one county. For all other nominations to public offices, certificates of nomination shall be filed with the clerks of the county courts of the respective counties wherein the offices are to be filled by the electors."

Section 10260, R.S. Mo. 1929 provides:

"No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and all declaration papers shall be filed as follows: 1. For state officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the secretary of state. 2. For officers to be voted for wholly within one county or in the city of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the City of St. Louis."

From a reading of Sections 10260 and 10234, supra, we naturally conclude that the City of St. Louis being treated as a county, the phrase "or any district or division of a greater extent than one county" would apply, and you would receive your certificate of nomination from the clerk of the City of St. Louis. We also mention the fact that under Section 10260 the declaration should be filed in the office of the election commissioners of the City of St. Louis; however, it matters not what construction we may personally place upon the two statutes above quoted. The Supreme Court of Missouri made the following decision in the case of *State ex rel. v. Roach*, 258 Mo., 1.c. 551-553:

"The statute, the ambiguous and contradictory terms of which have created the doubt mentioned, is as follows: 'No person shall file more than one written declaration indicating the party designation under which his name is to be printed on the official ballot, and all declaration papers shall be filed as follows: 1. For State officers, representatives in congress, courts of appeals and circuit judges, and those members of the senate and assembly whose districts comprise more than one county, in the office of the Secretary of State. 2. For officers to be voted for wholly within one county or in the City of St. Louis, in the office of the county clerk of such county or the office of the election commissioners of the City of St. Louis.' (Sec. 5862, R.S. 1909)

Even a casual reading of the above section discloses a serious conflict in its provisions, not however in the language used in the section, but in that language when applied to a well-known fact which we judicially notice because embodied in a general law, that is, that the Eighth Judicial Circuit is composed wholly of the City of St. Louis. We must ourselves notice this fact (*State v. Pope*, 110 Mo. App. 520; *Alabama Ins. Co. v. Cobb*, 57 Ala. 547; *Railroad v. Hyatt*, 48 Neb. 161; 1 *Chamberlayne*, Mod. Ev., sec. 669), and the rules of statutory construction require us to presume, naught else appearing, that the Legislature also held it in mind when the statute was passed. Moreover, the petition herein standing per stipulation as and for the alternative writ, so charges and on demurrer the truth of all matters well pleaded in the petition is admitted.

The above section requires by specifically naming these offices that all candidates for 'state officers, representatives in congress, courts of appeals and circuit judges' shall file their declarations of candidacy 'in the office of the Secretary of State.' It further provides generally that all declarations for nomination 'for officers to be voted for wholly within one county, or in the City of St. Louis', shall be filed in the office of the county clerk of such county, or in the office of the election commissioners of the City of St. Louis. Applying the rule of construction which requires the general provisions of a statute to yield to special provisions, where there is a conflict and where the general expressions in one part of a statute are inconsistent with the more specific provisions in another part of the statute \*\*\*\* we see that candidates for circuit judges are required by a specific provision naming this office to file their declarations with the Secretary of State. We may gather from the whole law a fairly consistent legislative intent to divide the officers into classes, pursuant to which classification (which was as consistent as the facts will permit) and those officers who ordinarily are elected from more than one county are required to file declarations with the Secretary of State, while those who ordinarily are elected from a single county are required to file declarations with the county clerk. The only provision which is in any way inconsistent with this view of the legislative intent, is that relating to a state senator whose district is composed of but one county. This legislative intent, save and except that such inconsistency as to place a filing declaration of candidacy of certain candidates for state senator still inheres, is accentuated by a reference to Section 5860 of the same act. Here candidates for nomination for the office of Circuit Judge are specifically and again by naming the office, required to pay the fees required to the Treasurer of the state central committee, while again county officers are put into another class and are required to pay such fees to the treasurer of the county central committee.

It was early announced as a rule of statutory construction in this state that effect shall if possible be given to the whole and every part of a statute. \*\*\*\*\*

\*\*\* This rule is wellnigh universal in all jurisdictions and is without exceptions, save that the interpretation reached by the application of the rule should be reasonable and not out of accord with the legislative intent. \*\*\*\*\*

Unless we say that candidates for nomination for Circuit Judge in the Eighth Judicial Circuit must file their declarations of candidacy with the Secretary of State and not with the board of election commissioners of the City of St. Louis, we are compelled to excise as meaningless from Section 5862 the words 'circuit judges'. For we cannot reach this conclusion until we cut out and cast away these words from clause 1 of the above section. It is persuasive but concededly not in any manner decisive, that still another general classification was in the legislative mind. That is, that county officers (and city officers elected at general elections) were put in one class and all other officers (again except a state senator from a single county) were placed in another class.

These considerations induce us, while conceding the existence of some argument for the other view, to believe that the rules of statutory construction and the great weight of reason lies with the view that declarations of candidacy for nomination for circuit judge of the Eighth Judicial Circuit should be filed with the Secretary of State, and so we hold."

#### Conclusion

If under Section 10260, R.S. Mo. 1929 a declaration of your candidacy for Circuit Judge is to be filed with the Secretary of State, then, by the same argument under Section 10234, supra, the certificate of nomination to you would necessarily be the duty of the Secretary of State.

Proceeding further, the phrase "make out and file with the officer empowered by law to issue the certificate of election to such office or place", as contained in Section 10482, supra, would compel you to file your affidavit in detail regarding expenses

of the primary election with the Secretary of State.

II

As to your question dealing with the expiration of the time for filing such expense account, we have recently rendered an opinion to the Honorable Austin Sneed, Clerk of the County Court of Newton County wherein we have tried to exhaustively cover this question. A copy of this opinion is being enclosed herewith and we believe it will properly answer the second question contained in your inquiry.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH  
Encl-1

RELATING TO POWER OF COUNTY BOARDS OF EQUALIZATION TO  
MAKE ASSESSMENT OF PROPERTY OMITTED FROM ASSESSOR'S BOOKS:

April 28th, 1934

5-14



Hon. Walter M. Hilbert  
Pres. Atty. Lewis County  
Monticello, Missouri

Dear Sir:

We acknowledge receipt of your letter of date of April 18th, 1934 in which you inquire and state as follows:

"One Samuel Mattingly, a resident of Lewis County, Missouri, departed this life some six months ago. At the time of his death he was the owner of about \$40,000.00 par value of Corporate stock in the U.S. Steel Corporation of Pennsylvania. He had owned this stock since before June 1, 1933. This stock has been inventoried among the assets of the estate of the said Samuel Mattingly.

The Board of Equalization of this county has added the amount of the above stocks to the assessment list of Mr. Mattingly as this item was not included in the list of property given to the Assessor of this county by Mr. Mattingly prior to his death.

In your opinion has the Board of Equalization the lawful right to make such an increase in Mr. Mattingly's assessment? Please give me your opinion at once."

I.

County boards of equalization may assess property omitted from assessor's books.

Section 9816 Revised Statutes, 1929, reads as follows:

"The county board of equalization, at its annual meeting in each year, in addition to the powers now conferred by law, shall have authority to assess and equalize the value of any property that may have been omitted from the assessor's books then under examination by said board, and in case said



Hon. Walter M. Hilbert

April 28th, 1934

shall add any property, real or personal, to said assessor's books, it shall cause notice in writing to be served upon the owner of such property, stating the kind and class of property and the value fixed thereon by said board, and naming the time and place, not less than five days thereafter, when and where such owner may appear before said board and show cause why said assessment should not be made. At the time fixed, said board shall again meet and give an opportunity to said taxpayer to be heard in regard to said assessment, and may change or alter the same upon it being shown by said owner that said assessment was erroneous or improperly made; otherwise, said property and the valuation, as fixed by said board, shall be extended upon the assessor's books, as in case of other property. Said notice shall be signed by the clerk of the county court and shall be served by the sheriff of the county, and it shall be the duty of the prosecuting attorney, when called upon by the board of equalization, to represent said county in any such proceedings. In case of the assessment of real estate belonging to nonresidents, publication may be made of the additional assessment in the same manner as publications required by law where the assessment has been increased by said board."

Prior to the enactment of the foregoing statute the courts of our state held that the county boards of equalization had no power to make assessments or adding property to lists returned.

In State ex rel v. Cunningham, 153 Mo. 1. c. 652, the court said:

"The board of equalization have nothing to do with making a list of the property or adding property to the lists returned except in the proceeding contemplated in Section 7537 when the assessor gives written notice to the board that a person has made a false list with intent to defraud. The ordinary duties of the board of equalization pertain only to equalizing values of property on the lists returned by the assessor."

No doubt in view of the above opinion and others



Hon. Walter M. Hilbert

April 28th, 1934

as well the legislature in session of 1903, passed section 9816 Supra. to vest the board of equalization with power to assess and equalize the value of any property that may have been omitted from the assessor's books, then under examination by said board.

Under the provisions of the above statute where property is added it becomes necessary that notice be served upon the owner or his legal representative, stating the kind and class of property, and the value fixed thereon by said board, and fixing a time and place not less than five days after service of said notice, when and where such owner or his legal representative may appear before said board and show cause, if any, why such assessment should not be made.

It is therefore the opinion of this department if the foregoing proceedings are followed, the board of equalization have the power and authority under the law as it now is to add property to lists which may have been omitted from the assessor's books.

Very truly yours,

~~W. W. Barnes~~

Assistant Attorney-General

APPROVED:

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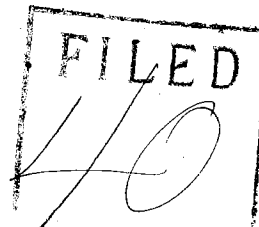
Attorney General

SCHOOLS:

No resident pupil or parents do not have to pay tuition or other fees to attend high school, *yet*

*subject receives state aid.*

May 25, 1934.



Hon. Walter M. Hilbert  
Prosecuting Attorney  
Lewis County  
Monticello, Missouri

Dear Mr. Hilbert:

On May 7th, 1934, you wrote this office as follows:

"Please give me an opinion on the following state of facts and the law applicable.

The city High School at Canton, Missouri, has established the tuition for non-resident pupils at \$60.00 per year which they claim is the actual per capita cost of instruction in this school. Pupils from an outlying country district attended Canton High School the school term of 1933-1934. The district in which the pupils resided paid to Canton High School the sum of \$10.00 per pupil for the instruction received by their pupils. The state allotment was less than the \$50.00 remaining due the Canton School as tuition on each pupil in question.

Are the parents of the pupils in question or the School District in which the pupils reside or both the parents and district liable for the difference between the amount actually paid by the state and the sum of \$50.00."

To which, on May 17th, we advised that there was pending before the Supreme Court of Missouri the case of State ex rel., Mildred Burnett, Relator, v. School District of City of Jefferson et al., Respondents, in which the identical question you requested an opinion concerning was before the court, and our refusal to further express our views because of its status.

The Supreme Court of Missouri, en Banc, on this date rendered its decision in the above case ordering that its peremptory writ of mandamus issue against the respondents, and in its opinion held that a school district receiving and accepting state aid could not charge non-resident pupils any tuition, whether in the form or guise of an incidental fee or otherwise.

State ex rel. Mildred Burnett, Relator, v. School District of City of Jefferson et al., Respondents, No. 33454 (Not yet reported) was "an original proceeding by mandamus to compel the School District of the City of Jefferson and its officers to admit Mildred Burnett as a pupil in respondents' high school without the payment of tuition by her or her parents."

The court in its opinion stated that relator was a minor between the ages of six and twenty years; was a resident of a common school district which maintained no high school or classes beyond the eighth grade; that she completed the course of study provided in her district and was fitted in every way to enter and pursue the course of study provided in respondents' high school; that the high school maintained by respondents was in an adjoining county and the most convenient for relator to attend; that respondents excluded relator because she or her parents failed to pay a \$3.00 per month incidental fee.

The court in its opinion said:

"The controversy in this case hinges upon the meaning and constitutionality of section 16. As enacted in 1931 (Laws of Missouri, 1931, pp. 343, 344) this section

is as follows: (Then the court here quoted Section 16)

\*\* \* \* \* \*

"Counsel for respondents contend that under the law the Jefferson City School District may admit non-resident pupils and prescribe a reasonable tuition fee to be paid by them. It appears from the pleadings that respondents, proceeding on this theory, when advised that under the appropriation made by the General Assembly for the school year 1933-34 the amount received per non-resident pupil would be approximately \$12.50 instead of \$50.00, levied an assessment of \$3.00 per month on each non-resident pupil in lieu of the deficit of approximately \$37.50 in the state's appropriation.

"The above contention is based on the view that the provision in section 9207 R. S. 1929, that a school board 'may admit pupils not resident within the district, and prescribe the tuition fee to be paid by the same', applies to respondent school district notwithstanding the subsequent enactment of Section 16, supra.

"It may be here observed that for the purposes of this proceeding the three dollar charge designated by the board as an 'incidental fee' should be regarded as a tuition fee. It was to be paid by each non-resident pupil as a condition precedent to admittance, and counsel necessarily treat the charge as tuition when they seek to defend the order by invoking the above quoted provision of section 9207.

\* \* \* \* \*

"However, the act of 1931, of which section 16 is a part, still in furtherance of the same mandate 'made quite a change in the

method of distributing the state school funds'. (State ex rel. Dist. of Kansas City v. Lee, (Mo. Sup.) 66 S. W. (2d) 521, 522). Equalization and teacher and attendance aids were substituted for certain aids provided in the old law. (Sec. 13 of the act of 1931, Laws of Missouri, 1931, p. 340). Other and additional forms of state support were provided by the new law, and it appears from the pleadings herein that respondent district is receiving state support. Moreover, section 16 of the new act provided a complete scheme for payment of the tuition of qualified non-resident pupils, carrying with it the plain implication that such pupils should be admitted by school districts receiving state support and that tuition should not be charged therefor except as provided in the act. If under the old law, which afforded less state support, the General Assembly saw fit to limit the power given school boards under section 9207, R. S. 1929, by compelling the admittance of non-resident pupils by districts receiving such support, it is unreasonable to suppose that larger state support would be given with the intention of imposing no limitation whatever upon this power. The legislative plan to further state-wide 'gratuitous instruction' by the coordination of state agencies would come to naught if districts could avail themselves of state support and at the same time refuse to admit non-resident pupils coming within the purview of the plan or ignore the provision therein for payment of their tuition.

\* \* \* \* \*

"A complete scheme for the payment of the tuition of non-resident pupils thus having been provided in the new law we cannot escape the conclusion that it was intended to be exclusive, and that by accepting state support

respondents must be deemed to have surrendered the power to charge tuition in any other way. (underscoring ours) With respect to admittance of non-resident pupils and payment of their tuition the provisions of old section 9207 and the new law are inconsistent and the latter must prevail.

"The above interpretation is in harmony with above mentioned Section 1, Article XI, of the Constitution of Missouri, \* \* \* State agencies set up to accomplish this high purpose are necessarily coordinated to that end, and legislation designed to distribute the burden and promote the efficiency of 'gratuitous instruction' among the various subdivisions of the state should be liberally construed in furtherance thereof. \* \* \* \* \*

The court then took up the constitutionality of the questions raised by respondents, holding that Section 16 did not violate Section 1, 14th Amendment of the Constitution of the United States, and Article 2, Section 30 of the Constitution of Missouri, saying:

"\* \* \* \* \* Compliance therewith is merely a condition precedent to state support which the district may avoid by failing to apply for and receive such support. Acceptance of the plan being voluntary on the part of such district its operation can not be regarded as a taking of property without due process of law."

The court also held that Section 16 was not violative of Section 3, Article X, of the Constitution of Missouri, which provides, "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying

May 25, 1934.

the tax, and all taxes shall be levied and collected by general law."; having this to say:

"Under the act of 1931 no funds derived from taxation are to be paid over to the qualified non-resident attending pupils or used for their support. Such funds are to be used only for the purpose of affording them 'gratuitous instruction', which is strictly a public purpose. The objection appears to be without merit and it is overruled."

The court further ruled that the title to the new law of 1931 did not violate Section 28, Article IV, Constitution of Missouri, in that it contained more than one subject and subjects not clearly expressed therein, citing the case of State ex rel. School District of Kansas City v. Lee, 66 S. W. (2d) 521 (Mo. Sup.), saying:

"This question as to the constitutionality of the act is also ruled against respondents.

"For the reasons above stated peremptory writ of mandamus should issue against respondents, and it is so ordered."

The opinion was written by Honorable Frank E. Atwood, Judge, and was concurred in by all the Judges, except Judge Ellison, absent.

The above case clearly and completely answers your question and is in accord with previous opinions rendered by this Department on the same subject, copies of which were sent you in our letter of May 17th.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General

JLM:EG



SCHOOLS: District where non-resident pupils reside must pay tuition of pupils.

8-13  
August 9, 1934.



Hon. Albert D. Hewitt  
Prosecuting Attorney  
DeKalb County  
Maysville, Missouri

Dear Mr. Hewitt:

This is to acknowledge your letter as follows:

"The Clarksdale High School here in De Kalb County have had some non-resident pupils coming in to their school from the Thornton School, which is a rural school and have never been able to collect for tuition from this school district, and are now threatening to sue the rural school for the tuition for these non-resident pupils, and have called on me, that is the High School Directors concerning this action.

"It seems as though that under the 1933 laws, at page 393, Section 16, that the high school might have this right. However, there has been some dispute about their right of action.

"Thanking you for your opinion in the matter, I am,"

Laws of 1933, page 393, Sec. 16, in part provides as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work

8/9/34

through the twelfth grade shall pay the tuition of each and every pupil resident therein \*\*\*\*\*."

In a recent case before the Supreme Court of Missouri En Banc, in case of State of Missouri ex rel. Mildred Burnett v. School District of the City of Jefferson (not yet officially reported), the court in passing upon that section said:

"Now, although section 16 contains no express provision that a non-resident pupil shall not be required to pay tuition, it does provide a complete and apparently exclusive scheme for its payment. First, it unequivocally requires the district of residence to (*italics ours*) "pay the tuition of each and every pupil resident therein who has completed \*\*\*\*\*."

And further,

"It is now conceded by all parties hereto that the provision in section 16 for payment by the state of \$50.00 tuition per non-resident attending pupil is in reality state aid to the sending district and not to the receiving district. \*\*\*\*\*"

From the above and foregoing, it is our opinion that the district where the non-resident pupil resides is liable to the school of attendance for the tuition of such non-resident pupil.

Yours very truly,

APPROVED:

JAMES L. HORNOSTEL  
Assistant Attorney-General.

ROY MCKITTRICK  
Attorney-General.

JLH/afj

OCCUPATION TAX; Contractors.

August 24th, 1934



Hon. Otto P. Higgins, Director  
Police Department,  
Kansas City, Missouri.

Dear Mr. Higgins:

Your letter addressed to General McKittrick of sometime ago has been handed to the writer for reply

The question of contractors insofar as being amenable to the provisions of the Occupation Tax has always been a mooted question with this Department. However, in the past we have ruled substantially as follows:

Your client I take it makes contracts for placing new roofs or replacing roofs on houses and buildings. If your client makes a contract with a person for a complete job, furnishing all materials and labor and receiving a certain amount when the work is approved then the materials and supplies should be included in the gross receipts and a return made to the State Auditor. The labor involved is not to be included, the theory being that your client by purchasing materials from a person engaged in that business is using and consuming the same. On the other hand if your client makes contracts wherein the materials are itemized and the owner of the building or house agrees to pay the seller for the same and your client receives a certain amount for his labor, skill and superintending the job then no return of materials purchased should be made.

I am enclosing an opinion rendered by Assistant Attorney-General Gilbert Lamb on March 8th, which embodies the principle of your question and will be of further assistance to you.

Soon after the passage of the Occupation Tax Law this Department prepared an opinion in pamphlet form which discusses the taxability of various lines of business and the same is being mailed you under separate cover in the hope that it may prove valuable

Hon. Otto P. Higgins,

-2-

August 24, 1934

to you if other questions arise.

With kindest regards and hoping that I may see you in person soon, I am

Yours very truly,

OLLIVER W. NOLEN  
Assistant Attorney-General

OWN/mh

APPROVED:

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ROY McKITTRICK  
Attorney-General

SCHOOLS: County Treasurer should not honor teacher's warrant  
SCHOOL DISTRICTS:—where reports required by Section 9316, R. S. Mo.  
1929, has not been made and filed with the Clerk.

FILED

1-22  
January 17, 1934.

Mr. W. H. Holmes,  
Prosecuting Attorney of Maries County,  
Vienna, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"I would like your opinion on Section 9316 Revised Statutes of Missouri, 1929, for our County Treasurer, under the following state of facts: A local school district employed two teachers for an eight months term and they taught until recently, both for four months. At the end of four months they ceased teaching, and there is a difference of opinion between the teachers and the board as to whether they quit of their own accord or whether at the request of the Board due to small tax receipts. The board employed two other teachers to finish out the term and they are now so doing.

The two teachers who stopped filed all their monthly reports and received and cashed warrants for their first three months services. The Board of Directors also issued them their warrants for their fourth month's services, but no term report was filed as required in the Section above referred to and our County Treasurer hesitates to pay these last two warrants without a term report being filed, and the purpose of this letter is to get your opinion whether or not the County Treasurer would be protected in paying them under the above state of facts."

You inquire whether the County Treasurer should pay a teacher's warrant where the teacher has neglected or refused to file the monthly report, as required under Section 9316, R. S. Mo. 1929. Section 9316, R. S. Mo. 1929, provides as follows:

"It shall be the duty of every teacher to make out and file with the district clerk, at the expiration of each month, a report of the number of pupils in attendance during the month, distinguishing between male and female, the average attendance, and such other statistics as the board of directors, by order, may require, and no warrants shall be ordered by the board or drawn by the clerk for such month's salary until such monthly report has been made and filed with the district clerk; and at the close of the term a report, embracing a summary of the above, together with the length of term taught, wages paid, teachers employed, and such other information as the board, by its official acts, may require; a duplicate of same shall be filed with the county superintendent, and no warrant shall be issued by said clerk in favor of such teacher for the last month's salary of such term until he shall have filed with said clerk and county superintendent such term report."

Under the above section every teacher is required to make out and file with the district clerk, at the expiration of each month, a monthly report. The statute expressly directs that no warrants shall be ordered by the board or drawn by the clerk for such monthly salary until such report has been made and filed. It is apparent under the above section that the board shall not issue the warrants until the report is filed.

In Hall v. School District, 24 M. A. 213, the Court held that the teacher could not recover a judgment upon the warrant unless the report had been filed. The Court says at page 223:

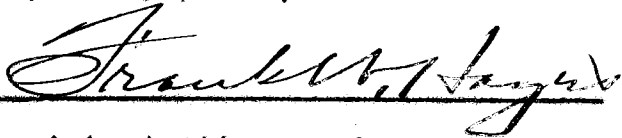
"At the end of the month, for one-half of which he had taught, the plaintiff should have made out and filed with the clerk of the school district the monthly report required by section 7079. Until this had been done, the board of directors of the school district had no power, under section 7071, to order the payment of the plaintiff's salary or wages for such half month. The plaintiff could not lawfully recover judgment against the defendant on account of a claim which the statute prohibited the defendant from paying. Until the plaintiff had made and filed said monthly report he could not recover in this action for the one-half of a month taught by him."

January 17, 1934.

Under the foregoing section of the statute, the warrant issued where no report has been filed was wrongfully issued. Under the foregoing decision, the teacher could not recover a judgment against the district upon such warrant. It is apparent from the foregoing that the warrant is not a legal warrant and that the County Treasurer would have no right to pay these warrants until the report required by the statute had been filed by the teacher.

It is therefore the opinion of this Department that the County Treasurer would not be protected in paying a teacher's warrant where there had been no report made and filed, as required under Section 9316, R. S. No. 1929.

Very truly yours,



Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S



3-15  
March 12, 1934.



Hon. Lawrence Holman  
Prosecuting Attorney  
Randolph County  
Moberly, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated February 17, 1934, which reads as follows:

"There has been considerable discussion among County Officials, as to the construction of Section 12,165, as appears in the Session Acts of 1933, at page 353, in regard to the publishing of County Financial Statement.

"It seems to me that the Statute is rather plain and speaks for itself; however, in order that we may be sure about the proper construction, I wish you would please give me an opinion as to just what is necessary in order to make up a financial statement that will comply with this Statute."

Section 12165 and 12166 R. S. Mo., 1929, as amended in Laws of 1933, page 353 provides for the annual financial statement of county courts.

This law was approved by the Governor on April 7, 1933, and as there was no emergency clause attached to the bill it went into effect ninety days after adjournment, which would be July 24, 1933. Hence county courts are required to comply with the Act starting on or before the first monday in March, 1934.

In order for your county to publish the prescribed county financial statement for the year ending December 31, 1933, which is the financial statement for the preceding fiscal year, the law designates that the duty to prepare the said statement is primarily on the Clerk of the County Court, in those counties where the County Court has failed or refused to designate any other person, and whether the financial statement be compiled by the Clerk of the County Court or by the duly authorized agent appointed by the court, it must be certified to in the form prescribed by the Statute for certification. When the statement is compiled by an agent employed by the court, other than the County Clerk, the certification prescribed for the County Clerk is not required. For a false certification, one is liable on his bond, and the act is also

March 12, 1934.

designated as a crime.

Any county court authorizing an agent to compile the financial statement should first let the terms of the authorization and employment show of record as provided in Section 12107, R. S. Mo., 1929, which provides:

"The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

The financial statement of any county should be compiled to include the following detail and be in substantially the following form, viz:

FINANCIAL STATEMENT FOR \_\_\_\_\_ COUNTY  
FOR THE YEAR ENDING DECEMBER 31 \_\_\_\_\_ AS  
COMPILED BY \_\_\_\_\_.

I.

The total bonded debt of \_\_\_\_\_ County outstanding December 31, \_\_\_\_\_, was \$ \_\_\_\_\_. If the County had outstanding bonds, then set out in detail the following facts, viz:

The bonds are identified as \_\_\_\_\_ bonds and mature as follows \_\_\_\_\_ their interest rate is \$ \_\_\_\_\_ and the annual levy for interest and sinking fund is \$ \_\_\_\_\_, as authorized by Section \_\_\_\_\_ R. S. Mo., 1929. The total amount of interest and sinking fund that has been collected is \$ \_\_\_\_\_, and the total amount of interest and sinking fund on hand in cash is \$ \_\_\_\_\_. The interest and sinking fund on hand has been loaned to the following persons as follows, viz:

	Name of Borrower	Amount of Loan	Interest on Loan	Description of Security	Amount of Interest Delinquent.
1.	_____	\$ _____	\$ _____	_____	\$ _____
2.	_____	\$ _____	\$ _____	_____	\$ _____
3.	_____	\$ _____	\$ _____	_____	\$ _____

## II.

The total amount of county and township school funds on hand for the fiscal year was \$\_\_\_\_\_, and the total amount loaned out was \$\_\_\_\_\_.

The amount of fines, penalties and forfeitures collected during the year and turned into the permanent school fund was \$\_\_\_\_\_.

The school loans now outstanding are as follows, viz:

	Name of Borrower	Amount of Loan	Date of Loan	Date of Maturity	Description of Security	Amount of Interest Delinquent.
1.	_____	\$ _____	_____	_____	_____	\$ _____
2.	_____	\$ _____	_____	_____	_____	\$ _____
3.	_____	\$ _____	_____	_____	_____	\$ _____

## III.

The total valuation of county property for taxation for the fiscal year was \$\_\_\_\_\_.

The Constitutional rate permitted by the Constitution was \$\_\_\_\_\_.

The rate levied by the County Court was \$\_\_\_\_\_, and said rate was divided among the several funds as follows, viz:

	Rate
1. Insane, State Institutions and Paupers	_____
2. Jury and Election	_____
3. Roads and Bridges	_____
4. Salary and Operation	_____
5. Contingent and Emergency	_____



7. From Fines and Penalties	\$	_____	\$	_____	\$	_____	\$	_____	\$	_____	\$	_____
8. From all Other Sources	\$	_____	\$	_____	\$	_____	\$	_____	\$	_____	\$	_____
Total received in each Fund	\$	_____	\$	_____	\$	_____	\$	_____	\$	_____	\$	_____

## VI.

The Counties total disbursement for everything for the fiscal year was \$\_\_\_\_\_.

The following salary warrants were issued and paid to officers drawing a yearly salary, viz:

1	2	3	4	5
Issued to	Title of Officer	How many Warrants	Drawn on what Fund	Total Amount Paid
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	\$ _____
_____	_____	_____	_____	\$ _____

Warrants No. \_\_\_\_\_ to No. \_\_\_\_\_ inclusive were issued and paid to judges and clerks of election at \$ \_\_\_\_\_ per day in the total amount of \$ \_\_\_\_\_. The Warrants were issued to the following named persons, viz:

\_\_\_\_\_

The disbursements were made by road districts in the following manner, for fiscal year.

## ROAD DISTRICT NO. 1.

Received \$ \_\_\_\_\_, which was disbursed as follows, viz:

Issued to	Purpose	Warrant No.	Date	Demand on what Fund	Amount.
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

(Set out each Road district as above) District total \_\_\_\_\_

The total disbursement made by all road districts for the fiscal year was \$\_\_\_\_\_.

The following disbursements were made by road overseers, for the fiscal year.

Name of Overseer	Paid to	Purpose	Total Amount Paid
_____	_____	_____	\$_____
_____	_____	_____	\$_____
Grand Total			\$_____

When the above purpose was for labor then set out the days worked and the rate paid per hour or per day.

The following receipts and disbursements were made by Special road districts for fiscal year.

Special road District No. \_\_\_\_\_

This district received \$\_\_\_\_\_ and disbursed it as follows:

Warrant No.	Issued to	Date	Purpose	Amount.
_____	_____	_____	_____	\$_____
_____	_____	_____	_____	\$_____
_____	_____	_____	_____	\$_____
Total Amount				\$_____

(All special Road Districts should be listed as above.)

The county distributive school fund received the following amount during the fiscal year from the following sources.

From	Amount.
_____	\$_____
_____	\$_____
_____	\$_____
Total	\$_____



The county distributive school fund was disbursed as follows for the fiscal year:

Disbursed to	Total Amount.
_____	\$ _____
_____	\$ _____
_____	\$ _____

If taxes were levied by virtue of Section 22, Article X, Constitution of Missouri, then fill in the following:

"By virtue and authority of the discretionary power conferred upon county courts of the several counties of this State to levy a tax not to exceed twenty-five cents on the \$100.00 assessed valuation the county court of \_\_\_\_\_ County did for the year covered by this report levy a tax of \_\_\_\_\_¢ on the \$100.00 valuation which said tax amounted to \$ \_\_\_\_\_ and was disbursed as follows."

Paid to	Warrant No.	Purpose	Amount.
_____	_____	_____	\$ _____
_____	_____	_____	\$ _____
_____	_____	_____	\$ _____
Total Amount			\$ _____

All disbursements for the fiscal <sup>year not</sup> heretofore set out or included in the foregoing disbursements, are hereby set out as follows in detail:

Warrant No.	Date	Issued to	Purpose	Amount	Drawn on what fund
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

(Here follow in the language of the Statute the form therein set out for certification. Let the compiler date and sign the same.)



It is our opinion that this County Financial Statement law is a mandatory law prescribing duties and details that must be complied with. Any financial statement which follows the above form is prepared substantially in conformity to the requirements of the law set out in Sections 12165 and 12166 supra, and when the statutory certification is attached it is ready for publication. The statute provides that the Financial Statement be published in some newspaper of general circulation, published in the county, but if there be no newspaper, then the Statute provides for publication by posting the statement in ten public places in the county. According to the Statute, publication in one issue of a qualified newspaper meets the requirements as to publication.

Section 12166 supra, provides that the publisher, whom we believe will usually be a newspaper, as there is not a County in the State but that some newspaper can qualify for publication, must file two proofs of publication with the county court, and it then becomes the duty of the court to file one proof of publication in the records of the court and the other one they must forward to the State Auditor. The publisher is required to furnish the county court with a copy of the statement in addition to the one filed with proof of publication in the office of the court. This extra copy is to be posted on the records of the court after the court has made an order to that effect. The publisher is not entitled to his charge for printing until he has fulfilled the law in filing the required two proofs of publication and the extra statement to be posted in the record. The publisher must set his type in the manner that takes the least space measured by the standard column width measure. For the publication of said financial statement as above set out, the publisher is entitled to be paid his bid based on standard column width measure and if he did not bid for the job, then he is entitled to receive a reasonable amount based on standard column width measure.

Any person a designated and employed agent, by the county court, other than a bonded county officer, to prepare the Financial Statement, is required to give a surety bond for the faithful performance of his duty, and if a county officer or employed agent fail, neglect or refuse to prepare the statement in compliance with the Act, he is liable on his official bond for dereliction of duty, in addition to the criminal penalties above referred to.

Any person designated as agent by the court to prepare the county financial statement cannot be paid by the court for this service until the State Auditor has acknowledged receipt of his proof of publication and has notified the court that the Finan-

cial Statement complies with the requirements of law. For preparing the statement the court may allow the amount agreed on by contract of employment but not to exceed the price per hundred words permitted to the Clerk of the County Court for the writing of court record.

The pay for preparing and publishing the Financial Statement should be prorated among the several county funds in proportion that each item bears to the total cost of preparing and publishing said statement, and when it be not feasible to charge the proportionate share to any specific fund, then that proportionate share should be charged to the Salary and Operation Fund. For instance, that part of the statement which deals with the Permanent School Fund would entitle the publisher to a warrant from the Permanent School Fund, which warrant would be in the amount as the column inch published relating to the Permanent School Fund bears to the total column inch published in the whole Financial Statement. It would entitle the compiler to a warrant from the Permanent School Fund in the amount based upon the number of words used in matter relating to the Permanent School Fund compared to the total number of words used in the completed Financial Statement. On the other hand, matters in the statement relating to delinquent tax could not reasonably be charge against any fund by reason of the matter published, and hence this charge under the law should be made against the Salary and Operation Fund.

The duty to paste the published statement on the court records after the court so orders, is upon the Clerk of the County Court, and for pasting same on the record he is not to be allowed any pay.

There is a duty on the State Auditor, upon receipt of a County Financial Statement, to examine it and if it complies with the law, to approve it and immediately notify the County Treasurer and County Court that he has received the proof of publication and their Financial Statement for the fiscal year ending December 31,\_\_\_\_, and that it complies with the law. It is also the duty of the State Auditor to prepare sample forms for financial statements on or before July 24, 1934, and mail same to the County Clerks of each county in this State. On the other hand, the law provides that the failure of the State Auditor to supply forms does not excuse any person from performing any duty imposed by this Act.

This Act went into effect on July 24, 1933, and under the provisions of the Act the County Treasurer is restrained from either paying or entering for protest any warrant for the pay of

Hon. Lawrence Holman

-10-

March 12, 1934.

any Judge of the County Court after April 1, 1934, and until such time as he has received notice from the State Auditor that proof of publication of the County's Financial Statement as provided by this article has been filed in the Auditor's office, and if a County Treasurer pays or protests a salary warrant for any County Judge he is liable on his official bond for dereliction of duty.

If we have not fully covered the question submitted in your request we will be pleased to render you a further opinion in the matter.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK  
Attorney General.

WOS:H

CHATTEL MORTGAGES: The Recorder of Deeds shall release same,  
when and how?

4-11  
April 9, 1934.



Honorable Lawrence Holman  
Prosecuting Attorney  
Randolph County, Missouri  
Moberly, Missouri

Dear Mr. Holman:

We are hereby acknowledging your request for an opinion  
dated March 21st. Your request is as follows:

"I have received a letter this morning from  
Charles C. Hon, our County Recorder, the con-  
tents of which, are as follows: 'I am sub-  
mitting herewith for the opinion of the At-  
torney General of Missouri, a copy of a re-  
lease submitted to me for release of a recorded  
chattel mortgage as to its validity, also what  
shall I do with the release when it is used  
for as I understand it this is intended to  
be my authority for making a marginal release.  
We have no place for the official filing of  
such records that I know of.

"I am holding the release in the meantime. It  
has been my custom in the past to require the  
cancelled note or notes. As the note carries  
the security I cannot understand why it should  
not be the basis of release \* \* \* \* \*

Yours truly,

Chas. C. Hon  
Recorder of Deeds.'

"From a conversation I had with Mr. Hon, I  
think the question he is interested in is  
whether or not he is protected in the event  
he enters satisfaction of a chattel mortgage  
in accordance with the methods provided for  
in Section 3099 Revised Statutes, 1929. This  
Section seems plain in providing as to the  
manner of releasing a chattel mortgage, but  
he is afraid that there is some other section

April 9, 1934.

of some other construction that might cause him trouble. His theory is, that the cancelled note should be produced when a chattel mortgage is released, because of the fact that an innocent purchaser for value of the note might lose his security when the Recorder enters the release on the strength of an affidavit such as the one I am inclosing herewith.

"Therefore at his request, I am writing this letter to get your opinion on this matter."

We also acknowledge the exhibit which was attached to your request, which is as follows:

" Release.

The Marion Steam Shovel Company, a corporation duly organized under the laws of the State of Ohio, and having its principal place of business at Marion, Marion County, Ohio, does hereby certify that it is the record holder of a certain chattel mortgage heretofore executed and delivered to it by Ray E. Antry of Moberly, Missouri; that the conditions thereof have been satisfied and the amount due thereon paid in full and the filing or recording officer of Randolph County, Huntsville, Missouri, is hereby directed to cancel and discharge the same from record, the said chattel mortgage having been filed or recorded in his office on December 28th, 1932, Book 14, Page 191, covering one Used Type 450 Gasoline Electric Revolving shovel complete, Shop Number 6358.

"In Witness Whereof the said Marion Steam Shovel Company has caused this instrument of release to be executed this 14th, day of March, 1934.

The Marion Steam Shovel Company,

by A. Gibson  
Secretary-Treasurer.



April 9, 1934.

"State of Ohio (  
Marion County ) ss.

"Before me, a Notary Public, in and for said county personally appeared A. Gibson, Secretary & Treasurer of the Marion Steam Shovel Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that he did sign and seal said instrument as such treasurer in behalf of said corporation and by authority of its board of directors; and that said instrument is his free act and deed individually and as such treasurer and Secretary and the free and corporate act and deed of said Marion Steam Shovel Company.

"IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Marion, Ohio, this 14th day of March, 1934.

WM. G. Slack.

Notary Public, Marion County, Ohio.

My commission expires Jan. 10th, 1936."

follows: Laws of 1933, Page 360, Section 11526 provides as

"There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, 'The office of the Recorder of Deeds.' "

Section 11527 R. S. Mo. 1929, provides as follows:

"The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books in which the recorder shall record all instruments of writing authorized and required to be recorded. If there is no courthouse or other suitable county building at the seat of justice, the county court shall provide an

April 9, 1934.

office for the recorder at any other place in the county where there is a courthouse and courts of record are held."

Section 11535, R. S. Mo. 1929 provides, both before and after the amendment of 1933, page 361, that the recorder give bond "conditioned for the faithful performance of the duties of his office." This condition in his bond places it squarely up to the recorder to only release mortgages in the manner provided by law and not otherwise. A recorder of deeds is liable personally to the party aggrieved for the damages resulting from an omission to perform a duty imposed on him by law, or for a performance of such a duty in a negligent manner, for it was said in *State ex rel. v. Green*, 100 S. W. 1115, 124 Mo. App. 80, 1. c. 88:

"The defendant, as a public officer, stands positively charged by the statute with the performance of his duties in a specific manner. \* \* \* It is suggested, however, that while it is true the law presumes the due execution of official duties by a public officer, and the relator had the right to presume the defendant would do his duty, yet notwithstanding this presumption, the relator himself is presumed to know the law, as is every citizen. \* \* \* And this being true, that he is charged with knowledge of the manner provided by the statute quoted for satisfying deeds of trust \* \* \* P."

And in your case, all innocent purchasers for value of notes secured by chattel mortgage are presumed to know the law as it relates to the recorder's duty to satisfy chattel mortgages and that when the statutory method is complied with, the recorder's act of satisfaction is essentially ministerial.

On this same subject, *Corpus Juris*, Vol 53, page 1070, Section 2, states the law thus:

"Notwithstanding the performance of his duties requires, to some extent, the exercise of judgment and discretion, or that he is vested with quasi judicial powers the office of register of deeds is essentially a ministerial one."



Section 11544, R. S. Mo. 1929, provides as follows:

"The several classes of instruments of writing mentioned in the several subdivisions of the preceding section shall be recorded in separate books, according to their classification therein."

Section 11545, R. S. Mo. 1929, provides as follows:

"Instruments in writing, conveying chattels or personal property alone, which by any law of this state are required to be recorded or admitted of record in any recorder's office in this state, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

Section 11546, R. S. Mo. 1929, provides as follows:

"The recorder of each county in this state shall keep in his office a well-bound book or books, to be known as the 'abstract and index of deeds,' which shall have appropriate columns properly ruled and headed for each of the following items, namely: Names of grantors and grantees, date of instrument, date of filing instrument for record, nature of instrument, book and page where recorded, description of land conveyed or affected; said books shall be divided into two equal parts, the front part to be alphabetically arranged for the names of grantors, and the back part to be alphabetically arranged for the names of grantees."

Section 11549, R. S. Mo. 1929, provides as follows:

"When any instrument of writing conveying or affecting real estate authorized by law to be recorded shall be filed in the recorder's office for record, the recorder shall enter the same in the names of the grantors and grantees in both parts of the abstract and index of deeds, filling each appropriate column with the several items contained in such instrument in alphabetical order, in the names of the grantors and grantees; and if the instrument be made by the sheriff,

April 9, 1934.

in the name of the sheriff, and the defendant in the execution, or of the person whose land is sold, and of the grantee; and if made by an executor or administrator, in the name of the executor or administrator, and of the testator or intestate, and of the grantee; and if by attorney, in the name of such attorney and of his constituent and of the grantee; and if by a commissioner, in the name of such commissioner, and of the person whose land is sold, and of the grantee."

It would seem that the proper interpretation of the law, required a recorder to keep a record of chattel mortgages separate from his record recording real estate, and that he index his chattel mortgages in a book or books known as the "abstract and index of deeds". It is provided that the index pages be properly ruled and headed as follows:

Names of grantors	Names of grantees	Date of instru- ment.	Date filed	Nature of instru- ment.	Where files are located	Descri- ption of Property	Date Satisfied.
:	:	:	:	:	:	:	:
:	:	:	:	:	:	:	:
:	:	:	:	:	:	:	:

It is provided that this index shall in the same book arrange grantors' and grantees' names alphabetically.

It was said in *Emerson Brantingham Implement Co. v. Rogers* (App.) 216 S. W. 994, 1. c. 995:

"The recorder correctly recorded it in a book used to record miscellaneous conveyances affecting real-estate, and not in a separate book used to record chattel mortgages, as required by section 10383, R. S. Mo. 1909. (Now Section 11545, supra.) Nor was there any index made of such mortgage, as required by section 10384 and 10387 R. S. Mo. 1909, (Now 11546 and 11549, supra.) which seems to be made applicable to chattel mortgages by Section 2861 R. S. Mo. 1909. (Now 3097 R. S. Mo. 1929.)"

Section 3097 R. S. Mo. 1929, provides as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a non-resident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such recorder shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county, or, in case of the city of St. Louis, upon the records of said city, in the office of the recorder of deeds; and such instrument, when acknowledged and recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

Section 3099, R. S. Mo. 1929, provides as follows:

"Such recorder shall enter in a book, to be provided by him for such purpose, the names of all the parties to such instrument, arranging the names of such mortgagors or grantors alphabetically, and shall note thereon the time of filing such instrument or copy, for which said recorder shall re-

April 9, 1934.

ceive a fee of ten cents. Such mortgage or deed of trust when satisfied, shall be discharged by either of the following methods:

"1. By the mortgagee, cestui que trust, his agent or assigns, on the margin of such index, which shall be attested by the recorder, for a fee of ten cents.

"2. Upon the presentation by the mortgagor or grantor of the original mortgage or deed of trust, and upon such mortgagor or grantor making affidavit before such recorder that the instrument presented by him in the original of the copy on file, and that such mortgage or deed of trust has been fully paid and satisfied, for which such recorder shall receive a fee of ten cents.

"3. Upon presentation or receipt of an order in writing, signed by the mortgagee or cestui que trust thereof, attested by a justice of the peace, or any notary public, stating that such instrument has been paid and satisfied.

"When either of these provisions have been complied with, it shall be the duty of the recorder to enter in a column for that purpose the word 'satisfied,' giving date, and the fee for such service shall be ten cents. All fees for the release of such mortgage or deed of trust shall be paid by the mortgagor. When a chattel mortgagee shall be satisfied as above provided, the recorder may deliver said mortgage to the holder of the note secured thereby, or, if the holder of said note refuse to receive the same the recorder may destroy said mortgage: Provided, that the recorder may deliver to the parties entitled thereto, or destroy all such mortgages now remaining on file in his office and which have been entered satisfied on the chattel mortgage register."

April 9, 1934.

Under the provisions of 3097 *supra*, we see that a chattel mortgage may be recorded as real property conveyances are recorded, or may be filed in the original or by copy, and that when filed it has the same effect as if it was spread upon the record in the manner provided for making real property conveyances. The methods of discharging a chattel mortgage which has been recorded or filed is set out in Section 3099, and these three methods of discharging a chattel mortgage should be recognized by the recorder as sufficient evidence of satisfaction. The recorder, being a ministerial officer, has but to follow the statute, which is directory as to his powers, and he then is not personally liable, for he has done that which he was authorized by law to do. It is true that Section 3099 is rather ambiguous, for it provides methods of release for chattel mortgages "when satisfied," and in the same section provides three methods which when followed it becomes his duty to enter up satisfaction on the record. Under these statutory methods one might hypothecate a case where it becomes the recorder's duty to "satisfy" a chattel mortgage in compliance with the statute which in fact has never been actually satisfied. It is not for the recorder to hypothecate. He has no personal discretion but must only follow the statute to be protected in his official conduct. It is true that the legislature did not intend a chattel mortgage to be released until it be satisfied, but on the other hand they provided exact circumstances under which *prima facie* evidence of satisfaction must be accepted by the recorder, unless of his own knowledge he is aware that these evidences, when submitted, are a trick and a fraud.

Since chattel mortgages may be recorded as real property mortgages are recorded, the first method under Section 3099 was provided so that a marginal release can be made when the chattel mortgage is copied into the record and not filed. In such cases the record can and should show satisfaction by the same method that real property mortgages are now satisfied as specially outlined in Laws 1933, page 196, Section 3078 *supra*, but a recorded chattel mortgage is also subject to a marginal release when method two or three of Section 3099 *supra*, is complied with. Under method two and three, instead of the marginal notation required under method one, that the notes were produced and cancelled, the margin of the record should show that the original mortgage was presented by the mortgagor showing on its face the affidavit of the mortgagor before the recorder that it had been satisfied and paid, or the margin of the record should show that the recorder had been presented with an affidavit by the mortgagee or cestui que trust stating that the recorded mortgage had been fully paid and satisfied.

*Case*  
In those cases where the chattel mortgage is recorded by filing them, that part of Section 3099 dealing with marginal



April 9, 1934.

releases on the record is not to be followed, because a marginal release on the record proper was not intended when the chattel mortgage was recorded by filing a copy with the recorder. When recording a chattel mortgage by filing is the method followed, then it is the duty of the recorder, when the mortgage is satisfied under provisions two or three of Section 3099, to let his record show satisfaction by writing the word "satisfied" in the column provided in the index book for that purpose and in the same column place the date that the notation "satisfied" is entered. When the chattel mortgage is shown satisfied by entry on the index, the recorder may determine positively who is the holder of the notes secured thereby and deliver the mortgage to him only, or he may destroy the mortgage upon the holder of the notes refusal to accept the satisfied mortgage then on file.

Whenever a chattel mortgage has been filed and mortgagor or grantor makes an affidavit to the recorder substantially as follows: viz.

"Before me appears \_\_\_\_\_  
the (mortgagor) (grantor) in the mortgage  
indexed in Book \_\_\_\_\_ Page \_\_\_\_\_, who  
presents the original mortgage and upon  
which he recognizes the notation made by  
the holder of the note which notation is  
substantially as follows, 'This chattel  
mortgage is the original of a copy now on  
file in the recorder's office and the same  
has been fully paid and satisfied and is  
hereby ordered 'satisfied' of record."

\_\_\_\_\_  
(Mortgagor) (Grantor)

Subscribed and sworn as true facts before  
me this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Recorder. "

In such a case, it is the duty of the Recorder to mark the index "satisfied" and preserve his affidavit.

Whenever a chattel mortgage has been filed and thereafter the mortgagee or cestui que trust makes an affidavit before a notary public or Justice of the Peace, which affidavit be presented to the recorder and is substantially as follows: viz.

April 9, 1934.

"Before me \_\_\_\_\_  
(a notary public) ( a justice of peace)  
appeared \_\_\_\_\_ (the mortgagee)  
(the cestui que trust) and takes oath that  
the chattel mortgage recorded in Book \_\_\_\_\_  
Page \_\_\_\_\_ in \_\_\_\_\_ County, Missouri, has  
been fully paid and satisfied and is here-  
by ordered 'satisfied' of record.

\_\_\_\_\_  
(Mortgagee) (Cestui que trust)

Subscribed and sworn before me this \_\_\_\_\_  
day of \_\_\_\_\_.

\_\_\_\_\_  
(Notary) (Justice of Peace).

In such a case it is the duty of the recorder to mark  
the index "satisfied" and preserve his affidavit.

CONCLUSION.

The exhibited affidavit submitted and attached to  
your request, is in our opinion a sufficient compliance with  
method three, outlined in the laws as a method calling for the  
recorder to mark the index record as "satisfied". It is not  
for the recorder to question the exhibit, unless he be apprised  
that it be presented in perpetration of a fraud and is not ex-  
ecuted in good faith. The recorder, when releasing chattel  
mortgages is but a ministerial officer in the performance of a  
ministerial act, and he has only to follow the directions of the  
statute, to avoid personal liability.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK  
Attorney General.

WOS:H



RELATING TO AUTHORITY OF COUNTY COURTS TO MAKE APPROPRIATION FOR REPAIR OF BRIDGES IN SPECIAL ROAD DISTRICTS:

April 27th, 1934

5-14



Mr. Lewis B. Hoff  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri

Dear Sir:

We acknowledge receipt of your letter under date of April 16th, 1934 in which you state and inquire as follows:

"The opinion of your department is requested on the following question:

May the County Court, under the county budget law, use the funds of Class 3 for the purpose of repairing a bridge in a special road district where the cost of such repairs will exceed fifty dollars (\$50.00) ?

You will note that Section 7900 R.S. Mo. 1929 provides that repairs necessary at one time costing more than \$50 shall not be required to be done by the road district.

The specific case at hand is a large bridge in a special road district. The repairs on the floor of the bridge will require a large lumber bill.

I would appreciate an opinion at your earliest convenience."

I.

County courts may not appropriate funds out of Class 3 of the county budget for repairing bridges in special road districts.

We are not advised by your letter whether the special road district referred to is organized under Chapter 42 Article 9, or under said chapter and Article 10. If under Article 9 of said chapter, we are referred to section 8039 R.S. 1929 which reads as follows:

"BOARD MAY BUILD BRIDGES.-- Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair

Mr. Lewis B. Hoff

April 27th, 1934

and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district: PROVIDED, HOWEVER, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

If under chapter 10 of said chapter, we are referred to Section 8065 M.S. 1929, and said section in part reads as follows:

TOOLS, MACHINERY, ETC., TO BE DELIVERED TO COMMISSIONERS--THEIR POWERS AND DUTIES.--  
.....Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: PROVIDED, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

In consideration of section 8039 Supra, we find that it is purely optional with the county to give assistance to special road districts to repair bridges, if there are any funds available for that purpose.

Under Section 2, Laws 1933, page 341, we find the provisions of the county budget law and class 3 thereof reads as follows:

Mr. Lewis B. Hoff

-3-

April 27th, 1934

"Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

From the above it appears that the county is not vested with any authority to make appropriations for upkeep, repair or replacement of bridges in special road districts.

II.

Commissioners in special road districts organized under Article 10 of Chapter 42 have exclusive control in repairing bridges in their districts.

Under Section 8065 Supra. it is provided that the commission shall have the exclusive control over all bridges in their district, and to improve or repair same, and shall at all times keep all bridges in as good condition as the means at hand will permit.

From the express statutory provision as cited above, it is the opinion of this department that the county court may not appropriate any funds out of class 3 of the county budget law to repair bridges in special road districts in their respective counties, and further any aid given by the county court for such purpose out of any other funds available is wholly discretionary with the county court.

We trust you will find this helpful in solving your problem.

We herewith inclose a copy of the opinion given out by this department, on the manner of computing relationship under Section 13 Article XIV of the Constitution.

Very truly yours,

W. W. Barnes

Assistant Attorney General

APPROVED:

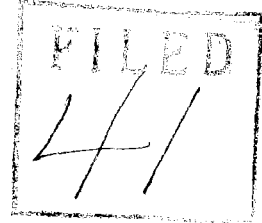
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Attorney General

SCHOOLS:-Under Section 9292, R. S. Mo. 1929, unless district contains three or more resident pupils eligible to take ninth and tenth grade work, board may not furnish teaching for ninth and tenth grades

May 1, 1934. 5-14

Mr. Lawrence Holman,  
Prosecuting Attorney,  
Moberly, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"One of the rural school districts in this County has, for a number of years, maintained ninth and tenth grade work, I suppose under Section 9292, Revised Statutes, 1929. During the past year there have been only two resident pupils in these grades, although there have been some six or seven from other districts taking advantage of this work.

At the present time it appears that there will be no resident pupils attending either of these grades next year, although there probably will be a number from adjoining districts.

A number of the taxpayers of the district came to me a short time ago and asked for an opinion as to whether or not the school board could legally continue to maintain these grades, under the above state of facts, and I wrote them an opinion to the effect that the board could not maintain this work for the reason that there were not at least three resident pupils eligible for said additional school work. Others interested have asked that I obtain your opinion on this question and I am therefore submitting this request for an opinion from your office, as to whether or not a district school can maintain ninth and tenth grade work when there are less than three resident pupils."

Section 9292, R. S. Mo. 1929, among other things, provides:

"Whenever a school district within this State contains three or more children who

May 1, 1934.

have completed the eight elementary grades of school work, the board of directors may provide for the teaching of the ninth and tenth grade work. If the board of directors of the school district, after being requested to provide for the teaching of the ninth and tenth grades, refuse, then upon the filing of a petition twenty days before the annual school meeting with the clerk of the district, signed by ten or more qualified voters residing in said school district, directed to said board of directors, the board of directors shall submit the question at the annual school meeting, and if carried by a majority vote, the school board shall provide for the teaching of said grades.\*\*\*\*\*

As we interpret the above section, it is only where the school district contains three or more children who have completed the eight elementary grades that the district has the privilege of teaching the ninth and tenth grades. The above section provides that where there are three or more children in the district who have completed the eighth grade, the directors may provide for the teaching of the ninth and tenth grades. That provision leaves it purely optional with the board as to whether or not the ninth and tenth grades shall be taught. The section further provides, however, that upon a failure of the board to provide for the teaching of the ninth and tenth grades, after being requested so to do, that an election shall be held and if carried the ninth and tenth grades shall be taught.

Since there will be no children, residents of the district, who are qualified to take the ninth and tenth grade work next year, we do not believe that it is proper for the board to furnish teaching for the ninth and tenth grades. The fact that there are children from other districts who will attend school does not authorize the teaching of these extra grades, as we believe that it is only where there are three resident students eligible to take the ninth and tenth grades that the board may furnish the higher instruction.

It is therefore the opinion of this Department that the district must contain three or more children as residents who have completed the eight elementary grades of school work before the board may provide the teaching of the ninth and tenth grade work.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

Attorney General.

RELATING TO SECURITY OF DEPOSITORIES OF CITIES OF THIRD  
CLASS:

5-19  
May 8, 1934



Mr. John Hogan  
City Clerk and Ex-Officio Collector  
Maplewood, Missouri

Dear Sir:

We acknowledge your letter of date April  
20th, 1934, in which you state and inquire as follows:

"May we ask your opinion in re:  
liability for loss of City Funds  
through bank failures.

All our funds are handled as per State  
law, secured by collateral of United  
States Bonds or Securities, held in  
the amount of 10% above the actual  
total deposit.

All collections are transferred monthly  
from the Collector to the Treasurer.

Collector is under \$10,000.00 bond.  
Treasurer is under \$10,000.00 bond.

The Bonding Company states that the  
Collector and the Treasurer are each  
personally liable for any loss over and  
above the bond average.

They demand the Collector to transfer  
daily all collections to the Treasurer.  
What, in your opinion is the reason for  
this demand. What liability do these  
officials assume?

We are enclosing herewith a copy of our  
agreement with the Citizens National Bank.

In case of bank failure, could the City  
levy on the U.S. securities which are put  
up as collateral by the depository bank?"

I.

Depositories of cities of the third class  
shall secure funds of such cities, in the  
manner provided by statute.

Mr. John Hogan

May 8, 1934

Section 6794 Revised Statutes 1929, relating to cities of the third class, reads in part as follows:

"Within five days after the selection of such depository, it shall be the duty of the banking corporation, association or individual banker so selected to execute a bond payable to the city, to be approved by the mayor and filed with the city clerk, with not less than three solvent sureties, who shall own unencumbered real estate in the state of as great value as the amount of said bond--the penalty of said bond to be at least double the revenues of the city for any one year, and conditioned for the faithful performance of all the duties and obligations devolving by law or ordinance upon said depository, and for the payment upon presentation of all checks drawn upon said depository by the city treasurer, whenever any funds shall be in said depository applicable to the payment of said check, and that all funds of the city shall be faithfully kept by said depository and accounted for according to law; and for a breach of said bond, the city, or any person injured, may maintain an action in the name of the city, to the use of the person injured thereby."

There does not appear to be any authority in the statute for a city of the third class to accept in lieu of real estate as security, bonds of the United States or of the State of Missouri.

It will be observed, that depositories of county funds may so secure county funds, but the authority is derived from section 12187 R.S. 1929.

The fact that your city operates under commission form of government would not alter the case.

Section 6944 R.S. 1929, provides as follows:

"All laws governing any city under its former organization and not inconsistent with the provisions of this article shall apply to and govern such city after it



Mr. John Hogan

May 8, 1934

adopts the form of government herein provided, or all by-laws, ordinances and resolutions lawfully passed and in force in any such city under its former organization shall remain in force until altered or repealed by the council elected under the provisions of this article."

It therefore appears that all laws governing the city under its former organization, which are not inconsistent with the provisions of laws relating to commission form of government, shall apply to and govern such city.

However safe it may appear, in securing your deposits with government bonds, we are constrained to hold that no authority to the city, appear empowering it to secure their deposits in any other manner than provided by the statutory law.

## II.

It is the duty of city collector to pay into the city treasury, monthly, all moneys received by him from all sources.

Section 6785 H. S. 1929, relating to cities of the third class reads in part as follows:

"It shall be the duty of the city collector to pay into the treasury, monthly, all moneys received by him from all sources, which may be levied by law or ordinance; also, all licenses of every description authorized by law to be collected, and all moneys belonging to the city which may come into his hands. He shall give such bond and perform such duties as may be required of him by ordinance."

Section 6797 H. S. 1929, relating to cities of the third class reads in part as follows:

".....The city treasurer shall not be responsible for any loss of the city funds through the negligence, failure or wrongful act of such depository,....."

From section 6785, Supra., it appears that a city collector is required to pay monthly all funds collected by him on account of the city from any source.

Mr. John Hogan

May 8, 1934

It is only a cautionary matter that your bonding company insists that the collector pay over to the city treasury daily, for the reason when the funds belonging to the city are deposited by the treasurer in the depository, neither the collector or treasurer would be responsible for loss of said city funds through the negligence, failure or wrongful act of such depository. And too, it could be a matter of contract between the bonding company and the city collector.

Respectfully submitted,

W. W. Barnes

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Assistant Attorney-General

APPROVED:

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Attorney General

RELATING TO QUESTION, WHETHER PRESENT CIRCUIT CLERKS  
MAY RETAIN FEES EARNED IN OFFICE AND APPLY TO SALARY.

6-5  
May 23, 1934

FILED  
41

Hon. Sol Hobbs  
Circuit Clerk  
Stoddard County  
Bloomfield, Missouri

Dear Sir:

Your letter addressed to this department of date  
of May 9th, 1934 in which you state and inquire as  
follows:

"We are writing your office for an  
opinion upon the following state of facts:

The Circuit Clerk of Stoddard County  
together with his deputy, are paid  
upon a salary basis, and all fees earned  
by virtue of his office are by law re-  
quired to be turned over to the County  
General Revenue account, and he, together  
with his deputy, are in turn paid in  
warrants drawn upon the General Revenue  
account of the County.

Stoddard County is in a very bad financial  
condition, and as a result thereof, the  
warrants of Stoddard County come at large  
discounts when they can be sold at all,  
and they have just about reached the point  
where it is practically impossible to sell  
them, except at a very ruinous rate of  
discount in the neighborhood of 40 to 50%  
or more.

We desire to know, whether my deputy and  
I may apply the fees earned by my office  
in payment of our salaries, and to accept  
warrants for that part of our salaries  
over and above the amount of fees earned by  
this office.

We will appreciate an early reply."

I  
Circuit clerks may retain fees earned and  
collected, to pay deputies and assistants  
but not for their own salaries, until end  
of their present terms.

Hon. Sol Hobbs

May 23, 1934

Section 11813 R. S. 1929 provides as follows:

"The salary of the clerk, and that of his deputies and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The clerk and his deputies and assistants shall present their accounts to the county court, and said court shall draw its warrant therefor upon the county treasurer, to be paid out of any money available in the treasury."

Section 11814 R. S. 1929 provides in part as follows:

"It shall be the duty of the clerk of the circuit court to charge and collect for the county in all cases, every fee accruing to his office and to which he may be entitled, under the provisions of sections 11785, 11787 and 11788 or any other statute except, .....: that he shall file with the county clerk a report of the fees accruing to his office, and that it shall be his duty upon the filing of said report to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in such monthly report....."

Section 11816, R.S. 1929, provides as follows:

"It shall be the duty of such clerk within fifteen days (referring to the order provided in section 11810) has been made to pay over to the county treasury the amount of money so ordered paid, and to take duplicate receipts therefor, one to be by him filed in the office of the clerk of the county court, who shall thereupon charge the treasurer with the amount thereof, and if the clerk should fail to pay the money so ordered into the county treasury, the county court shall cause suit to be filed upon his official bond."

Section 11817, R.S. 1929, provides as follows:

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May 23, 1934

"If any clerk shall fail or neglect to file such statement, so verified, within the time in this article specified, he shall be deemed guilty of a misdemeanor, and shall be subject to be indicted and tried in any court having criminal jurisdiction in such county, and, upon conviction, shall be fined in any sum not less than two hundred and fifty dollars."

Section 11830 R.S. 1929, provides as follows:

"Every person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for each offense in any sum not less than fifty dollars nor more than one thousand dollars, and conviction thereunder shall work a forfeiture of his office."

The above statutory provisions while repealed in session of 1933, they are still effective as to circuit clerks until the expiration of their present term of office.

Section 11786 Laws 1933, page 369, provides in part as follows:

"Provided further, that, until the expiration of their present terms of office, the persons holding the office of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Section 11814 Laws 1933, page 372, provides in part as follows:

"It shall be the duty of the clerks of all courts of record to collect, in all cases, every fee accruing to their office.....and quarterly such clerk shall pay into the county treasury the amount of any fees collected in excess of the sums permitted to be retained for services and pay of deputies and assistants....."

It will be observed that the word "shall" used in the sections R. S. 1929 Supra. is a word of command, imperative, and leaves no discretion in the matter. The word "shall" will be presumed

Hon. Sol Hobbs

May 23, 1934

to be used in the sense as indicated unless something in the character of the statutes or the subject to which it relates, or in the contents, show that such could not have been the intention of the legislature.

In State ex rel Stevens v. Wurdeman, 295 Mo. 1. c. 586, the court in construing the word "shall" said:

"Usually the use of the word 'shall' indicates a mandate, and unless there are other things in a statute it indicates a mandatory statute. Especially is this true in a statute calling for strict construction."

From the above quoted statutes of 1929 relating to circuit clerks, we find that they employ the word "shall" with reference to their duties as to fees collected. It is therefore our opinion that circuit clerks can not retain any part or portion of fees earned and collected by them in their respective offices, in payment of their respective salaries, until the expiration of their present terms of office, but shall be paid in the same manner and to the same extent as provided in the said statutes of 1929, however, after the expiration of their present terms, then they may retain fees, up to amount of their respective salaries, and pay of deputies and assistants.

It is also the opinion of this department that the Laws 1933 are now effective as they relate to deputy circuit clerks, and that the respective circuit clerks may retain out of fees collected, not to exceed the salaries of their deputies and assistants, and apply the same to the salaries of said deputies and assistants, and pay the excess if any into the county treasury.

Respectfully submitted,

W. W. Barnes

Assistant Attorney-General

APPROVED:

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Attorney General

June 16, 1934.

6-19  
FILED

Senator W. L. Hixson,  
Ozark, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"At a regular session of the County Court held in Ozark, Missouri today there were a number of representative citizens present and they asked the County Court to provide the sheriff with the necessary firearms, so that he would and his deputies would have an equal break with desperadoes who are infesting the Ozark Hills.

It was the opinion of the committee assembled that the sheriff should be provided with a machine gun and some other equipment.

The County Clerk claims that under the budget plan as we are now run they have no money available for this purpose.

It is needless for me to explain to you how very necessary this class of equipment is. Bandits ride into a town and terrorize the citizens and shoot their way out. Our officers are as brave as the average but they stand no chance against this sort of thing. What I desire to know is this, is there some way to buy this equipment under this budget plan?"

We note from your inquiry that the County Court claims they have no money now available to purchase firearms for the Sheriff. You, of course, are familiar with the provisions of the County Budget Act, Laws of Missouri 1933, pages 340-351, inclusive. A quotation of these sections would serve no useful purpose.

This Act is now in force and all expenditures



June 16, 1934.

made by the County Court must be made pursuant to the provisions of that Statute. We do not know of any way to make expenditures for any purpose except under the provisions of the Statute. The County Court being charged with the responsibility of pro-rating and expending the County revenue under this Budget Act they naturally are the ones who know whether or not there are funds available to make the expenditure in question.

Since they are of the opinion that they have no funds at this time which can be used for the purpose of purchasing firearms, we know of no way that such purchase can legally be made without circumventing the provisions of the Act. No doubt as soon as the County Court can legally make an expenditure for this purpose under the provisions of the Budget Act they will do so.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

FWH:MS

UNTY OFFICERS: NECESSITY OF CIRCUIT CLERKS ACCOUNTING WITH MONEY  
AND NOT IN SALARY WARRANTS FOR MONEYS COLLECTED  
AND DUE AND OWING THE COUNTY.

July 27, 1934. 8-11-34



Hon. Sol Hobb,  
Circuit Clerk of Stoddard County,  
Bloomfield, Missouri.

Dear Sir:

Your letter of June 12, 1934, has been received. In this letter you state and inquire as follows:

"We previously wrote you about accepting warrants for our salaries over and above the fees this office collects and we have your answer, with opinion as to the same.

Our letter did not probably state the facts exactly as we wanted to, for what we wanted to know was could we turn in to the County Treasurer, the warrants we receive for our salary, in lieu of the fees we collect in this office and that we settle for at the end of each month.

Your careful consideration of this matter and a ruling on same would be appreciated very much. The Circuit Judge, Mr. Billings, has told us to write you."

I find no direct statutory pronouncement on the question you have submitted for an opinion. However, I do find in numerous statutes references to the method and manner in which the circuit clerk should account to the county treasurer for such county funds as the circuit clerk has collected, and the method and manner governing the cashing of county warrants.

I refer you to Section 11814 R. S. Mo. 1929, which reads as follows:

" \* \* \* \* \* It shall be the duty of the circuit clerk, upon the filing of said report, to forthwith pay over to the county treasurer all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipts therefor, one of which shall be filed with the county clerk, and every circuit clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided. \* \* \* \* \*

You will note that, in the above statutory provision, the statute contemplates that all moneys received by the circuit clerk shall be accounted for, to the county treasurer. Such statute, apparently, does not contemplate any other means of making said accounting, than with money, or its equivalent.

Section 11830 provides a penalty for the violation of this Section, which reads as follows:

"Every person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for each offense in any sum not less than fifty dollars nor more than one thousand dollars, and conviction thereunder shall work a forfeiture of his office. (R. S. 1919, 11830)"

As to the question of payments of warrants, I find the following provision in Section 12171 R. S. No. 1929:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be no money in the treasury for that purpose, the treasurer shall so certify on the back of the warrant, and shall date and subscribe the same. (R. S. 1919, 9569)"

In support of this Section is Section 12153 R. S. No. 1929, which provides that:

"All collectors, sheriffs, marshals, clerks, constables and other persons chargeable with moneys belonging to any county shall render their accounts to and settle with the county court at each stated term thereof, pay into the county treasury any balance which may be due the county, take duplicate receipts therefor, and deposit one of the same with the clerk of the county court within five days thereafter. (R. S. 1919, 9551)."

In support of the position I am taking in this opinion, I refer you to Section 12140 R. S. No. 1929, which makes a special provision for the county collector, for the receipt of warrants lawfully received in payment of taxes, which Section reads as follows:

" \* \* \* \* \* Provided, however, that nothing herein contained shall prevent the treasurer

from receiving from the collector all scrips and warrants lawfully received by him in the payment of county tax. \* \* \*

I find no such exception providing for the reception of county warrants by the county treasurer from the circuit clerk.

Along the same tenor is Section 9911 R. S. No. 1929, which states:

"\* \* \* \* \* Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant. \* \* \* \* \*

I find that circuit clerks and other employees of the county are given preference for the payment of their warrants by virtue of Section 12139 R. S. No., which reads as follows:

"\* \* \* \* \* Provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated. (R. S. 1919, 9637)"

In reference to the payment of county warrants, I find the statutory law above set forth well supported by the following excerpt from 15 C. J. Section 515, Page 606:

"As a general rule orders or warrants against counties can be satisfied only out of the revenue available for the payment of the claims represented by such orders and warrants; and where a county order or warrant is on its face payable out of a special fund, the holder having accepted the same can look only to such fund for the payment of his claim, and cannot recover payment after such fund has been exhausted, unless the county has diverted the money of such fund from the payment of the warrants drawn against it and has used the same for other purposes. \* \* \* \* \*

It is necessary to inquire into the nature and character of county warrants before definitely deciding the question before us. I look to 15 C.J., Section 307, Page 598 for a specific definition, which reads as follows:

"A county warrant is merely an order on the treasurer to pay a certain sum of money. While it is prima facie evidence of an indebtedness on the part of the county and of the validity of the claim for which it was issued, it is not a conclusive adjudication in the sense that a judicial decision is, and the county is not estopped from afterward questioning its validity. Also it is but evidence of a pre-existing indebtedness; it is not a debt, except within the meaning of some constitutional provisions, when it is to be satisfied out of the revenues of future years. In a sense a county warrant is a promise by the county to pay, and it has been likened to a promissory note, although it is to be distinguished from a bond, and it does not possess the elements of a contract. It is a means and a safeguard provided by law for the disbursement of the public money of the county by the officers intrusted with its keeping and disbursement, it being specifically provided by statute in some jurisdictions that no money can be paid out of the treasury of the county except on a warrant issued by the proper authorities. \* \* \*

If the circuit clerk were allowed to account by way of salary warrants for county moneys collected by said clerk, such a practice would allow the circuit clerk to settle cash obligation to the county with unmatured obligations, it would in substance allow the circuit clerk to cash his salary warrant in a manner contrary to the statutes, which require warrants to be registered and paid out of certain funds in regular order. In addition, such a practice would possibly delay the payment of salaries of other county officials, due to the fact that county moneys had been used to cash the salary warrants of the circuit clerk.

The 1933 Legislature passed the County Budget Law, which provides that three classes of claims shall be paid prior to the payment of the salary of any county officer. - Laws No. 1933,

Hon. Sol Hobb,

-5-

July 27, 1934.

p. 340. To allow an officer collecting for and on behalf of the county fees, to apply such fees to his salary, in some instances might constitute him a preferred creditor over classes 1, 2 and 3 of the new Budget Law in the event that the county treasury did not have sufficient funds to pay all classes in full.

It is, therefore, the opinion of this department that a circuit clerk must account to the county treasurer in money, or its equivalent, for all moneys collected by said circuit clerk belonging to the county, and that to account for said moneys by using unmatured county warrants is illegal.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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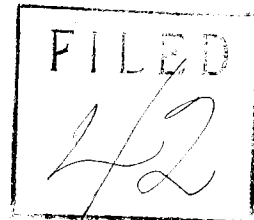
ROY McKITTRICK  
Attorney General

FER:FE



GRAIN INSPECTION:-Method of weighing grain in elevators not considered a violation of the terms of the statute.

1-15  
January 9, 1934.



Hon. J. B. Hopper,  
State Warehouse Commissioner,  
Kansas City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Section 6051, of the Grain Inspection and Warehouse laws, Article 11, of Chapter 49, as amended 1921, 1923, 1925, 1927, 1929, reads as follows:

'It shall further be the duty of the person or persons doing a public warehouse or public elevator business under this article, at some convenient time, at least once a year or when ordered by warehouse commissioner, after giving fifteen days' notice, and under the supervision of an authorized state weighmaster and inspector of the state grain inspection department, to weigh and inspect all grain at such time or times then in such warehouse or elevator, and to report to the warehouse registrar the result of such weighing and the actual amount of each kind and grade in such warehouse or elevator. During such time as such weighing is going on, the receiving and shipping of grain into and from such warehouse or elevator shall be discontinued until such general weighing has been completed.'

The enforcement of and compliance with this regulation when applied to public warehouses and elevators doing a receiving, storage, and shipping business causes no great inconvenience and can be readily complied with. However, in applying to a public elevator or warehouse connected with a mill which elevator is used for storage and filling the requirements of the mill, the enforcement of this regulation involves considerable difficulty. The main difficulty is the necessity of closing down all milling operations, thereby laying off a number of men for a period dependent entirely upon the physical capacity for handling grain of the connecting elevator, and in



some cases this would mean a period of three or four weeks, and cause considerable expense, inconvenience, and interruption of the mill grinding and carrying on its business. In order to prevent this delay, we are asking an opinion as to the legality of the following procedure.

During such time as the weighing is going on for the purpose of this regulation the unloading or loading out of all grain is stopped, but permitting grain to be taken from the elevator to the mill for grinding purposes, warehouse receipts being cancelled for each amount sent to the mill. It is understood that this movement to the mill does not involve the use of box cars, but is conveyed by means of belts to the mill from the elevator. While this is going on, the contents of each bin or tank, except those being used to furnish the mill grain for grinding, are weighed and inspected and sealed at the bottom to prevent the grain being reweighed, or moved until the entire operation of weighing up has been completed.

During this operation there will have been a number of bins or tanks either entirely or partly emptied as a result of drawing wheat to continue the mill in operation. After all grain, except that in tanks or bins which were used for milling, has been weighed, inspected, and sealed, then the entire plant is closed down to weigh the remnants left in the bins or tanks which were used to continue the mill in operation. This method cuts down the period of mill inactivity to a minimum and permits milling operations for most of the period of the weigh-up. The advantage of this method for the mill operator can be readily seen. There would be a disadvantage because of not having a particular time, date or cutoff for checking outstanding warehouse receipts with the amount and grades in the elevator warehouse receipts with the amount and grades in the elevator at that particular time, and the possibility of some grain being ground into flour which would not meet the receipts surrendered as to grade. However, this is very remote as all grain going into the mill to be ground is inspected by our inspectors.

Another disadvantage of this method would be that it does not comply with the interpretation of the regulations contained in Section 6051. Please bear in mind that under the method described all grain is weighed, inspected and sealed, except that ground into flour, for which grain receipts are cancelled

as it is run into the mill and graded by our inspectors."

You ask whether the portion of Section 6051, which is now Section 13379, R. S. Mo. 1929, would be violated by the method of weighing as set out in your letter. It is apparent that the purpose of the above section is to ascertain whether or not there is sufficient grain of each kind and grade in the warehouse to cover the outstanding receipts. The statute provides "that during such time as such weighing is going on the receiving and shipping of the grain into such warehouses or elevators shall be discontinued until such general weighing has been completed."

As you point out in your letter, the closing down of the elevator and mill, where there is one in connection with the elevator, is a serious handicap not only to the business of the concern, but is a great expense and hardship upon the employees of the Company. It is apparent from your statement that it often requires three or four weeks to complete the weighing. Under the plan outlined in your letter the receiving and storing of grain is absolutely stopped, and you inquire whether it would be in violation of the section to permit the withdrawal of grain for milling purposes where the receipts are cancelled for the grain withdrawn in order to avoid the stopping of the running of the mills for the three or four weeks involved in doing the weighing. We do not believe it was the intention of the Legislature that such a serious handicap as pointed out in your letter should be inflicted upon the operators of mills in connection with warehouses. The grain withdrawn from the elevator for milling purposes is not shipped within the strict meaning of that word, and we do not believe that the plan outlined by you would be deemed a violation of the statute. We believe that the provision in the statute prohibiting the receiving and shipping of grain in such warehouses and elevators during the weighing period should be construed as directory and not mandatory. The distinction between mandatory and directory enactments is discussed in *Bituminous Paving Co. v. McManus*, 144 M. A. 593, 607, where the court says:

"The distinction between mandatory and directory enactments has often been under consideration by the courts. Into which of these classes any given statute falls is to be determined by its character and purpose. If no substantial rights depend upon it and no injury can result from ignoring it, and the purpose of the Legislature can be accomplished in a manner other than as prescribed therein and substantially the same results obtained, then the statute will generally be regarded as directory."

In *State ex rel. v. Bird*, 244 S. W. 938, 939, it is said:

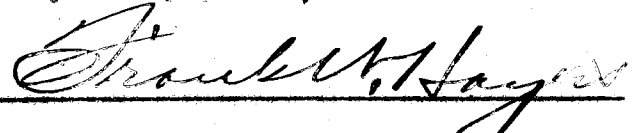
January 9, 1934.

"Under a more general rule, this construction may be sustained, in that, if a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by the law."

The evident purpose of the above section is to ascertain the relationship between the amount of grain in storage and the amount of warehouse receipts outstanding. We believe that the intention of the statute is met and the purpose thereof complied with by adopting the plan outlined in your letter. Since the evident intention of the statute can be carried out for all practical purposes by the plan you outline, in view of the doctrine announced in the above cases, we construe the provisions of the above statute to be directory, and that the method of weighing, as suggested by you, would not be in violation of the law.

We are therefore of the opinion that the provisions of the statute should be construed to be directory and not mandatory, and that the plan outlined in your letter would not be in violation of the statute as construed.

Very truly yours,



Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

WAREHOUSEMEN: Existence of outstanding warehouse receipts unrepresented by grain in warehouse, and prosecution therefor.

1-22  
January 12, 1934.



Honorable J. B. Hopper,  
State Warehouse Commissioner,  
317 Board of Trade Building,  
Kansas City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of October 26, 1933, such request being in the following terms:

"As State Warehouse Commissioner, I am charged with the enforcement of the Revised Statutes of Missouri, 1919 Grain and Inspection Laws, as amended 1921, 1925, 1927, and 1929.

These laws make certain provision whereby public warehouses can be licensed and bonded for the purpose of issuing warehouse receipts based on the inspecting and weighing of grain both into and out of the public elevators by employees of the State Grain Inspection and Weighing Department. There are also provided regulations under which the business of public warehouses shall be conducted and penalties for the violation of these regulations. Violations are extremely rare, but when it is realized that in Kansas City alone there are now approximately 25,000,000 bushels of grain on which warehouse receipts have been issued and registered under the supervision of this department, then the importance of sustaining the integrity of the receipts is very evident.

On October 4th, our St. Louis office wired that the Central A. Elevator, located in St. Louis and operated by the Flynn Grain and Feed Company, had been weighed up and checked by our St. Louis office, and that the grain found in the elevator was not equal in amount nor grade to the outstanding warehouse receipts. A conference was held October 9th at which I was requested by the Schreiner Grain Company, the holder of the outstanding warehouse receipts, to permit the loading out of the grain then in the elevator, they agreeing to submit to the Flynn Grain and Feed Company the warehouse receipts for the amounts loaded which in turn were to be cancelled by our Registrar in St. Louis. It being thought advisable to have an opinion from your office on this phase, decision was withheld until a conference could be had with your office, this being accomplished October 10th with your Mr. Reagan, who advised an opinion could not be given without a written request, although the necessity for prompt action was stressed because of possible deterioration of the grain. He did however state the matter should be placed before the circuit attorney of St. Louis. This was done the afternoon of

2. Honorable J. B. Hopper

January 12, 1934.

October 10th, and resulted in our being referred to your assistant Mr. J. H. Lennon in St. Louis, who upon explanation of the circumstances wrote an opinion, copy of which is enclosed.

In line with Mr. Lennon's opinion the grain has been loaded out and there are now warehouse receipts outstanding for which there is no grain in storage in the Central A. Elevator, and with this in mind, Mr. Lennon was again consulted by our letter of October 19th in which was expressed our opinion that the proper procedure to take would be to make written demand in person on the Central A. Elevator Co., for the surrender of the outstanding warehouse receipts for cancellation. Then if they refused to do so, it would be necessary to start prosecution under the State Warehouse Law. Copies of our letter and Mr. Lennon's reply are enclosed. We are also enclosing copy of a letter written by the Fidelity and Deposit Company of Maryland to our Mr. Newell in St. Louis, giving their consent to the disposal of the small amount of grain left in the elevator, after all possible delivery had been made on outstanding warehouse receipts.

In accordance with the fourth and fifth paragraphs of Mr. Lennon's letter of October 23rd, I am submitting the facts in this case, and will appreciate an opinion regarding prosecution and all possible phases entering into it which would influence our policy in handling this particular matter. I believe the important facts have been covered, but please advise if additional information is necessary."

R. S. Missouri 1929, Section 13344 provides as follows:

"Sec. 13344. Receipts - fraudulent - penalty.--Any warehouseman or elevator-man of any public warehouse or public elevator created by this article, or employe of such warehouse or elevator, or owner or manager connected with same, or any other person who shall be guilty of issuing any warehouse or elevator receipt for any property not actually in such warehouse or elevator at the time of issuing such receipt, or who shall be guilty of issuing any warehouse or elevator receipt in any respect fraudulent in its character, either as to its date or the quantity, quality or inspected grade of such property, or who shall issue a duplicate receipt without marking the same 'duplicate', or who shall forge the registrar's name to an original or duplicate warehouse or elevator receipt, or who shall remove any property from such warehouse or elevator except to preserve it from fire or other sudden danger, without the return and cancellation of any and all outstanding receipts that may have been issued to represent such property, shall, when convicted thereof, be guilty of a felony, and in addition to other penalties prescribed by this article, may be punished by imprisonment in the penitentiary

January 12, 1934.

for not less than two nor more than ten years."

The above statute is self-explanatory, and, as we understand your letter and request, the transaction referred to in such letter and request must be covered by such statute because, as will be observed in the above statute, a definite fraudulent intent is not made necessary for many of the violations defined by such statute.

Section 13354 provides as follows:

"Sec. 13354. Warehouseman or elevatorman - prosecution of duty of prosecuting attorney.--In all criminal prosecutions against a public warehouseman or public elevatorman for the violation of any of the provisions of the article, it shall be the duty of the prosecuting attorney of the county in which such prosecution is brought, or if in the city of St. Louis, the duty of the prosecuting attorney of said city, to prosecute the same to a final issue in the name of and on behalf of the people of the state of Missouri."

Section 13369, which deals with the duties of the Warehouse Commissioner, provides in part as follows:

"\* \* \* Whenever it shall come to his knowledge, or he shall have reason to believe that any law governing the public warehouses or elevators of this state under this article is being or has been violated, he shall cause to be prosecuted or prosecute all persons guilty of such violation.\* \* \*"

Section 13373 provides as follows:

"Sec. 13373. Attorney-general and prosecuting attorney-duty of.-- It shall be the duty of the attorney-general and the state's attorney in every county, if in cases brought in St. Louis, the state's attorney for said city, or on the request of said commissioner to institute and prosecute any and all suits or proceedings which they or either of them shall be directed by said commissioner to institute and prosecute for a violation of this article or any law of this state concerning public warehouses or public elevators as constituted by this article, or the officers, employees, owners, operators or agents of such warehouses or elevators."

We believe that the answer to your inquiry is found in the above statutes. Thus, by Section 13369 it is made the duty of the commissioner to investigate violations of the statutes respecting inspection of warehouses containing grain and to "cause to be prosecuted or prosecute all persons guilty of such violation" which means that it would seem to be the duty of the commissioner to call violations to the attention of the proper authorities for prosecution. The proper authority for prosecution by Section 13354 would be the prosecuting attorney of the county in which the prosecution is brought

4. Honorable J. B. Hopper

January 12, 1934.

and perhaps under Section 13373 of the Attorney General.

It is our opinion that, on our understanding of the facts that warehouse receipts were issued without the property actually being in the warehouse, or that property was removed without return and cancellation of such receipts, that either of such acts would amount to a violation of Section 13344 which provides that such violations are felonies punishable by imprisonment in the penitentiary under Section 13344, and that the proper authority to whom such violation should be reported would be the Prosecuting Attorney of the county where the prosecution is to be instituted, or the Attorney General, and that it would be the duty of the Warehouse Commissioner to make such report.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.



NEPOTISM:-Where relative is not appointed to hold an official position, relative may assist office-holder without being a violation of Section 13 of Article XIV of the Constitution of Missouri.

3-5  
February 26, 1934.

Mr. E. L. Hirst,  
County Treasurer,  
Greenfield, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am County Treasurer and Ex-officio Collector of this County. As you know, there is no provision for hiring extra help and whatever I have must be hired by me and paid for out of my regular earnings. This being the case, would I be allowed to hire a relative?"

Again, I have a son who is a student in the Oklahoma College of Agriculture. During vacation, which begins on the 24th of May, he would be glad to assist me without pay as he is anxious to learn the business of the office. Is this permissible?"

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

As we construe the above section of the Constitution, any public officer who names or appoints any person related within the fourth degree to some official position makes himself liable to forfeiture of office. The test is, as we interpret it, whether or not the person is appointed to an official position and renders service to the State in such official capacity. We do not believe that it was intended that a public officer might not avail himself of personal

February 26, 1934.

service of the members of his family where they are not paid out of the public funds and where they are not rendering service to the State in an official capacity.

In the first instance about which you inquire, you intend to hire some extra help. This extra help would not be paid out of State funds, but would be paid out of your own earnings. So long as such person is not appointed to an official position created by statute, then we believe that you may employ a relative.

We do not believe it would be a violation of the constitutional provision for you to permit your son, while on vacation, to assist you in your office without pay. He is not being appointed to an official position and he is not being paid out of State funds, and we conclude that this would not be an act of nepotism.

It is the familiar rule that the father, as such, is entitled to the services and earnings of his unemancipated children. That well-recognized rule is expressed in 29 Cyc. 1623, where it is said:

"The father is the head of the family. He is entitled to the services and earnings of the children so long as the latter are legally under his custody or control and unemancipated."

We do not understand that this constitutional provision has changed that well-recognized rule. The father, whether a public officer or not, is still entitled to the services of his unemancipated children. Where such services are performed for him, such relative is not rendering service to the State in an official capacity, as contemplated by said constitutional provision.

It is therefore our opinion that so long as the relative, son or otherwise, has not been appointed to an official position and is not serving the State in an official capacity, it would not be in violation of the nepotism provision for you to employ such person to assist you in the office.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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Attorney General.

FWH:S

CIRCUIT CLERKS - Duty to include all costs in criminal costs bill.  
CRIMINAL COSTS - Duty of circuit clerk in making criminal costs bill.

3-13

March 10th, 1934.



Hon. Ellis W. Howlett  
Clerk of Circuit Court  
Mississippi County  
Charleston, Missouri

Dear Sir:

We received your letter of February 20th, 1934, asking for an opinion upon the duties of the circuit clerk in certifying to criminal costs bills. In this connection, we call your attention to Section 3841, R. S. Mo. 1929:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

You will note that the above section requires the circuit clerk, in making out the costs bill, to tax all costs which have accrued in the case. The circuit clerk is not required to be the judge of the law and the facts in making out costs bills. It is the duty of the clerk to make out such costs bills and include thereon all fees due officers and witnesses, and other costs that have accrued in the case. Costs which have been specifically taxed against the defendant need

#2 - Hon. Ellis W. Howlett

not be included in the costs bill certified to the state or county.

It is made the duty of the prosecuting attorney and the judge of the circuit court to pass upon the facts and the law relating to each cost bill, and this duty is specifically detailed in Section 3842, R. S. Mo. 1929, wherein it is made the duty of the prosecuting attorney to ascertain,

- 1st. Whether the services have been rendered for which charges were made.
- 2nd. Whether the fees charged are expressly given by law for such service.
- 3rd. Whether greater charges are made than the law authorizes.
- 4th. Whether said fee bill has been made out according to law.
- 5th. Whether any errors have been made, and if so to correct all errors.
- 6th. To report his finding of fact, conclusions of law, and corrections on the costs bills of the circuit judge.

If it appears to the circuit judge that the prosecuting attorney's findings, conclusions, and corrections are formal and correct, then the circuit judge and the prosecuting attorney shall certify the costs bill to either the state or county, depending upon which is liable for the costs.

It is the opinion of this office that the clerk has no discretion in making out costs bills, and that the same should include all costs which have accrued in the case. Discretion is vested in the circuit judge and the prosecuting attorney to check over and correct these costs bills and to pass upon the law and the facts of each case. This discretion of the circuit judge and the prosecuting attorney cannot be con-

#3 - Hon. Ellis W. Howlett

trolled by mandamus. -State v. Oliver, 116 Mo. 188.

When a criminal costs bill is certified by the circuit judge and the prosecuting attorney to the county, then under the provisions of Section 3845, R. S. Mo. 1929, the county court must pay that costs bill. - State ex rel. Appleby, 136 Mo. 408 (1896).

It is, therefore, the opinion of this office that in making out criminal costs bills, the circuit clerk should certify all costs in the costs bill, and the prosecuting attorney and circuit judge will decide from the facts and the law whether the fees in that costs bill are properly chargeable to the state or county.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTICK  
Attorney General

PER:FE

PAUPERS - Funeral expenses.

COUNTIES - Liable for funeral expenses of poor persons.

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4-20  
April 10, 1934.



Missouri State Highway Patrol  
Jefferson City, Missouri

Attention: L. B. Howard

Dear Sir:

Your request of December 6, 1933 for an opinion as to the liability for the funeral expenses of an automobile driver killed by Patrolmen Brown and Massie on September 23d, 1933, one mile south of Willow Springs, has been received.

It appears from your request that T. R. Burns and Son of Willow Springs, Missouri, upon the orders of the patrolmen, took charge of the body and have now raised the question as to who is liable for the funeral expenses. We assume, for the purposes of this opinion, that the deceased had no property and no friends or relatives to pay the funeral expenses and therefore came within the class of poor persons. Under such circumstances, Section 12955 R. S. Mo. 1929 provides:

"The county court of the proper county shall allow such sum as it shall think reasonable, for the funeral expenses of any person who shall die within the county without means to pay such funeral expenses."

It is, therefore, the opinion of this office that the above statute controls under the facts covered by this opinion, and that the undertakers should present the matter to the county court of their county.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

PER:FE



State Warehouse Commissioner:

Commissioner can, in his discretion, appoint an employee of a mill as a state weighmaster for said mill, providing said weighmaster is properly bonded for appointment.



June 9, 1934.

Mr. J. B. Hopper,  
State Warehouse Commissioner,  
317-326 Board of Trade Building,  
Kansas City, Missouri.

Dear Mr. Hopper:-

We have your letter of May 19, 1934, in which was contained a request for an opinion as follows:

"Representatives of the milling industry of Springfield, Missouri, have requested consideration be given to a plan of theirs whereby they can be furnished official state weights on grain moving into and out of their mills, none of which are at present licensed and bonded under the State Warehouse Act.

"For the past twelve years and until discontinued by this Department, grain arriving at these mills was weighed by their own employees but not under the supervision of State Weighers. The weights thus obtained were given to the State Grain Inspector located there who on this information issued an official state weight certificate, collecting a fee of \$1.00 per car. This arrangement as far as can be learned, was satisfactory to all concerned but in our opinion did not meet the requirements necessary to make a state weight certificate of proper value, nor relieve the Department of embarrassing criticism in the case of a controversy where our employee would be asked if he had actually weighed or supervised the weighing. For these reasons we discontinued this practice, although knowing of no complaint and being assured of the honest intentions of all concerned.

"The plan submitted by them contemplates the bonding of an employee of each mill under a \$5,000.00 surety bond, the employee to be paid by the State, who would in turn bill on the milling company for the expenses of salary and overhead. This employee would weigh all grain received or shipped, and from his results our Department would issue an official state weight certificate for which a fee would be collected. When this employee is not weighing, he would be used by the mill in whatever capacity they desire.



June 9, 1934.

"This arrangement would enable the milling company to have an official weight certificate for settlement and involve no additional cost except the payment for the bond, because they at all times are compelled to retain one of their employees as a weigher, also using him in other capacities. The revenue accruing to the State would help the mills meet their guarantee for our inspection service since it is maintained on a self-sustaining basis, and the weighing revenue would be applied to the inspection expenses.

"Although this Department is greatly concerned in meeting the requirements of the business interests with which it is associated, still we feel such a decided departure from customary procedure should first have your consideration and opinion for legality."

Section 13360, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 13360. To make rules and regulations--chief inspector, deputy and assistants to be governed by same--fees to be paid--where.--The chief inspector of grain, the deputy chief inspector, assistant inspectors and other employees in connection therewith, shall be governed in their respective duties by such rules and regulations as may be prescribed by the commissioner, and the said commissioner shall have full power to make all proper rules and regulations for the inspection of grain, not inconsistent with this article, to include the fixing of charges for the inspection of grain and other duties of said chief inspector, deputy chief inspector and assistant inspectors and samplers and to make rules for the collection of same, which charges shall be regulated in such manner as will, in the judgment of commissioner produce sufficient revenue to meet the necessary expenses of the service of inspection and no more. All fees collected shall be turned into the state treasury, and all fees so turned into the state treasury from the inspection and weighing of grain are hereby re-appropriated to the warehouse commissioner for the purpose of paying all salaries and expenses necessary for inspecting and weighing grain, and paying all other expenses incurred in the administration of the department."

Section 13377, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 13377. Commissioner to appoint weighmasters--duties of.--The commissioner shall appoint suitable persons to act as weighmasters at such places in this state where state grain inspection and weighing may be established in conformity with the provisions of this article; said weigh-

masters shall at the places aforesaid, supervise the weighing of all grain which may be subject to inspection and weighing, etc."

Section 13381, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 13381. Weight certificates are not to be issued except by bonded state weigher--false or untrue certificates given out--penalties.--It shall be unlawful for any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate or to issue or sign any paper or ticket purporting to be the weight of any car, wagon, sack or other package of grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed and in control of the scales under the provisions of this article, or to make any charge for such weighing, or purported weighing, or weight certificates, or tickets, or purported weight certificates or tickets. And any person, corporation or officer, agent or servant of such corporation who shall do any of the acts declared by this section to be unlawful, shall be deemed guilty of a misdemeanor, etc."

Section 13382, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 13382. Weighmasters--bond of--compensation.--The weighmasters provided for in this article shall each give a bond in the sum of five thousand dollars, conditioned for the faithful discharge of their duties and shall receive such compensation as the commissioner shall determine."

All of the sections above quoted are contained in Article 1, Chapter 98, Revised Statutes of Missouri, 1929, said chapter being entitled "Inspections" and said article being entitled "Inspection of Grain." In other words, said article sets forth the law of this state relating to the inspection and weighing of grain by state authorities.

A reading of section 13360 above quoted shows that the commissioner is given a general discretionary power in the management and administration of his department. The use of the word "suitable" as applied to weighmasters appointed by said commissioner (see Section 13377 above quoted) therefore means that said commissioner may appoint any person as weighmaster if that person is, in said commissioner's opinion, a person suitable for the position.

Mr. J. B. Hopper

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June 9, 1934.

In our opinion, therefore, if the commissioner desires to appoint one of the employees of a certain mill to the position of state weighmaster, and the bond provisions of Section 13382 above quoted are complied with, we can see no objection to such procedure. In order, however, to satisfy Section 13381 above quoted the employee referred to in your letter would have to be duly appointed and authorized as a state weighmaster. The employee who had been appointed to the position of weighmaster might in his spare time have and perform other duties in the mill in his capacity as mere employee. The provision in Section 13381 prohibiting any employee of a mill from performing any of the acts declared therein to be unlawful would, in our opinion, not apply in this case because when the weighing duties were being performed by said employee he would, in a legal sense, be a different person or at least acting in a different capacity, i.e. the capacity of a duly appointed and authorized weighmaster.

Since we see nothing in the article above referred to that would militate against the procedure suggested in your letter, we feel that in a legal sense such procedure would be permissible. We leave the matter of the advisability or workability of such a practice to the discretion of your Department and to you.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

Approved:

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Attorney General

State Warehouse Commissioner:

1. Under the Statutes of Missouri the Grain Inspection and Weighing Department must furnish weighing and inspection service to all grain elevators and warehouses qualifying as public elevators or warehouses.

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6-15

June 9th, 1934.

Mr. J. B. Hopper,  
State Warehouse Commissioner,  
317-326 Board of Trade Bldg.,  
Kansas City, Missouri.

Dear Mr. Hopper:-

We have your letter of May 17, 1934 in which an opinion was requested as follows:

"The code of the United States for country elevators requires every elevator doing a commercial storage business to license itself either under federal or state warehouse acts. In this connection, we will appreciate very much your prompt opinion as to whether we are compelled under the law to furnish weighing and inspection service to those elevators which may meet the requirements of the law, and obtain state license, but the business of which would not amount to enough to pay our expenses of servicing them.

"The law provides that all grain going in or out of an elevator licensed by the state, must be inspected and weighed, and since there are in Missouri a number of small country elevators which might meet the technical provisions outlined in the warehouse laws, it is very evident that it would be impossible for us to service them without considerable financial loss.

"As this issue is liable to come up in the near future, we will appreciate your prompt attention and reply."

Section 13332, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 13332. Grain to be inspected.--Receipts of grain by public warehouses in all cases shall be inspected and graded by a duly authorized inspector, etc."

Section 13377, Revised Statutes of Missouri, 1929 provides in part as follows:

"Sec. 13377. Commissioner to appoint weighmasters--duties of.--The commissioner shall appoint suitable persons to act as weighmasters at such places in this state where state grain inspection and weighing may be established in conformity with the provisions of



June 9, 1934.

this article; said weighmasters shall at the places afore-said, supervise the weighing of all grain which may be subject to inspection and weighing, etc."

Section 13360, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 13360. To make rules and regulations--chief inspector, deputy and assistants to be governed by same--fees to be paid--where.--The chief inspector of grain, the deputy chief inspector, assistant inspectors and other employees in connection therewith, shall be governed in their respective duties by such rules and regulations as may be prescribed by the commissioner, and the said commissioner shall have full power to make all proper rules and regulations for the inspection of grain, not inconsistent with this article, to include the fixing of charges for the inspection of grain and other duties of said chief inspector, deputy chief inspector and assistant inspectors and samplers and to make rules for the collection of same, which charges shall be regulated in such manner as will, in the judgment of commissioner produce sufficient revenue to meet the necessary expenses of the service of inspection and no more."

From a reading of the portions of the above quoted sections it can be seen that the state has no choice but to furnish weighing and inspection service to those elevators or warehouses qualifying as public elevators or warehouses. Fees for such can be charged accordingly in the proper judgment of the commissioner.

The point then arises as to what is to be considered a public warehouse, or what warehouses are to be governed by the laws pertaining to public warehouses.

Section 13327, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 13327. Public warehouses--public warehousemen.--All buildings, elevators, or warehouses, in all cities in this state having or which may hereafter have a population of seventy-five thousand or more, erected or used, or which may hereafter be erected or used for the purpose of storing or transferring grain of different owners, for a compensation received directly or indirectly, are hereby declared public warehouses, and the person or persons, associations, copartnerships or corporations owning such building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within this state or not, are public warehousemen within the meaning of this section."

Section 13383, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 13383. Private warehouses defined.--All buildings, elevators or warehouses located anywhere within this state, and which are used for the purpose of storing or transferring grain, or which may hereafter be erected or used for the purpose of storing or transferring grain, and are not so located or conducted as to come within the class of public warehouses as defined by section 13327, R. S. 1929, are hereby declared to be private warehouses."

Section 14367, Revised Statutes of Missouri, 1929 provides as follows:

"Sec. 14367. Certain warehouses declared public warehouses.--All warehouses in this state equipped for handling, receiving, storing, shipping, or re-shipping wheat, or other grain and in which grain is stored for hire, are hereby declared to be public warehouses, and subject to the provisions of chapter 137, R. S. 1929, and all other laws of this state, pertaining to public warehouses: Provided, that this article shall not apply to warehouses used principally for the storage of grain grown by the owner or owners of lessee of said warehouse."

Section 14368, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 14368. All private warehouses subject to laws of state pertaining to public warehouses.--All private warehouses in this state equipped for handling, receiving, storing, shipping, or re-shipping of wheat, corn, or other grain, having a storage capacity sufficient for the storage of 25,000 bushels of wheat, corn, or other grain, located in any city of this state now or hereafter having more than 5,000 inhabitants, or within ten miles of any such city and in which grain is stored for hire, are hereby declared to be public warehouses, and as such subject to the provisions of chapter 137, R. S. 1929, and all other laws of this state pertaining to public warehouses."

Section 13327 above quoted was enacted in 1915 (Laws Missouri 1915, p. 302), and Section 13383 above quoted was enacted in 1921 (Laws Missouri 1921, 1st Ex. Sess. p. 70). Sections 14367 and 14368 above quoted were enacted in 1923 (Laws Missouri 1923, p. 79).

A reading of these four sections shows that the first two are repugnant to and inconsistent with the latter two, and vice versa, in that different rules are set out for the classification of public warehouses. Obviously the sections cannot be reconciled or stand together; the definition must be the one or the other.

Mr. J. B. Hopper

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June 9, 1934.

This being the case it is a well recognized rule of law in this state that the 1923 sections must prevail. Where two statutes dealing with the same subject-matter are in conflict so that both cannot be operative, the later act will be regarded as a substitute for the earlier and will operate as a repeal by implication.

See State v. Stell, 14 S. W. (2d) 515.

State ex rel. v. Public Service Commission of Missouri, 275 Mo. 60.

The only suggestion we can make is that you make sufficient charges for your service to avoid any financial loss.

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

CMHJr:LC

Approved:

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Attorney General.



GRAIN INSPECTIONS:-Money derived from sale of surplus grain must be paid into the State treasury to be withdrawn only on proper appropriation, and cannot be expended by the Grain Inspector for any purpose.

June 11, 1934.



Mr. J. B. Hopper,  
State Warehouse Commissioner,  
Kansas City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We have a condition existing in this Department that there have been several opinions handed down on, by Attorney Generals in the past and as I am very anxious to have an opinion from your Department, I am writing you in regard to the overflow of waste grain that comes into this Department for our inspectors. In other words, out of each sample taken from the various cars, there is a small amount left over after the inspectors are through with their work.

This grain is saved, and from time to time is sold. This money obtained from the selling of this accumulated grain has in the past been used to pay for additional furniture that might be added to the Department, or any traveling expenses that are incurred by having men go from place to place, and for replacements or worn out utensils in the inspection department and laboratories, and we would like to have your opinion as to the legality of this method used in the past.

I am enclosing an opinion handed down to this Department under date of June 12, 1929, which is more explanatory than my letter, no doubt. Thanking you in advance for an early opinion in this matter."

We have read the opinion attached to your inquiry given by former Attorney General Stratton Shertel. While we respect the opinions given by the former Attorney Generals

yet in this instance we do not believe that we can concur in the ruling he has made. While we cannot find any decision passing upon this proposition, we believe that the Constitution prohibits the practices outlined in your letter.

It appears from your letter that these samples of grain are taken for the purpose of being used for inspection. The right to take the grain for inspection purposes exists simply because the inspectors are representing the State in carrying out the inspection duties imposed by statute. We must assume that the title to the grain taken for inspection purposes is in the State. If such be true, the title to that part of the grain not consumed in examination, as well as that part consumed in making your examination, must also be in the State. Under no circumstances can it be said that the title to any of this grain would be in yourself or any member of your Department because the inspectors are acting simply as agents of the State in carrying out the mandates of the Statutes. If the title to the part of the grain taken for samples is in the State, then the title to all of that taken must be in the State. The only other person who could doubt the validity of the State's title would be the person from whom the grain was taken, and since he is not a party to this question we must assume, for the purpose of this opinion, that the title to all of the grain in question was and is in the State of Missouri.

Assuming then that the title to all of the grain which is left over is in the State of Missouri the question is presented, what shall be done with the money derived from the grain after it is sold. If the title to the original grain is in the State, then the proceeds resulting from the sale of the State's property would belong to the State. Such being true, we believe that Section 43 of Article IV of the Constitution of this State applies. That section is as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law. All appropriations of money by the successive General Assemblies shall be made in the following order:

First, For the payment of all interest upon the bonded debt of the State that may become due during the term for which each General Assembly is elected.  
Second, For the benefit of the sinking fund, which shall not be less annually than

two hundred and fifty thousand dollars.  
Third, For free public school purposes.  
Fourth, For the payment of the cost of assessing and collecting the revenue.  
Fifth, For the payment of the civil list.  
Sixth, For the support of the eleemosynary institutions of the State.  
Seventh, For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

The above constitutional provision provides that "all revenue collected and moneys received by the State from any source whatsoever shall go into the treasury." While we do not contend that the proceeds from the sale of this grain can be construed as revenue collected, yet it certainly does come within the next provision because it is money received by the State for the sale of property belonging to the State. While the former Attorney General seemed to find no provision directing this fund to be paid into the State Treasury, we conclude that under the foregoing constitutional provision all the moneys derived from any source shall go into the State Treasury. Such is the plain mandate of the Constitution.

The well recognized policy of the State, as expressed in its Constitution and Statutes, is that all revenue and moneys derived from any source, except a few exceptions which do not apply in this case, shall go into the State Treasury and shall then be appropriated by the Legislature to provide the necessary means of carrying out the obligations of the State. Section 19 of Article X of the Constitution, among other things, provides as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law \*\*\*\*."

In view of the foregoing constitutional provision we are of the opinion that the proceeds derived from the sale of grain, the title of which is in the State, should go into the State Treasury, and that the money resulting therefrom cannot be expended for any purpose unless a legal appropriation is made by the Legislature. Such being true, it must necessarily follow that yourself nor the officers of your

June 11, 1934.

Department would have no right to use the proceeds resulting from the sale of this surplus grain for the purpose of buying materials or supplies for your Department, or paying expenses incurred by your men in carrying out the duties of their office. The Legislature, by its appropriations, has made appropriations for the very purpose of doing the things which you seek to do with the money derived from this grain. The money which you receive from the sale of this grain must be paid by you into the State Treasury, there to remain until such time as the Legislature sees fit to appropriate it for some appropriate purpose, as provided for under our Constitution. Unless such is done we would have a situation where your Department would be using State moneys which were not appropriated by the Legislature. Such a situation would be directly in conflict with Section 19 of Article X of the Constitution. While the amount of money involved may not be large, yet we are compelled to construe the Constitution as it is written, regardless of whether the amount be large or small, or whether such construction might result in some apparent inconvenience to the Department involved.

We are therefore on the opinion that the title to the grain in question is in the State and that when it is sold the proceeds resulting therefrom are moneys received by the State from such source and it shall be paid directly into the Treasury under Section 43 of Article IV of the Constitution; that to permit your Department to use the money derived from the sale of this grain for the purpose of carrying on the functions of your office would be permitting your Department to use State funds without an appropriation; that the money derived from the sale of this surplus grain must be paid into the State Treasury, there to remain until such time as the Legislature directs that it be paid out under a legal appropriation according to the purposes expressed in the Constitution, and that your Department would have no right to use the moneys derived from the sale of this grain for the purpose of buying furniture or equipment or paying the expenses of the men in carrying out the duties of their offices until such time as the Legislature, by a proper appropriation, authorizes its use for such purpose.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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Attorney General.



- ELECTION: A. Under Section 10278 if candidates whose name is written in receives more votes than the printed name of the other candidate, the candidate whose name is written in is legally elected.
- B. Judges of the primary have no authority to write name of candidate whose name is not printed on ballot for committee-  
July 31, 1934. man or committeewoman and hand same to voter.

Miss Josephine Howell  
County Clerk  
Vernon County  
Nevada, Missouri



Dear Miss Howell:

This department acknowledges receipt of your letter of July 27th pertaining to several questions and requesting an opinion of this department. Your letter is as follows:

"A candidate for Committeeman, who has duly filed, has been informed that a good many voters in his precinct are going to scratch his name and write in another name. He has requested me to write you and find out if the other man did receive more votes than he, would he be legally elected. He would also like to know if the Judges of the Primary have any authority to write this man's name on the ballot who has not legally filed."

Section 10278 R. S. Mo. 1929, relates to the method of electing committeemen and committeewomen and is as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: Provided, that any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot,

or party ticket on which he or she may desire to become a candidate for committeeman or committeewoman by complying with the provisions of section 10257 R. S. 1929."

By this section you will note that if no parties file for committeemen or committeewomen, the voters may elect by writing in the names. Under the last proviso a candidate for committeeman or committeewoman may have the name printed on the primary ballot if Section 10257 dealing with the manner of filing a declaration is complied with. Under the circumstances which you present, one candidate's name being printed on the ballot the other a candidate who is requesting voters to write in his name, if the candidate desires his name to be written in receives more votes than the candidate whose name is printed on the ballot, the candidate whose name has been written in will be legally elected. The primary election is for the selection of party nominees but in the case of committeemen and committeewomen it is a final or general election.

In the decision of Ousley vs. Powell, 12 S. W. (2d) p. 102, the Court held that the manner of voting in the situation which you present should be carried out as follows:

"\* \* \* These cases sustain appellant's position, but our statute and controlling decisions of our Supreme Court establish a different rule in this state. Section 4878, Stat. 1919, provides as follows: 'If a ballot should be found to contain a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole of the names designated to fill such office, but no further; but no ballot shall be considered fraudulent for containing a less number of names than are authorized to be inserted.' This section is found in the general election law, chapter 30, artl. 6, entitled 'Ballots, Voting and Returns.' In the same article, section 4895 provides: 'The provisions of this article shall apply to all the election precincts in this state.' There is no specific provision in the statute governing contests of election to office in cities of the fourth class. Section 4896, Stat. 1919, gives the circuit

court jurisdiction in cases of contested elections for county and municipal offices, and, since there is no separate provision applying to cities of the fourth class, it follows that the general provisions of law applicable to county offices also apply to offices of cities of this class, and we are clearly of the opinion that section 4878, supra, applies to a ballot cast for an officer of a city of the fourth class. This statute expressly provides that, if a ballot is found to contain a greater number of names for any office than is required to fill the office, it shall be considered fraudulent as to that office. This means, of course, that it cannot be counted for either of the parties, no matter how clearly the condition of the ballot might indicate the intention of the voter. When a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. *Horsefall v. School District*, 143 Mo. App. 541, 545, 546, 128 S. W. 33. . . ."

You further inquire whether or not the judges of primary have authority to write the unprinted name on the ballot. The object sought to be attained in Section 10257 which is as follows:

"The name of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form:

I, the undersigned, a resident and qualified elector of the (\_\_\_\_\_ precinct of the town of \_\_\_\_\_), or (the \_\_\_\_\_ precinct of the \_\_\_\_\_ ward of the city of \_\_\_\_\_), county of \_\_\_\_\_ and state of Missouri, do announce myself a candidate for the office of \_\_\_\_\_ on the ticket, to be voted for at the primary election



Miss Josephine Howell

-4-

July 31, 1934.

to be held on the first Tuesday in August  
\_\_\_\_\_, and I further declare that if  
nominated and elected to such office I will  
qualify.

(Signed) \_\_\_\_\_ "

was for a candidate to comply with the section and thereby have his name printed on the ballot. If a candidate has not complied with the section he is not entitled to have his name printed on the ballot nor can the judges legally write his name on the ballot and hand the same to the voter. It must be left to the discretion of the voter, who if he desires to write in a name, must scratch the printed name on the ballot.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
ROY MCKITTRICK,  
Attorney General.

OWN:MM

GAME & FISH: Signers on petition may make formal application and withdraw their names from petition before action has been taken on same.

10-19

October 18, 1934.



Miss Josephine Howell,  
Clerk of County Court,  
Vernon County,  
Nevada, Missouri.

Dear Madam:

This department acknowledges receipt of your letter of October 15, which is as follows:

"The county court has instructed the undersigned to write you and present to you a question which is now before the county court of Vernon County, Missouri.

In pursuance of the provisions of Section 8246, R.S. Mo. 1929, a petition was filed on August 22nd, containing 144 names of householders in Vernon County, Missouri, being more than sufficient to place the question of closed season for quails before the voters of Vernon County at the next general election. Subsequently, and on October 11th, a petition was filed by 54 of the petitioners on the other petition, asking that their names be withdrawn from the original petition. If this were done, it would leave less than a sufficient number of names on the original petition to place the question on the ballots. At the time of the filing of the second petition on October 11th, the county court had taken no official action upon the original petition whatsoever and had made no order requiring the question to be presented at the next general election or that ballots be printed therefore.

The county court would now like to know whether they have a legal right to withdraw the 54 names presented on the withdrawal petition from the original petition, and if they do so withdraw said names and the original then stands without sufficient names, should they make a court order so finding said original petition to be without sufficient names or should they disregard it altogether?"

We assume that the petition in question which was filed with the County Court was an attempt to comply with Section 8246, R.S. Mo. 1929, which is as follows:

\*\*\*\*\*Provided, that upon the filing of a petition signed by one hundred or more householders of any county and presented to the county court at any regular or special term thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question as to whether or not there should be a closed season upon quail for the next two years in their said county submitted to the qualified voters, to be voted on by them at the next election. Upon the receiving of such petition it shall be the duty of the county court to make the order as herein recited, and the county clerk shall see that there is printed upon all the ballots to be voted at the next election the following  
\*\*\*\*\*

This portion of the statute has been declared to be constitutional by the Supreme Court in the case of State v. Ward, 328 Mo. 658; however, as this has no bearing on the question, we will not quote same here.

The word "petition" as used in Section 8246, supra, is defined in that sense in the case of State ex rel. v. Tullock, 108 Mo. App. 1.c. 34, as follows:

"A formal request, written or printed and signed by one or many, preferred to a person in authority or to a legislative or administrative body, asking for the bestowal of some benefit or privilege, the concession or restoration of a right, the redress of a grievance, or such other special action as the applicants desire" Standard Dictionary.

"A legal lexicographer thus defines the word: 'A written address, embodying an application or prayer from the person or persons preferring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege or license.'

'An application made to a court ex parte, or where there are no parties in opposition, praying for the exercise of the judicial powers of the court in relation to some matter which is not the subject for a suit or action, or for authority to do some act which requires the sanction of the court; as for the appointment of a guardian, for leave to sell trust property, etc.' Black, Law Dictionary."

From the definitions above quoted, the names on a petition when submitted to a court, as in Section 8246, supra, constitute a prayer for the exercise of the duties or powers of the court. The petition does not bind the court unless it is in proper form, nor are the parties in any wise bound as in the case of a contract or the signing of a promissory note. In other words, there is no consideration for the petitioners signing the petition.

There is nothing in the statutes of Missouri which prevents persons signing a petition in the nature of or similar to the one under discussion which would prevent the signers from withdrawing their names. In the case of State v. Rupert, 122 N.E. 39, the court said:

"Unless provided otherwise by statute, the electors who have signed a petition may withdraw their names before official action has been taken thereon."

In the case of Dutton v. Hanover, 42 Ohio 215, the Court said:

"If as a result of the withdrawal, the petition fails to contain the requisite number of names, it should be dismissed."

In the case of State ex rel. Westhues v. Sullivan, 283 Mo., 1.c. 592, the court in passing upon the question of withdrawing names from a petition, said:

"After the time for filing the petitions had expired, and after the petitions had been filed with the Secretary of State, there were a number of the signers who indicated their purpose to withdraw their names. A few had so indicated before the time of the filing had expired. These

Oct. 18, 1934.

These indications were in response to post cards sent out by relator and plaintiffs. Of the former there were 671; of the latter, 5559. The former class directed their card to the Secretary of State. The latter authorized Westhues and Wood to withdraw their names. Such is the situation of the attempted withdrawals.

To our mind a single proposition eliminates both classes of the alleged withdrawals. To obviate fraud the statute (Sec. 6749, R.S. 1909) requires that each sheet of the petition shall be verified by the affidavit of the circulator of such sheet of the petition, in which affidavit such circulator shall give the names of the signers thereon and make oath that they signed it in his presence and other matters named in the statute, supra. The very purpose of the statute in requiring this formality was to obviate fraud. To get off of such a petition the action of the signer should be at least as formal. His request should at least be verified by his affidavit before some officer. This to the end that the Secretary of State might know that the signature to the request was genuine. A mere postal card or letter purporting to be signed by a signer of the petition is not sufficient. Such course would open wide the gates for fraud. These alleged withdrawals cannot be considered."

#### CONCLUSION

If the 54 names now presented to the County Court on a withdrawal petition have formally signified their desire and intention of withdrawing from the original petition, it is the opinion of this department that said petitioners can, in the manner as aforesaid, withdraw their names, and as stated in the above citation, if the petition then lacks the required number of names, it can be dismissed by the County Court.

Respectfully submitted,

OLLIVER W. NOEEN,  
Assistant Attorney General

APPROVED:

OWN:AH

ROY MCKITTRICK,  
Attorney General

CIRCUIT CLERK: Salary of Circuit Clerk of Polk County for last two years should be computed as to population on presidential vote of general election of 1932.

1-2  
December 29, 1934.



Hon. Jesse House,  
Clerk of Circuit Court,  
Bolivar, Missouri.

Dear Sir:

This department is in receipt of your letter of December 21, 1934, wherein you request an opinion as to the following:

"As Circuit Clerk of Polk County, a question has arisen whether or not I should be paid a salary until the expiration of my present term, December 21, 1934, on a basis of population computed on the presidential vote of 1928, or should it be for 1932?"

Section 11786, Laws of Mo. 1933, page 369 provides in part as follows:

"Provided further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

We construe this provision to refer to the old section, namely, Sec. 11786, R.S. Mo. 1929, the pertinent part of which is as follows:

"Provided further, the provisions of this section shall not apply to any county which now contains or may hereafter contain a city of 75,000 inhabitants or more, or to any county which now contains or may hereafter contain 80,000 inhabitants and less



than 150,000 inhabitants, in which circuit court is held in two or more places in said county; for the purpose of this section the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination: \*\*\*"

As to the question of whether or not the population should be computed on the presidential vote of 1928 or 1932, we are assuming that you were elected in 1930, which is termed the "off year".

This question was before the Supreme Court in the case of State ex rel. Moss v. Hamilton, 303 Mo. 302, wherein the Court said (l.c. 313-315):

"Relator's term began on January 1, 1919, and ended on December 31, 1922. No law was passed between those dates which increased his salary. The whole difficulty, if there be difficulty in the case, arises out of the fact that clerks of circuit courts are not elected at Presidential elections, but at what we call the off-year elections, whilst the Act of 1915 fixed the method of determining the salary by Presidential election dates and data. Were our circuit clerks elected in Presidential years, there would not be before us the peculiar and rather difficult question we have in the instant case. This Act of 1915 was in effect when relator was elected. Under it relator's salary was fixed for his whole term, but not in named dollars and cents for the whole term. The effect of this Act of 1915, was to say to relator, your salary shall be determined upon the Presidential vote of 1916, until there is another Presidential election, at which time your county may be in a lower or a higher class, according to the population indicated by the Presidential vote. The salary, in amount, was fixed by law as to relator's office in any event. If his county was not subjected to a change of class, his salary was not changed. If his county (by a decreased population) dropped to a lower class, his salary was



fixed, and was fixed before his election, although the change of class might give him a different amount. So too if his county increased in population and thereby passed to a higher class, the existing law (that in force at the time of his election) fixed for him a salary. True it was higher, but it was definitely fixed at the date of his election. If the Act of 1915 had said that the Circuit Clerk of Crawford County elected in 1916 shall receive \$1600 per year for the first two years, and \$1950 per year for the last two years of the term, there would be no question. Sec. 8 of Article 14 of the Constitution could not be invoked, because the salary would not be either increased or decreased during the term. To my mind the Act of 1915 as it now stands is no nearer a violation of Section 8 of Article 14 of the Constitution, than the supposed law. The law-makers knew the Presidential election years, and with this knowledge classified the counties as to salaries, and provided that such salaries should be determined by the last previous Presidential vote. The salary of each class was fixed, and, as said, no subsequent law has changed the fixed salaries. The mere fact that a county passed from one class to the other does not deprive the holder of the office of the salary fixed by law, and fixed, too, at a time long prior to relator's election. In our judgment Section 8 of Article 14 of the Constitution does not preclude a recovery for relator. This because his salary was fixed by law before his election, and no law since enacted has changed it, except as we may hereafter note. The cases cited have no application to this state of facts. The exact question has never been ruled before. There is some language in *King v. Texas County*, supra, which might be construed to be in support of this ruling, but the question was not squarely at issue in that case."

#### CONCLUSION

In view of the above decision, it is the opinion of this department that the salary of your office for the last two years

Dec. 29, 1934.

should be computed as to the population, based on the Presidential vote of the general election of 1932.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

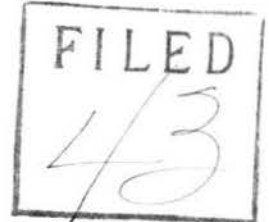
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ROY McKITTRICK,  
Attorney General.

OWN:AH

COUNTY TREASURER:

In view of Section 12132a, Laws 1933, page 338, merging office of county treasurer and county collector in certain counties, where county treasurer before end of term runs for and is elected to office of county collector, he must resign as said treasurer when he qualifies and takes office as collector.



January 12th, 1934. 67

Mr. E. C. Hutchison,  
County Treasurer,  
Vienna, Missouri.

Dear Mr. Hutchison:-

We have your letter of October 19, 1933, in which is contained a request for an opinion as follows:

"Relative to the merging of the County Treasurer, and Collectors office, at the expiration of the present treasurer term December 31, 1936, in case County Treasurer should run for the office of Collector in the year 1934, and receive the nomination and be elected at the General Election in November 1934, at what time would he have to resign the Treasurer's office to assume the duties of the Collector?"

Section 12132a, Laws of 1933, page 338, provides as follows:

"Sec. 12132a. COLLECTOR TO ACT AS TREASURER.- On and after the expiration of the term of office of the county treasurer on the 31st day of December, 1936, in all counties of this state which now or hereafter have a population of less than 40,000 inhabitants according to the last decennial United States census and not under township organization, the county collector shall take over all the duties now performed by the county treasurer and such collector shall be county collector and ex officio county treasurer and shall perform any and all duties now devolving upon the county collector and county treasurer. Such collector shall act as ex officio treasurer and perform the duties attached thereto with no additional remuneration other than such moneys as are allowed by law for his services as county collector, and he shall not be required to give any bond other than the bond given as county collector. All duties and obligations now imposed by law upon county treasurers in counties having a population of less than 40,000 inhabitants according to the last decennial United States census are hereby set over and made a part of the duties and obligations of the ex officio county treasurer as provided for in section 12132a."

E. C. Hutchison--#2

Jan. 12th, 1934.

We construe the above section to mean that such law as is provided therein shall go into effect on December 31, 1936, and not before. It may be argued that the law is to come into effect on the happening of the contingency of the present county treasurer ending his personal term by death, resignation or otherwise, but we do not so regard the meaning. The limitation set by the date above mentioned must be considered since it is a well settled principle of law in this state that in construing a statute, effect must be given to every word, clause and sentence within such statute; and that no part shall be considered meaningless.

In the case of *Ex parte Andrews*, 18 S.W. (2nd), 580, the court at page 582 stated:

"The legislative intention is to be ascertained from the words used in a statute. Another rule of construction is that effect is to be given to every word, clause and sentence within a statute. *Hannibal Trust Co., Executor, vs. Elzea, et al.*, 315 Mo. 485, 286 S.W. 371."

Further, in the case of *Cook vs. Sears, Roebuck & Co.*, 51 S. W. (2nd) 134, the court at page 135 stated:

"In considering this statute as amended we are bound to give effect to all the provisions thereof and so to rule, if possible, that no part is destroyed or made meaningless by the construction of other parts. (*State ex rel vs. Offutt*, 223 Mo. A. 1172, 26 S. W. (2nd) 1.c. 831)," etc.

In view of the above, therefore, the offices of county treasurer and county collector are to be separate and distinct county offices until December 31, 1936.

Article II, Section 19, of the Constitution of Missouri provides as follows:

"That no person who is now or may hereafter become a collector or receiver of public money or assistant or deputy of such collector or receiver, shall be eligible to any office of trust or profit in the state of Missouri under the laws thereof, or of any municipality therein, until he shall have accounted for and paid over all the public money for which he may be accountable."

E. C. Hutchison--#3

Jan. 12th, 1934.

The above section of the Constitution, of course, makes it impossible for a county treasurer under our present laws to go into office as county collector until he has resigned his office as county treasurer. The question as to when such resignation and accounting must take place now arises. The Supreme Court of Missouri sitting in Banc, all the judges concurring, has construed the word "eligible" in the above section to refer not to the time of election or appointment but to the time of the actual qualification and taking of office.

The decision above referred to was in the case of State ex inf. Major vs. Breuer, 235 Mo. 240, 138 S. W. 515. We quote the concurring opinion of Valliant, C. J., at page 250, which sustains the view above expressed:

"Valliant, C. J.- The word 'eligible' in reference to a candidate for a public office, is not always used by law-writers with the precise point in view that is presented by the learned counsel for the relator in this case, that is, whether it means eligible at the date of the election or appointment, or at the date of taking possession of the office. It may sometimes be used in reference to the one date and sometimes to the other and whether the reference is to the one or the other depends on the context and on the subject; in view of the context in which the word 'eligible' is used in section 19 of article 2 of the Constitution and of the particular subject to which it relates, I am satisfied that it refers to the date that the candidate is to take possession of the office.

"Therefore, I concur in the conclusion that the ouster should be denied. Lamm, Woodson, Graves, Ferriss and Brown, J. J., concur in this opinion."

We are therefore of the opinion that the county treasurer having been elected county collector need resign as county treasurer only on his actual qualification and taking of office as such county collector.

Very truly yours,

CHARLES M. HOWELL, Jr.,

Assistant Attorney-General.

Approved:

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Attorney-General.

RELATING TO THE APPORTIONMENT OF THE MONEYS BELONGING TO SCHOOL DISTRICTS. WHO'S DUTY?

2-17  
February 14, 1934



e 7 12  
Hon. Peter H. Huck  
Prosecuting Attorney  
Ste. Genevieve County  
Ste. Genevieve, Mo.

Dear Sir:

We acknowledge receipt of your letter in which you state an inquiry as follows:

"Inclosed find a blank form, used by our County Collector, monthly, when he pays collected school money to our County Treasurer.

Will you kindly give us the opinion of your department, on the following question, to wit:-

Is it the duty of the Collector or of the Treasurer, to make the apportionment of said money, to the "Building", "Contingent" and "Teachers" funds?

The question is raised because there is considerable work attached to make the apportionment among the different funds."

I.

It is neither the duty of the Collector of County Revenue nor the County Treasurer to apportion school moneys of a school district.



Section 9214, R. S. Mo. 1929 provides as follows:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

It is very apparent from the above statutory provision that it is the duty of the various Boards of Directors of school districts to furnish the county clerk of their county an estimate of the amount of funds necessary to sustain their school, including the estimate for a building fund. Section 9261, R. S. Mo. 1929 provides as follows:

"On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of



goods, wares and merchandise owned by them and taxable for state and county purposes: PROVIDED, that the levy thus extended shall not exceed in any one year as follows: For building purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for school purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for sinking fund, forty cents on the one hundred dollars' valuation, and a sufficient amount to pay interest on bonded indebtedness; all of which shall be extended by the county clerk upon the general tax books of the county for said year in separate columns arranged for that purpose; and the county clerks shall list the names of all persons owning any personal property who do not reside in any school district, and the value thereof; also, list all lands and town lots in any territory not organized into a school district, and shall levy a tax of forty cents on the one hundred dollars' valuation on all such taxable property, said taxes to be collected as other taxes and distributed as provided in section 9257; and it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also

on the personal assessment book, in columns provided for that purpose."

It is the duty of the county clerk to extend upon the general tax books of the county for the year in question in separate columns arranged for that purpose, Teachers Funds, Incidental Funds and Building Funds. The tax books are certified to the county collector by the clerk and receipted for by the collector and it is his duty only to collect the tax and pay it out to the proper authorities as collected by him. Section 9312, R. S. No. 1929 provides in part as follows:

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the "teachers' fund;" the money derived from taxation for incidental expenses shall be credited to the "incidental fund;" all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the "building fund;" and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the "teachers' fund" of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant:"

Hon. Peter H. Huck

-5-

February 14, 1934

It appears from the section last cited that the county treasurer opens an account for each fund specified in said section, namely, Teachers Fund, Incidental Fund, and Building Fund for all moneys received by him, and further directs what he shall place in the various funds therein named.

It is, therefore, the conclusion of this department that neither the county collector of revenue nor the county treasurer apportion moneys of the school districts coming to them by reason of taxes assessed against real and personal property, but merely handles same as it comes to them, as indicated by the tax books made by the county clerk.

Very truly yours,

W. W. BARNES  
Assistant Attorney General

APPROVED:

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ROY McINTIRICK  
Attorney General

TWB:FE

PENITENTIARY:

Director's right and duties relative to  
convicts used as servants in official residence.

5-21

May 14, 1934.



Hon. S. B. Hunter  
Director  
Department of Penal Institutions  
Jefferson City, Missouri

Dear Mr. Hunter:

This is to acknowledge your letter of recent date as follows:

"Section 8337, Revised Statutes of Missouri, 1929, under the heading of 'Rights, powers privileges of Director', reads as follows:

'The director of penal institutions shall have and exercise all the rights, powers, and privileges with reference to the residence provided for the warden of the Missouri State Penitentiary, and the employment of prisoners therein, heretofore by law granted to and conferred upon said warden with reference thereto.'

We should be pleased to have you advise us as to what are the 'rights, powers, and privileges with reference to the residence provided for the warden of the Missouri State Penitentiary, and the employment of prisoners therein, heretofore by law granted to and conferred upon said warden with reference thereto'."

Before answering your request for an opinion we wish to preface same with a brief history of the management of the Penitentiary so as to afford a background to Section 8337, R. S. Mo. 1929:

May 14, 1934.

In 1919 the law relative to management of the Penitentiary provided for a State Prison Board consisting of three members (Article 16, Chapter 111, Section 12407). No director was provided for in 1919 by statute. Article 20, Chapter 111, R. S. Mo. 1919, provided for the management, control and direction of the Penitentiary under a State Prison Board (Section 12466 R. S. Mo. 1919).

Section 12467, R. S. 1919, provided in part as follows:

"The warden \* \* \* \* \* shall be appointed by said prison board \* \* \* \* \* shall receive as full compensation for his services the sum of \* \* \* \* \* per annum, including fuel and lights, and shall reside within the precincts of the penitentiary in a house provided for that purpose."

In 1921, Laws of Missouri, 1921, page 548, et seq., the Legislature provided and created a department to be known as the Department of Penal Institutions and provided that the penal institutions be under the control and management of a commission composed of five members. The Governor appointed the commissioners and designated one of same as director, and "the commissioner so designated shall by virtue thereof be chairman of said commission and reside and have his official residence in a house near the Missouri State Penitentiary now provided for and occupied by the warden thereof." This appears in the 1929 statute as Section 8317.

In 1921, present Section 8337, R. S. Mo. 1929, was enacted.

In 1933, Laws of Missouri, 1933, page 327, Sections 8316, 8317, 8318 and 8319, R. S. Mo. 1929, were repealed and four new sections enacted in lieu thereof to be known as the same sections.

Section 8316, Laws of Missouri, 1933, page 327, provides:

"\* \* \* \* \* The Department of Penal Institutions shall be under the control and management of a Commission composed of three members, \* \* \* \* \*."

Section 8317, Laws of Missouri, 1933, page 328, provides in part as follows:

"Immediately after the taking effect of this act it shall be the duty of the Governor \* \* \* \* \*, to appoint three commissioners, \* \* \* \* \*. The Governor shall designate one of said commissioners as director of penal institutions, and the commissioner so designated shall by virtue thereof be chairman of said commission and reside and have his official residence in the house near the Missouri state penitentiary. Etc."

So much, then, for the history of the management of the Penitentiary.

From the above it will be noted that prior to 1921 the Penitentiary was under the control of a State Prison Board and the warden was appointed by such board. The warden lived in a residence provided for that purpose and was given light and fuel therefor, in addition to his salary. Since 1921, and until 1933, the Penitentiary was under the control of commissioners, five in number; one of which number was designated as Director; the Director being entitled to live in the residence theretofore provided for the Warden. In 1933 the Legislature changed the number of commissioners from five to three; making no change, however, as to the Director so far as the official residence was concerned.

Section 8397, R. S. Mo. 1929, which was Section 12473 in the 1919 statute and was on the statute books when the warden's right to live in the official residence was divested from him, provides in part as follows:

"\* \* \* \* \*; but nothing in this article shall be construed as forbidding the warden and deputy warden from using convicts as servants in their families, subject to such rules as may be prescribed by the board."

This statute is still in force and effect.

In 1919 when the warden resided in the official residence he was thus given the use of convicts as servants. Consequently, in 1921 when the director was permitted by the Legislature to occupy the residence, said director was likewise conferred the privilege enjoyed then by the warden, namely, that of the right to the use of prisoners in the residence, and Section 8337 R. S. Mo. 1929, was enacted to effect such arrangement.

Section 8337, R. S. Mo. 1929, provides for two things: first; use of the residence by the director, and, second: employment of prisoners therein. The first part of the statute reads:

"The director of the penal institutions shall have and exercise all the rights, powers, and privileges with reference to the residence provided for the warden of the Missouri State Penitentiary, "

And the second part reads:

"and the employment of prisoners therein, heretofore by law granted to and conferred upon said warden with reference thereto."

The "rights, powers, and privileges with reference to the residence" that the warden theretofore enjoyed of the residence was that of residing therein and having fuel and light furnished to him. In our opinion, the director now has those same rights, powers, and privileges. In addition thereto the appropriation act, Laws of Missouri, 1933, p. 103, provides:

"and other general expense; material and supplies, consisting of household supplies.  
--Etc."

The warden formerly enjoyed the use of convicts as servants in the official residence as the board prescribed by rules and regulations (Section 8397), so that now the director would be entitled to the use of such as servants under the statute as pre-



May 14, 1934.

scribed by the rules and regulations of the commissioners. Of course, the commissioners may not prescribe any rule or regulation, neither may the director enjoy any right or privilege, that is contrary to the statutes (appropriation law) or the Constitution of the State of Missouri.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

ELECTION - When three hundred or less vote in a precinct, four judges may be appointed for said precinct instead of six.

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June 27, 1934.

6-28

Honorable Arthur Huff  
Clerk of the Iron County Court  
Ironton, Missouri



Dear Sir:

This department acknowledges receipt of your letter of June 14, 1934. Also your supplemental letter of June 26, 1934 relating to the question of judges in the coming primary election. Your letter is as follows:

"We are doing everything possible to cut down expenses for 1934 in this county, and we are wondering if it would be legal to use only four judges in the coming Primary and General Elections instead of six, especially in the smaller precincts under the circumstances. Will you please give us your opinion in the matter.

If we can do that it will enable us to save considerably.

I am writing you at the request of our County Court, and I would appreciate an early reply as Court will convene in the very near future to appoint the judges for the Primary."

Section 10287, R. S. Mo. 1929 provides the manner of appointing judges and clerks for primary elections, and is as follows:

"The judges and clerks for primary elections held under this article shall be appointed in the same manner, and possess the same qualifications and consist of the same number as judges and clerks of general elections in this state: PROVIDED, that in all counties in this state which now contain, or hereafter may contain, a city of not less than one hundred thousand inhabitants and more than four hundred thousand inhabitants, the county committee of each political party which, at the general election held next preceding any primary election held under the provisions of this article, cast at least ten per cent, of all the votes cast at such election in such county, shall appoint three judges and one clerk for such primary election for each election precinct in such county outside of such city, and in all such cities the judges and clerks of election regularly appointed and commissioned for regular elections shall act as judges and clerks of all primary elections held under the provisions of this article."

Noting that the section quoted, supra, states that the judges and clerks of the primary election shall be appointed in the same manner as in the general election, we will refer to Section 10206, R. S. Mo. 1929, which deals with the manner of appointing judges for general elections and is as follows:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties; and there shall also be provided two ballot

boxes for said judges of election, one of which shall be numbered No. 1 and the other numbered No. 2; and it shall be the duty of said judges to select from their number two judges who shall be designated and known as receiving judges, and two who shall be designated and known as counting judges. After the poll books are signed in the manner hereinafter provided in the form of the poll books, the ballot box No. 1 shall be opened and examined by all the judges and clerks, and everything removed therefrom; and one of the receiving judges, first selected, shall receive the ballot of each elector, and after pronouncing the name of such elector in an audible voice, shall pass the ballot to the other receiving judge, who shall number the same and deposit it in said ballot box No. 1, which shall be kept securely closed while the balloting continues for one hour from the time of opening the polls. At the expiration of said hour, the receiving judges shall deliver said ballot box No. 1 to the counting judges, who shall immediately deliver over to said receiving judges ballot box No. 2, which ballot box No. 2 shall be opened and examined in the presence of all the judges and clerks, and after everything is removed therefrom, shall be securely closed, and, during the next hour, said receiving judges shall receive and deposit ballots therein, in the same manner as during the first hour ballots were received and deposited in ballot box No. 1. After the delivery of ballot box No. 1 to the counting judges, the same shall be immediately opened by them, and the tickets shall be taken out,

one at a time, by one of the counting judges, who shall read distinctly, while the ticket remains in his hand, the name or names written or printed thereon, also the office that is intended to be filled by such person voted for, and deliver the same to the other counting judge, who shall string the same on a thread or string, as provided by law. The same method shall be observed with each ticket, and the counting shall continue thus until all the ballots in the box are counted, and then the counting judges shall securely close ballot box No. 1 and deliver the same to the receiving judges, and receive from the receiving judges ballot box No. 2; and so on in the same manner until the polls are closed and all the ballots are counted. No person or persons shall be admitted into the room or office where such ballots are being counted, except the judges and clerks of election: PROVIDED, that any political party may select a representative man who may be admitted as a witness of such counting. It shall be the duty of one of the judges to announce to the electors present the total number of votes polled at each change of the box; but the judges, clerks and witnesses shall make oath that they will make no statement nor give any information of any kind as to the number of votes polled for any office or person, nor the name of any person voted for, nor any other fact tending in any way to show the state of the polls at any time previous to the closing of the polls of said election on the day of the same."

Sections 10208 and 10211, R. S. Mo. 1929 have been repealed and two new sections enacted in lieu thereof, namely, Sections 10208 and 10211, Laws Missouri 1933, p.p. 238-239, the sections now being as follows:

**Section 10208:**

"In all precincts in this state that at the last preceding general election cast three hundred or more votes, at the same time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected; three of the judges shall be taken from the political party that polled the largest number of votes at the last preceding general election and three of the judges from the party that polled the next largest vote. The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

**Section 10211:**

"In all precincts casting less than three hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting three hundred or more votes in the last preceding general election, the judges shall appoint four clerks. The clerks, before entering on the duties of their appointment, shall take an oath or affirmation, to be administered by one of the persons appointed or elected judges of the election, that they will faithfully record the names of all the voters; said clerks shall also take the oath above prescribed for judges to be administered at the same time and in the same manner heretofore directed."

June 27, 1934.

You state in your letter that you desire to reduce the usual number of six to four judges, especially in the smaller precincts. We call your attention to the fact that Section 10208, quoted supra, states that,

"at the last preceding general election cast three hundred or more votes \* "

then two additional judges shall be elected. We construe the statute to mean clearly that in the event some of the smaller precincts cast less than three hundred votes, that it is not mandatory to have six judges, and therefore the four judges, as set forth in Section 10206 will suffice. Prior to the enactment of the two new sections which we have herein quoted, the Supreme Court of our State passed upon the effect of only four judges acting in an election. In the case of Sanders v. Lacks, 142 Mo. 255, l.c. 263, the court said,

"Popular elections involve the exercise of one of the most cherished rights of the citizen in a free government. But the right of suffrage must needs be exercised under conditions which do not always admit of a rigid observance of every technical requirement of law. The judges of election who manipulate the machinery necessary to record the expression of the voters' will are usually laymen, unfamiliar with legal technicality, and often wholly innocent of that sense of the importance of matters of mere form which often seems to possess a strange fascination to some learned minds. Election judges are drawn from the great body of the people. They serve for a short while. In the main they do their best to faithfully perform their duties under the law. But they are often guilty of omissions and



oversights in attempting to follow the strict letter of the law. In dealing with those lapses the courts have promulgated a practical general rule which seems to have a direct bearing upon the appeal at bar. That rule is thus stated by the most eminent American text writer on the law of this subject, viz: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory, if they do, and directory, if they do not, affect the actual merits of the election." McCrary, Elections (4 Ed.), sec. 225. The use of the terms "mandatory" and "directory" in this connection is, no doubt, sanctioned by usage in the law of elections by ballot. The terms are sometimes misleading and not strictly accurate; but they are convenient to point out the distinction between two general classes of irregularities, and they are sufficiently well understood to keep their places in the literature of the subject in hand.

June 27, 1934.

Applying the rule already quoted, it is clear that the fact of four judges acting at a precinct in lieu of six (the complement prescribed by law) should not be held to deprive of their votes the citizens who voted at that precinct.

5. The next objection to the election is that the judges at the precinct were not equally apportioned to the two leading political parties. Of the four judges who finally acted, one was a Republican and three were Democrats.

It does not appear that any harm or prejudice to contestant's interests was occasioned by the failure to follow the law in the particular just mentioned. The full vote of the precinct was polled, counted, and returned. There is neither allegation nor proof of any sort of fraud or misconduct on the part of the judges in performing any of their duties in connection with the election. Nor is there any showing of unfairness in the result. This being so, we hold that the general rule already quoted, as to the effect or irregularities at elections, should be applied, and that the objection last above stated should be considered insufficient to nullify the vote cast at the precinct in question. The objection is one, however, that we should be disposed to treat very seriously if there was any testimony of an unfair result, which there is not in this case."

#### CONCLUSION.

It is the opinion of this department that in the

Honorable Arthur Huff

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June 27, 1934.

precincts wherein less than three hundred electors cast their votes at the last presidential general election, that the county court of that county may appoint four judges instead of the usual number of six, and that the manner of appointing clerks should be carried out according to Section 10211, Laws Missouri, p. 239.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

OWN:FE

BOARD OF PENAL INSTITUTIONS:

Expense of return of escaped  
convicts payable from  
fund.

7-30

July 23, 1934



Department of Penal Institutions  
Jefferson City  
Missouri

Gentlemen:

Acknowledgment is hereby made of your letter of  
July 17, 1934, as follows:

"The funds for the apprehension of es-  
caped criminals have been exhausted, and  
a few escapes have been returned here  
and the expenses paid out of Petty Cash.  
First, this would soon exhaust the Petty  
Cash fund. In addition, the State Audi-  
tor suggests that I get an opinion from  
you to know if it is legal to make these  
payments out of the Petty Cash fund, or  
any other fund."

Section 8338 Revised Statutes Missouri 1929, in  
part provides:

"The state prison board shall, subject to  
law, have the exclusive government, regula-  
tion and control of the Missouri state  
penitentiary, the Missouri reformatory,  
the industrial home for girls, the in-  
dustrial home for negro girls and of all  
other penal or reformatory institutions  
hereafter created and of all persons who  
now are or who hereafter shall be legally  
sentenced to either of the institutions  
hereinabove mentioned or referred to and  
who shall be committed to the custody of  
said board, and said board shall make and  
enforce such by-laws, rules and regula-

tions as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article.\* \* \* \*

Section 8437 Revised Statutes Missouri 1929 is as follows:

"Whenever any convict shall escape from the penitentiary, it shall be the duty of the board to take all proper measures for the apprehension of such convict; and for that purpose it shall offer to pay a reward, not exceeding one hundred dollars, if such convict be apprehended outside of Cole county, and twenty-five dollars if such convict be apprehended in Cole county, for the apprehension and delivery of such convict; such reward shall be chargeable to the state."

Defendants in criminal cases, where a penitentiary sentence has been imposed, are sentenced to the penitentiary there to be kept until the sentence is served or until the defendant is otherwise discharged from the penitentiary according to law. It is a matter of common knowledge that even under the most confident administration and strictest surveillance escapes from penal institutions will occur. It is as much the duty of the Board of Penal Institutions to see that such escaped convicts are returned to the penitentiary as it was to receive and keep them in the first instance. No provision is made in the law for the payment of the expense of the return of such escaped persons unless it can be found in Chapter 44 of the Revised Statutes of Missouri 1929.

Section 8437 above quoted, requires the Board to take all proper measures for the apprehension of escaped convicts. This authority necessarily implies the right

July 23, 1934

of the Board to incur such expenses as may be necessary to effect the apprehension of the escaped convict.

Referring to the State Penal Institutions, Section 8454 in part reads:

"All moneys derived from the sales of any articles manufactured in any of said industries in this article referred to, shall be collected by said board and paid into the treasury of the state to the credit of the following funds: \* \* \* \* \* Said board shall further determine what part of said receipts are due to labor and other profits in the operation of said penitentiary, and said amount shall be deposited in the 'earning fund'. \* \* \* \* \* The money deposited in the 'earning fund' shall be used by the prison board for the use of, support and maintenance of said prison, and such expenses as come under section 8408\* \* \* \* \*."

The Legislature, by Laws 1933, page 17, Section 43, appropriated out of the state treasury for emergency purposes only, the sum of three hundred thousand dollars (\$300,000.00) or so much thereof as might be necessary to meet any emergency in the operation, control and management of the state penal institutions, to be used only for the purpose of meeting unforeseen emergencies and only in such manner as the governor shall authorize and approve.

The Fifty Seventh General Assembly, Laws 1933, page 103,105, made a general appropriation for the expense of operating the state penitentiary, which appropriation bill provides, among other things, for the payment of general expense connected with the operation of the penitentiary. Since it is the duty of the Board of Penal Institutions to bring about the return to such institution of the prisoners who escape therefrom, we see no reason why the expense of the return of such prisoners could not be paid out of the appropriation for general expense above referred to, and such expense could also be properly paid out of the emergency appropriation of three hundred thousand dollars (\$300,000.00) appropriated for the operation, control and

Department of Penal Institutions

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July 23, 1934

management of the state penitentiary, and such is our opinion.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



LIQUOR CONTROL ACT: Collection of county liquor license fees is the duty of the County Collector.

8-25  
August 24, 1934.



Hon. Peter H. Huck,  
Prosecuting Attorney,  
Ste. Genevieve County,  
Ste. Genevieve, Missouri.

Dear Mr. Huck:

This department is in receipt of your request for an opinion as to the following state of facts:

"Ste. Genevieve County may license persons, etc. to sell intoxicating liquors by the drink on the premises where sold. We have a number of applicants, the question presents itself - under the new liquor law, who is to collect the liquor license fee for the county? We will appreciate your opinion on that question as soon as possible.

Formerly, the County Collector collected such license fees for the county; but by the underlined part of the inclosed 'County Liquor License' form, it appears that the County Clerk is supposed to collect such license fee due to the county. We find nothing in the new liquor law on the proposed question."

Section 24 of the Liquor Control Act of the State of Missouri provides:

"The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

It will be noticed that there is nothing in this section relating to the question here under discussion. It merely provides that the County Court is authorized to make a charge for licenses. As to the proper official to make the collection for the licenses, that is evidently left to the county management. A sample of the county liquor license of Ste. Genevieve County submitted to us contemplates that the fee for said license be paid to the County Clerk of said county. In our opinion, this is erroneous.

Under our system of county government, the county collector is the official who collects or receives taxes, duties or other public revenues. As was said by the court in the case of *Hubbell v. Bernalillo County* (Sup. Ct. N.Mex.), 86 P. 430, in defining the office of county collector:

"A tax collector is one whose duties it is to enforce the collection of taxes, the agent of the county to collect its dues. The treasurer, on the other hand, is the custodian of the funds of the county after they have been collected."

Occupation or license taxes are generally to be received or collected by the officers entrusted with the collection of other taxes, unless the license statute designates a special collector or officer to perform that duty. 37 C.J. 251. Where the tax is for county revenue and the statute is silent as to who shall receive it, the county tax collector is the proper person to receive it. *Ventura County v. Clay*, 112 Calif. 65, 44 P. 488.

A glance at the statutes of the State of Missouri will show that it was the intention of the Legislature in creating the office of county collector that the county collector was to receive, among other taxes, all license fees. Section 9927, R.S. Mo. 1929 provides in part as follows:

"Every county collector and ex officio county collector, except in the City of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively."

Section 9929, R.S. Mo. 1929 provides in part as follows:

"Every county collector shall, on or before the fifteenth day of each month, pay to the state treasurer all state taxes and licenses received by him prior to the first day of the month, as provided in section 9927 \*\*\*\*\*"

Section 9935, Laws of Mo. 1933, page 454 provides for the compensation of the county collector in the different counties of the state. This section is in part as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

I. In each county in this state wherein the whole state, county, bridge, road school and all other local taxes, including merchants' and dramshop licenses, assessed and levied for any one year amount to five thousand dollars or less, a commission of ten per cent on the amount collected.\*\*\*\*\*"

The language of the above statutes show clearly that it is the duty of the county collector to receive and collect all license taxes. The present Liquor Control Act is silent as to what official shall collect the license tax provided for, and in the absence of any legislative direction, it would appear that the county collector is the proper official to make the collection.

A practical example of the collection of license fees may be had by reference to the method of collection of merchants' licenses. True, the Legislature has specifically provided that the county collector shall collect these license fees; however, the procedure set out by the Legislature is indicative of the intention of the Legislature with respect to the collection of all licenses. Section 10085, R.S. Mo. 1929 provides:

"Such clerk shall deliver to the collector of his county all licenses so issued, and charge him therewith in a book to be kept for that purpose."

Aug. 24, 1934.

Section 10086, R.S. Mo. 1929 provides:

"The collector shall, at the time of delivering such license, collect the sum of fifty cents, the fee herein allowed to the clerk for issuing the same, and twenty-five cents each for the bond and statement to be retained by the collector as his fee for furnishing the same."

CONCLUSION

In view of the foregoing, it is the opinion of this department that, in the absence of any specific direction on the part of the Legislature, the collection of the county liquor license fees is properly the duty of the county collector, and that the collection of said license fees by any other county official is not according to law.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

STATUTES: EFFECT OF GENERAL REPEAL PROVISION IN STATE  
PURCHASING AGENT LAW ON PRIOR STATUTES.

September 8, 1934.



Hon. S. B. Hunter, Chairman  
Department of Penal Institutions,  
Jefferson City, Missouri.

Dear Sir:

Your letter of August 18, 1934, addressed to this department has been received. In this letter you state and inquire as follows:

"Under the Session Act of 1933 creating a State Purchasing Agent, we find that Section 4, 6, 8, 10, and 11 seem to, in some ways, deal with some things found in the Sections of the Revised Statutes of Missouri, 1929, dealing with penal institutions, especially Sections 8323, 8331, 8332, 8407, and 8452. Then, Section 14, page 414 of the Laws of Missouri, 1933, reads as follows:

'All acts or parts of acts inconsistent or in conflict with this Act are hereby repealed to the extent of such inconsistency or conflict.'

Nowhere is there any reference to any particular Section or part of any Section being repealed, but it seemed to be a blanket attempt to repeal anything that might be in conflict with the Sections setting up the State Purchasing Agent.

Now, under the Sections of the Statutes dealing with the penal institutions, certain responsibilities and duties were set up for the Penal Board and the officials of the penal institutions. We want to know if the law creating a State Purchasing Agent relieves us of these duties and responsibilities.

If the repealing Act had set out any particular Sections or parts of Sections as being repealed, we would not be in any doubt at all. However, as the Act does not, and having no desire to be in conflict with the State Purchasing Agent and only wanting to perform the duties that the law in-

tends the Penal Board shall perform, we shall be pleased to have you advise us if the repealing Act repealed the Sections referred to above; that is, Sections 8323, 8331, 8332, 8407, and 8452 of the Revised Statutes of Missouri, 1929."

Section 14, page 414 of the Session Acts of Mo. 1933, reads as follows:

"All acts or parts of acts inconsistent or in conflict with this Act are hereby repealed to the extent of such inconsistency or conflict."

This Section is clear and unmistakable in its meaning. Only such parts of Sections 8323, 8331, 8332, 8407, 8452 that conflict with the duties of the State Purchasing Agent are repealed. It is, of course, possible that a portion of said Sections of the Statutes are repealed and the remainder is in full force and effect. As to what portions are conflicting is left to your own judgment in the absence of a specific interpretation by this department, or by the courts.

I quote to you from the case of State ex rel v. Assurance Companies, 251 Mo. 278, 1. c. 292, which reads as follows:

"The Oliver Act which was approved March 18, 1911, does not purport in terms to repeal any pre-existing laws, but upon the contrary, Section 11, by necessary implication, repels any such conclusion to be drawn therefrom, for it in express terms provides that 'all laws and parts of laws in conflict with this act are hereby repealed,' and consequently all laws and parts of laws not in conflict therewith are not repealed thereby, but are left in full force and effect. That is the common sense of the language used, and the clear design the Legislature had in mind when it enacted it."

The syllabi of the case of Nichols v. Hobbs, 197 S. W. 258, contains the following statement:

"A later statute does not repeal an earlier one by express provision that it repeals former acts inconsistent with it, if they can both be given effect without clear repugnancy or unreasonableness."



Hon. S. B. Hunter

-3-

September 8, 1934.

It is, therefore, the opinion of this department that Section 14 above set forth repeals only those portions of other statutes which are clearly in conflict with the laws governing the State Purchasing Agent. Section 14 relieves the Penal Board of such duties and responsibilities as are clearly placed upon the State Purchasing Agent by said Act. It is quite possible that only a portion of a statute is in conflict with said Purchasing Agent Act, and that the balance of said statute is still the law governing the Penal Board.

Respectfully submitted,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



RELATING TO THE LIABILITY OF THE DEPOSITORY BONDSMEN FOR THE  
CONVICT FUND HELD BY THE PRISON BOARD:

9-12

September 11, 1934



Hon. S. B. Hunter  
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter of August 18th, 1934, in which you state and inquire as follows:

"In what is known as the "Convict Fund", we have deposited in the bank more than \$18,000.00. This is money belonging to the convicts which they have deposited with us from time to time, and which they withdraw as permitted or when they leave the institution.

We formerly had part of this money invested in Government bonds. These bonds were matured some months ago. Although we may occasionally have some expenses in dealing with this fund, this bank balance is producing no return at the present time. Has the Board the right and authority to deposit a part of this money on time, thereby getting a small return from it? There are \$10,000.00 or \$12,000.00 that could be kept on time deposit.

The bank gives the Penal Board a bond to secure deposits placed with the bank. If a part of this "Convict Fund" were withdrawn from the daily checking account and deposited in the same bank either in a savings account, which bears interest, or as a time deposit, which would also bear interest, would this fund be secured by the bond given by the bank? What would be the additional responsibility of the Board, if any, if this fund were deposited so it would return some revenue?

It is possible that a bank would not feel that it should pay interest on a deposit or certificate of deposit, for which it is required to give bond to secure its payment."

## I.

Funds belonging to convicts are secured by bond of the selected depository of Department of Penal Institutions.

Section 8402 Revised Statute, provides in part as follows:

"Said board shall take charge of all money and other articles of value which may be brought to the penitentiary by any convict, or come into his possession while in the penitentiary, which money or valuables, whenever the convict is discharged from prison or the same is legally demanded, shall be returned to such person as may be legally entitled to receive the same; and the board shall keep a book in which such receipts and disbursements shall be duly and properly noted."

It will be observed from the provisions of the foregoing statute, that the State Prison Board is the legal and statutory trustee of all the convicts' fund while confined in the penitentiary, and have charge of all moneys or other articles of value which such convicts, may bring or come into their possession while in the penitentiary.

The conditions of the bond held by the commissioners of the Department of Penal Institutions, and executed by The Central Missouri Trust Company, as principal, are as follows:

"Now if the said Central Missouri Trust Company as principal shall well and truly in every respect perform all the duties and obligations devolving by law upon said depository and shall pay upon presentation all checks drawn on such depository by officials designated by the Board of the Department of Penal Institutions to so act, whenever funds or moneys of such institution shall be in such depository and shall faithfully keep all the funds and moneys of such institution which shall come into the hands of said depository and account for the same according to law, then this obligation shall be null and void, etc."

From the conditions of said bond, we find said depository obligates itself to "keep all funds

September 11, 1934

and moneys of such institutions which shall come into the hands of said depository and account for the same."

Since, as we have said, the State Prison Board is made trustee of the funds brought to the penitentiary, and all funds acquired by any and all convicts while in said penitentiary, they are held and bonded to account for such funds as much as any other funds coming into their hands.

This department therefore rules that the conditions of the bond of the depository, The Central Missouri Trust Company, are sufficiently broad as to include and secure the funds referred to in your letter as "Convict Funds", and in the event said Central Missouri Trust Company should fail to safely keep and account for said funds, then such bond would become effective, and action upon the same could be maintained in the name of the State of Missouri to the use of the Prison Board, it matters not how such funds are received.

Respectfully submitted,

W. W. Barnes

Asst. Attorney General

APPROVED:

Attorney General

RELATING TO FACTS THAT CONSTITUTE A SCHEME OR DEVICE  
WHEREBY THINGS OF VALUE ARE FOR A CONSIDERATION ALLOTTED  
BY CHANCE CONSTITUTING LOTTERY.

16-5

September 25th, 1934



Mr. George E. Husser  
Manager Better Business Bureau Inc.  
Kansas City, Missouri

Dear Sir:

We acknowledge receipt of your letter of August 26th in which you enclose your Bulletin of August 2nd, 1934 describing a so-called game of skill, known as "tango."

We have carefully examined your bulletin furnished us, and we quote the following:

"Briefly, the game is played as follows: For ten cents a player is given a card and a supply of chips, buttons, beans or corn. On the card are five rows of squares across the card and five rows of squares down the card. In each square except the middle space, which is blank appears a number. To start the game each player places a chip on the center square. This is considered a free number. The object of the game is to fill a row of five squares with these chips before any other player fills a row. The row may be filled across the card, down the card, or in any straight line. The player who first fills a row yells "Tango" or knocks on the counter and receives the "jack pot" in the form of so-called "merchandise" cards which immediately may be converted into cash by the "bank."

"The playing procedure is to allow each player to throw a ball into either a portable or stationary box containing open spaces numbered from 1 to 75. The number of the space into which the ball drops is called out and appears on a lighted signboard above the playing table. As the numbers are called, the players whose cards contain the numbers called, cover the number with chips or buttons until a row is filled. If more than one player fills the row at

Sept. 25, 1934

the same time the "jack pot" is divided between them.

The Fortune Skill Ball Salon, operated by Fortune, Inc., on the second floor at 2 West 39th street, is a large and lavishly furnished place with row after row of player's seats. In front of each player is a glass box containing numbered squares into which the player may toss a rubber ball to obtain a number when his turn arrives, providing some other player does not fill his row first.

At any time during the game the player may throw another ball, known as the "skill ball," into the box in an endeavor to obtain any number he desires. If the bouncing "skill ball" lands on the number desired the player may cover that number with a chip even though the number is not called in the regular procedure of the game.

The player is advised to throw this ball only when but one number is needed to complete his row. The Bureau observer noted, however, that the bouncing proclivities of the ball were such that it seldom ended up in the space at which it was aimed."

It will be seen from the description of the manner of playing the game that chance plays a very large part in selecting the numbers, and that the part skill could play is extremely small.

It appears that it is possible for one to win a prize before any one playing used what is called the "skill ball," and even if a player should use the "skill ball," and fail, he would still be dependant upon the chance that some other player would be able to settle the ball into the compartment with the number required to complete his row, that he may "tango."

I.

A game played as described in bulletin referred to herein, is a scheme or device whereby things of value is for a consideration allotted by chance, regardless of the fact that the element of skill might be present in some small degree.

Article XIV Section 10 of the Constitution of Missouri provides as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4314 Revised Statutes of Missouri, 1929, provides in part as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, whether the same is being or is to be conducted, held or drawn within or without this state....."

In *State v. Emerson*, 1 S.W. (2d) 1. c. 111, the Supreme Court said:

"The people inframing the state Constitution (section 10, art. 14) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. *State ex rel. Hughes, supra, loc. cit. 534 (253 S.W. 229)*. In *State v. Becker, supra, 1. c. 560 (154 S.W. 769)*, in line with our former rulings and those of courts of last resort elsewhere, a more compre-



Sept. 25th, 1934

hensive definition is given to the word, and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme, or device whereby anything of value is disposed of by lot or chance."

Section 4287 Revised Statutes of Missouri, 1929, provides in part as follows:

"Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device, or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony,....."

This department is therefore of the opinion that the facts as gathered from your bulletin bring the case within the provisions of either of sections 4314 or 4287 (Supra) and would constitute a plan, scheme or device (of lottery) whereby a thing of value is disposed of by lot or chance rather than that of skill, and the use of which is unlawful and is prohibited by either of the foregoing criminal statutes.

Yours very truly,

W. W. Barnes

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Asst. Attorney General

APPROVED:

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Attorney General



ABSENTEE BALLOTS: In order for absentee ballots to be legal, procedure prescribed in Sec. 10186, Laws of Mo. 1933, p. 222-223 must be followed.

September 27, 1934.



Hon. Arthur Huff,  
Clerk of County Court,  
Ironton, Missouri.

Dear Sir:

Some time ago this department received a request from you relative to the counting of absentee votes cast in the Primary. We regret that due to the onerous duties of this office we were unable to render the opinion so as to enable you to use it at the Primary; however, we anticipate this question will again arise at the general election; hence, we now render the opinion. Your letter is as follows:

"Only three absentee votes will be cast in the Primary for this county. Will it be necessary to appoint four disinterested persons from the two dominant political parties for the purpose of opening and counting said absentee votes? Since the number of votes is so few, would it be lawful for the two justices of the peace to canvass these three votes while canvassing the regular primary vote?

I am writing at the request of the County Court. They are very interested in keeping expenses down."

The Regular Session of the Legislature in 1933 made a radical change in the mode and manner of casting absentee ballots. There have been no decisions on the law as changed; hence, we must be guided solely by the wording of the statute. Section 10186, Laws of Mo. 1933, page 222 is as follows:

"The official or officials charged with the duty of issuing such ballots to absent voters for the district, ward or precinct in which such absent voter resides shall receive the ballot of such absent voter and safely keep and preserve the same unopened in his or their office. At least 24 hours before said ballot shall be opened and canvassed, such official or officials shall make a complete list of the names of such absent voters whose ballots have been received, and shall cause such list thereof to be posted in some conspicuous place in his or their office, which list shall also show the precinct in which said absent voter claims to be a resident. Such list shall be open to public inspection. Whenever the county court of any county, or the board of election commissioners, as the case may be, shall meet to canvass the votes according to law they shall first appoint four disinterested persons from the two dominant political parties, not more than two of whom shall be of the same political faith, for the purpose of opening and counting said absentee vote, and the said persons so appointed shall take the oath prescribed for the regular judges of election, and shall at once proceed to open, canvass and count such votes, and having determined that such absent voter or voters are entitled to vote in the respective precincts wherein he or they offer to vote, and having been fully satisfied thereof they shall certify to the county court, or to the election commissioners, as the case may be, the number of qualified votes to be counted for each of the respective candidates voted for in such election precinct, or for or against the question of public policy submitted at such election, and shall forthwith make such certificate to the county court, or to the election commissioners, as the case may be, who shall tabulate such vote along with the other votes certified from the several precincts of the county and credit the same to the candidate or issue for whom or for which said absentee votes were cast in arriving at the total result of the election in the district, precinct or ward where said voter resides or lives: Pro-

vided, however, that no ballot shall be counted by said judges which has not been received and filed by the issuing official or officials within the time by this act required."

CONCLUSION

While we realize that the manner of counting the votes mentioned in your letter would be economical to the county, yet we are constrained to hold that in order for the absentee ballots to be legal and valid, it is necessary that the terms and conditions as set out in Sec. 10186, supra, be followed.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

RELATING : I. TO [REDACTED] MONTHLY FOR SALARY  
OF PROSECUTING ATTORNEY.

II. RELATING TO PAYING OR PROTESTING  
WARRANTS BY COUNTY TREASURER.

10-19

October 10th, 1934



Hon. J. L. Huett  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri

Dear Sir:

We acknowledge your letter of September 22nd in  
which you state and inquire as follows:

"On July, 2nd, I was appointed by the Governor to the office of prosecuting attorney of this, Reynolds County, on the first Monday of August, I filed with the county court the abstract of fees and also statement of my salary as is required by law, the county court seems to be very much confused by the new county budget law that was passed by the general assembly at its regular session, 1933, with reference to the payment of the salaries of the various county officers, under this law and are not issuing warrants drawn on the treasurer for their monthly salary.

Section 11314 A.S. 1929, fixes the salary of the prosecuting attorneys in the various counties of the state and also provides that said salary "to be paid monthly upon the warrant of the county court issued in favor of the prosecuting attorney to the county treasurer for that purpose."

I have advised the county court that it is its duty to issue the salary warrants as is provided by said Section 11314, and in case there is not at the time sufficient funds in the treasurer, that it is the duty of the treasurer to protest said warrants so that it may be paid in order of its protest.

Now what I want, is your opinion to the county court as to their duties in issuing the salary warrants monthly to the prosecuting attorney as is provided by the above section."

## 1.

After the budget has been filed with the County Treasurer, warrants may be protested by the Treasurer where there are no funds on hand to meet them without personal liability.

Section 8 Laws of Missouri, 1933, page 546, provides in part as follows:

"...After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such Budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand.) If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act...."

It appears from the above statute that a county treasurer may not pay nor enter protest on any warrant for the current year until such budget estimate shall have been filed with the treasurer. However, after the budget has been filed as provided therein, he may protest warrants.

Section 12171 Revised Statutes Missouri, 1929, provides as follows:

"No county treasurer in this state shall pay any warrant drawn on him unless such warrant be presented for payment by the person in whose favor it is drawn, or by his assignee, executor or administrator; and when presented for payment, if there be



PENAL INSTITUTIONS - Judgment bonds.

16-19  
October 17, 1934



Honorable Stephen B. Hunter, Director  
Department of Penal Commissioners  
Jefferson City, Missouri

Dear Sir:

I am writing you with reference to the judgments heretofore obtained by the State Penal Board against Buchanan County. The dates and amounts of these judgments are as follows:

<u>Case No.</u>	<u>Title of Case</u>	<u>Date Judgment Obtained.</u>	<u>Amount of Judgment</u>
56060	Dept. Penal Inst. (Industrial Home for Girls)v. Buchanan Co.	1-19-34	\$4,354.26
56061	Dept. Penal Inst. (Mo. Reformatory) v. Buchanan County	3-9-34	\$10,936.13
56062	Dept. Penal Inst. (Industrial Home for Negro Girls) v. Bu- chanan County	1-19-34	\$285.14

We call your attention to Section 8316, Laws 1933, p. 327, which in part is as follows:



#2 - Honorable Stephen B. Hunter

"There is hereby created and established a department to be known as the Department of Penal Institutions, by which name it shall have perpetual succession, with the right to complain and defend in all courts; \* \* "

The counties of this state are liable for the support, maintenance, clothing and all other expenses of certain persons committed to the Reformatory (Section 8358, 8359, R. S. Mo. 1929), to the Industrial Home for Girls (Section 8372, R. S. Mo. 1929), and to the Industrial Home for Negro Girls (Section 8385 R. S. Mo. 1929). Upon the failure of the counties to meet these obligations, suits were instituted against Buchanan County and a judgment obtained in favor of the Department of Penal Institutions. The question now presented is whether or not Buchanan County bonds may be accepted in satisfaction of the judgments obtained.

Section 2892, Laws 1931, p. 138, is as follows:

"The various counties in this state for themselves as well as in behalf of any township or parts of townships for which said counties may have heretofore issued any bonds, and the several cities, villages, incorporated towns, school districts and road districts in this state, are hereby authorized by their respective county courts and the said cities, villages, incorporated towns, school districts and road districts by their proper authorities, to fund or refund any part or all of their bonded or judgment indebtedness, including bonds, coupons or any judgment, whether based on bonded or other indebtedness, and

#3 - Honorable Stephen B. Hunter

for that purpose may make, issue, negotiate, sell and deliver renewal, funding or refunding bonds, and with the proceeds thereof pay off, redeem and cancel such judgments or old bonds and coupons as the same mature or are called for redemption, or such renewal, funding or refunding bonds may be issued and delivered in exchange for the judgments, bonds or coupons to fund or refund which the renewal, funding or refunding bonds were issued: PROVIDED, that in no case shall the amount of the debt of any such county, township or parts of townships, or city, village, incorporated town, school district or road district be increased or enlarged under the provisions of this chapter, and provided also that no renewal, funding or refunding bonds issued under this chapter shall be payable in more than twenty years from the date thereof, and that such renewal, funding or refunding bonds shall be of the denomination of not more than one thousand dollars (\$1,000) nor less than one hundred dollars (\$100) each, and shall bear interest at a rate not to exceed six per centum (6%) per annum, payable annually or semi-annually, and to this end each bond shall have annexed thereto interest coupons, and such bonds and coupons shall be made payable to bearer: PROVIDED FURTHER, that nothing in sections 2892 to 2894, inclusive, shall be so construed as prohibiting any county, city, township, school district or road district from renewing, funding or refunding such debt without the submission of the question to a popular vote: PROVIDED, HOWEVER, that no indebtedness, judgment

#4 - Honorable Stephen B. Hunter

or claim founded on bonds or coupons issued in the aid of or in payment for the capital stock of any railroad company shall be funded, nor shall any bonds be issued in lieu thereof or in compromise therefor until authorized by a majority of the qualified voters of such county, city, township or parts of townships voting at an election held for that purpose pursuant to an order entered of record by the county court of such county or council or aldermen of such city on petition of at least fifty of the resident taxpayers of such county, city or township, after public notice by advertisement in some weekly newspaper printed and published in such county or city, if there be such paper, and if not, then in such paper nearest to such county or city, setting forth the object of the election, for four weeks, and in addition posting up ten written or printed handbills in public places in such county or city, before the time for such proposition to fund its said indebtedness shall be voted on, which said notice shall contain the object and general nature of the proposition to fund said indebtedness. The election herein provided for shall be held in conformity with the statutes of the state covering state, county or municipal elections. And when such indebtedness<sup>has</sup> been once compromised and funded, the funding bonds issued in lieu thereof may again be refunded according to the other provisions of this article without such election."

#5 - Honorable Stephen B. Hunter

It would appear from the foregoing statute that the authority to issue such bonds is placed with the county, and if such bonds are issued, you are required to accept such bonds in satisfaction of the judgment. These bonds are payable to bearer.

While not passing directly upon the validity of the section above set out, the right of the county to refund its judgment indebtedness by the issuance of bonds seems to be recognized. State ex rel. Clark County v. Hackmann, 280 Mo. 686; State ex rel. Johnson v. Railroad Company, 315 Mo. 430; State ex rel Wayne County v. Hackmann, 272 Mo. 600.

We are assuming that the bonds issued by Buchanan County have been issued in accordance with the constitutional laws of this state.

It is the opinion of this office that Buchanan County has the authority to issue bonds in satisfaction of the judgments obtained against that county by the Department of Penal Institutions, and that the Department of Penal Institutions is required to accept such bonds in satisfaction of such judgments.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

ELECTIONS - Notice of selection of election judges may be served by the sheriff.

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October 29, 1934

2-4



Honorable Arthur Huff  
Clerk of the Iron County Court  
Ironton, Missouri

Dear Sir:

This acknowledges receipt of your request for an opinion under date of October 23, 1934, and which request is as follows:

"Our Sheriff believes that he is entitled to a fee for serving notices to the judges of election of their appointment by the County Court.

"The Court has no desire to deprive the Sheriff of any compensation justly due him and have requested me to respectfully request the opinion of your office in the subject as some of the County Courts, we understand, have allowed the sheriffs one dollar for serving these notices of appointment upon each judge of election.

"Our idea is to be fair with the sheriff, but remain within the law. Your opinion on this subject will be much appreciated by the Court and the writer."

#2 - Honorable Arthur Huff

We find from an examination of the statutory law of this state that a county court is a court of Record, Section 1826, R. S. Mo. 1929; that under Section 1844, R. S. Mo. 1929 it has power "to issue all writs which may be necessary in the exercise" of its respective jurisdiction.

Section 10209, R. S. Mo. 1929 provides that with reference to the election, the county court shall select and appoint the number of judges required to hold the election, taking one-half of the judges so appointed from each of the lists submitted by the two leading political parties.

Section 10210, R. S. Mo. 1929 provides that before the judges enter upon the duties of election judge, they shall take an oath which is set out in detail in this section. The law provides when the polls shall be opened and closed, and under Section 10194, R. S. Mo. 1929:

"The judges of each election hereafter to be held, general or municipal, shall open the polls at six o'clock in the morning and continue them open until seven (7) o'clock in the evening, unless the sun shall set after seven (7) o'clock, when the polls shall be kept open until sunset, \* "

Under the 1933 Laws, p. 239, it is provided:

"The judges of election shall designate two of their number, not of the same party, whose duty it shall be to have charge of the ballots and to furnish them to the voters in the manner hereinafter provided."

A new section, Section 10211, Laws 1933, p. 239, also provides that the judges shall appoint clerks of election who,

" \* before entering on the duties of their appointment, shall take an oath

#3 - Honorable Arthur Huff

or affirmation, to be administered by one of the persons appointed or elected judges of the election, \* "

It is apparent from the above and foregoing synopsis of election law that the Legislature, by the use of the terms "select and appoint" found in Section 10209 R. S. Mo. 1929, meant that the county court should notify such persons of the action of the county court in selecting them to be an election judge, although a specific statute on this matter has been omitted by the Legislature. It has been made the duty of the sheriff to attend each court held in his county, Section 1870, R. S. Mo. 1929.

Section 1845, R. S. Mo. 1929, in part, provides:

"Where there is no sheriff or other ministerial officer qualified to act, \* the court, or clerk thereof in vacation, may appoint one or more persons to execute its process and perform any other duty of such officer, who shall be entitled to such fees for their services in each cause as are allowed by law to sheriffs in like cases."

It is apparent from this section that any writ of either selection or election of any election judge by the county court is a matter of court record and a proper notice of such action should be served upon the election judge so selected. It was not the intent of the lawmakers that the county court, some county judge or the clerk of a county court should attempt to serve its decisions by mail or some other method. The intention was to have the sheriff in attendance on the county court to serve or carry out any notices or any other matters it had to serve, and for such services the Legislature, in Section 11789, R. S. Mo. 1929,



#4 - Honorable Arthur Huff

provided a fee of fifty cents for serving every notice or rule of court, to be paid to the sheriff, and also mileage at the rate of ten cents per mile for each mile actually travelled in serving such writ or notice.

It is, therefore, the opinion of this office that there is no mandatory provision of law requiring the county clerk to notify election judges as such, but in the event of the failure of the county court to so notify them, it is apparent that the judges so selected, unaware of their appointment as such, will fail to act, and under such circumstances, under the mandates of Section 10191, the voter, when assembled, may appoint the judges. However, if the county court deems it advisable to notify persons selected by the court to act as election judges, then the county court must follow the proper routine of having such notices served by the sheriff, whose compensation, as heretofore pointed out, is fixed by law.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

PENAL BOARD - Judgment bonds of Buchanan County.

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November 19, 1934



Honorable Stephen B. Hunter, Director  
Department of Penal Institutions  
Jefferson City, Missouri

Dear Sir:

This acknowledges receipt of your request of November 8, 1934 for an opinion relating to the acceptance of Buchanan County bonds by the Penal Board in payment of judgments obtained by the Penal Board against that county, and that part of your letter pertinent to the request is as follows:

"All these bonds are long-term bonds, bearing 5% interest, payable to bearer. Mr. Lane, in carrying out the instructions of the Penal Board, desires to be relieved of the custody of these bonds; and we are therefore asking you for instructions as to how he shall make delivery and to whom he shall deliver them.

"The Penal Board will not accept these Buchanan County bonds, if there is any way to avoid it, except on an order from the Court compelling us to take them. We are not satisfying the judgment and no one other than the Attorney-General's office has had any authority from the Penal Board to deal with the Buchanan County accounts in any way."

#2 - Honorable Stephen B. Hunter

These bonds were issued by the county of Buchanan under the 1931 Law, p. 138. The county court was the authorized body of Buchanan county to perform this act, and if the bonds are delivered, they should be re-delivered to the county court of Buchanan county, Missouri. If Buchanan county desires to "exchange" these bonds for the judgment now held by the Penal Board against that county, the entire matter of such an exchange calls for a mutual agreement between the Penal Board and Buchanan county.

That portion of our opinion heretofore written indicating that the Penal Board must accept these bonds has been re-considered and is hereby withdrawn, and it is the opinion of this office now that there is no duty on the Penal Board to accept these bonds unless the Penal Board wishes to do so. I am enclosing herewith a copy of a letter from E. P. Maupin, County Auditor of Buchanan County.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FBR:FE

COUNTIES: COUNTY CLERKS: County Clerk not entitled to extra compensation for his services in connection with the preparation of county budget.  
Under Section 12165, Laws of Mo. 1933, pages 355 and 356, County Clerk, where he becomes the designated person under said section may receive compensation for furnishing financial statement. Amount received must not exceed the aggregate amount of fees set out under Sec. 11811, Laws of 1933, page 370.  
December 19, 1934.

12-27  
Mr. Arthur Huff  
Clerk of the Iron County Court  
Ironton, Missouri



Dear Sir:

This department wishes to acknowledge your letter of recent date wherein you state in part as follows:

"We did a lot of work in this office last spring in the preparation of the county budget, and I am wondering if the County Court would have authority to allow me anything for this work should they feel so disposed; also what compensation would the Court have authority to grant me for preparing the financial statement, and if, in your opinion, the Court would be justified in making me an allowance in either case would I be required to account for same as part of the ordinary fees of the office, or could I retain either without rendering an account therefor?"

Laws of Missouri, 1933, Section 1, page 340, dealing with the County Budget Law, provides in part as follows:

\*\*\*\*\* All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclu -

sive of this act. \*\*\*\* It is hereby made the duty of the clerks of the county courts of the several counties of this state to prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this act. \*\*\*\*\*

Iron County has a population of 9,642, according to the last federal decennial census and would be governed by the above section as it relates to the county budget law.

It is a well-settled law in this State that whenever a county officer seeks to impose a charge upon the county and collects a fee for services performed, he must be able to point out the section in the statutes which authorizes the payment of the fee.

The rule is announced in Sanderson v. Pike County, 195 Mo. 598, 1. c. 605, as follows:

\*\*\*\*\* It is a well-settled law in this State that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute, and he is entitled to none for services he may perform as such officer, unless the statute gives it. (State ex rel. v. Adams, 172 Mo. 1-7; Jackson County v. Stone, 168 Mo. 577; State ex rel. v. Walbridge, 153 Mo. 194; State ex rel. v. Brown, 146 Mo. 401; State ex rel. v. Wolford, 116 Mo. 220; Givens v. Daviess Co., 107 Mo. 603; Williams v. Chariton Co., 85 Mo. 645; Gammon v. Lafayette Co. 76 Mo. 675.)"

We find the duty is upon the Clerk of the County Court to prepare the county budget but no provision is made for payment of fees and we are of the opinion that the county court would have no authority to allow you anything for your services in the preparation of your budget even if they felt so disposed.

Laws of Missouri, 1933, Section 12166, pages 356 and 357, provides for the payment and for the person designated to prepare the financial statement for the county - said section among other things provides:

\*\*\*\*The county court shall not pay the publisher until said proof of publication is filed with the court and shall not pay the person designated to prepare the statement for the preparation of the copy for said statement until the State Auditor shall have notified the court that said proof of publication has been received and that it complies with the requirements of this Section.  
\*\*\*\* For the preparation of the copy for the statement the court may allow not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting printed copy in the record.  
\*\*\*\*"

Section 12165, Laws of Missouri, 1933, pages 353 - 356, among other things provides:

\*\*\*\*\*Or if no one has been designated said statement having been prepared by the county clerk, signature shall be in the following form:

'Clerk of the County Court and ex-officio officer designated to prepare financial statement required by Section 12165 Revised Statutes 1929.\*"

Under the foregoing section, the County Court is authorized to appoint as a designated person to prepare a financial statement any person, or upon the failure of the court to designate a person to prepare the financial statement required by Section 12165, supra, the County Clerk becomes the ex-officio officer, designated under the statutes to prepare the financial statement.

Under Section 12166, supra, it is the duty of the County Court to pay the person designated, whether it be an outsider or the County Clerk to prepare the financial statement and the amount of compensation is limited not to exceed the price per hundred words and figures permitted to the clerk of the court for the writing of the record and no pay shall be allowed for pasting the printed copy in the record.

In view of the foregoing statutes, we believe that the Legislature has authorized and directed the County Court to pay the County Clerk for performing the services of preparing the financial statement, whenever the County Court has failed to designate some other person to prepare this statement.

It is, therefore, the opinion of this department that if you became the ex-officio officer designated to prepare the financial statement as required by Section 12165, supra, then you may recover compensation for preparing such statement for the years 1933-1934 at which time Sections 12165 and 12166, supra, were in effect.

Laws of Missouri, 1933, Section 11811, page 370, provides the aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of Chapter 84 of the Revised Statutes of Missouri, 1929, may retain for any one year's service:

\*\*\*\*\* In counties having a population of less than 7,500 persons, the less than 10,000 persons, the clerks shall be allowed to retain \$1100.00 for themselves; and shall be allowed to pay for deputies and assistants \$900.00; \*\*\*\*\*



Iron County, according to the last federal decennial census, would be governed by the above section. We are, therefore, of the opinion that if you became the ex-officio officer designated to prepare the financial statement as required by Section 12165, the compensation you may recover for preparing such statement added to the regular fees of your office must not exceed the aggregate amount set out above for any one year's service.

Respectfully submitted.

WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

NW-WOS/afj

SCHOOL FOR THE DEAF:

Board of Managers have exclusive and discretionary power to discharge persons enrolled therein.

January 12, 1934. 1/12



Hon. Truman L. Ingle  
Superintendent  
Missouri School for Deaf  
Fulton, Missouri

Dear Sir:

This office acknowledges receipt of your letter dated January 12, 1934, as follows:

"I am most anxious to get from you, an opinion regarding the powers and authority of the Board of Managers of the Missouri School for the Deaf. I wish, particularly, to know their authority in regard to discharging pupils, and whether or not, it is within their power to decide when and for what cause a pupil shall be dismissed from this school.

As there is a case now pending, an immediate reply from you will be greatly appreciated."

Section 9688 R. S. Mo. 1929, provides:

"The 'Missouri school for the blind' at Saint Louis, and the 'Missouri school for the deaf' at Fulton shall be regarded, classed and conducted wholly as educational institutions of the state."

Section 9689 R. S. Mo. 1929, in part pertinent, reads:

"The government of each of these schools shall be vested in a board of managers, etc."

Section 9692 R. S. Mo. 1929, provides:

"All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

In *Bellerive Inv. et al., v. Kansas City et al.*, 13 S. W. (2d) 628, the Supreme Court, l. c. 638, said:

"One of the cardinal rules of statutory interpretation and construction is that words in common use are to be construed in their natural, plain and ordinary signification and acceptation."

The words (pertinent to a determination of your inquiry) used in Section 9696, supra, are unambiguous and thus must be construed in their natural, plain and ordinary signification and acceptation. Attention is directed to the word "all" found therein ("all admissions and discharges \* \* \* shall be determined etc.")

Webster defines the word "all" to mean:

"The whole quantity, extent, duration, amount, quality or degree of; the whole; the whole number of, etc."

The purpose of the School for the Deaf is to give free instruction to persons, residents of this State, under twenty-one years of age, of suitable mental and physical capacity, and the Board is intrusted with this duty. Discharging of pupils should be for cause and should not be abused. Mere whim or dislike of a person should not cause his discharge. However, if a person is immoral, mentally unfit, or for any other reason a hindrance, then he should be discharged. The act, or acts, that go to make up that which the Board decides is sufficient to discharge a person is left entirely to the said Board of Managers' discretion.

Jan. 12, 1934.

It is our opinion that it is within the power of the Board of Managers of the Missouri School for the Deaf to decide when, and for what cause, a pupil shall be discharged from the school. But said power should not be arbitrarily abused.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

INHERITANCE TAX: General Assembly meant Sec. 573, R.S. 1929 to take advantage of the full 80% credit allowed by the Federal Government.

February 1, 1934.



Hon. Richard R. Nacy,  
State Treasurer,  
Jefferson City, Missouri.

Attention: Mr. E. Arnett, State Supervisor

Dear Sir:

We are in receipt of your request for an opinion as stated in a letter to your office from Mr. Joseph Morton:

"I will thank you to inform me whether it is the practice of your office to construe Section 573 of the Revised Statutes of Missouri of 1929 to mean that the amount of tax imposed upon an estate for the purposes of the Federal Estate Tax under the Revenue Act of 1926 before deduction therefrom of the Inheritance Tax paid to the State of Missouri, or the amount actually paid to the United States Government as an Estate Tax after deduction of the Missouri Estate Tax is used as the basis for computing the eighty per cent of Federal Tax which must be paid as an additional Inheritance Tax to the State of Missouri."

I.

The Missouri Estate Tax is equal to the difference between the Inheritance Tax of Missouri and Eighty Per Cent of the Federal Estate Tax.

Section 573, R.S. Mo. 1929 provides:

"In the event that the total of the inheritance taxes imposed upon the several interests and property comprising the estate of the deceased, by law, less exemptions allowed by law, and all other state inheritance taxes, shall not equal eighty per centum of the amount of the tax imposed upon the value of the

Feb. 1, 1934.

net estate of said decedent, under the federal estate tax law, whenever the federal estate tax is determined an additional tax shall then be imposed upon the value of the net estate of said decedent as of the date of such determination equal to the difference between the total of the tax imposed under said section 572 as amended and eighty per centum of the tax imposed by said act of congress."

Section 1093, Title 26, United States Code Annotated provides:

"The tax imposed by section 1092 of this title shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this section shall not exceed 80 per centum of the tax imposed by section 1092 of this title, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 1096 of this title."

It is apparent that it was the intention of the General Assembly of Missouri, by Section 573, supra, to take advantage of the full 80% credit allowed by the Federal Government. The manner of calculating the Missouri Estate Tax is as follows:

Federal Estate Tax.....	\$100,000.00
80% thereof.....	80,000.00
Missouri Inheritance Tax.....	30,000.00
Missouri Estate Tax.....	<u>\$50,000.00.</u>

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

INHERITANCE TAX LAW:

Waiver necessary on transfer of property from bank or trust company to executor; not necessary upon a transfer by the executor to the distributee.

5-26

May 24, 1934



Mississippi Valley Trust Company  
St. Louis, Missouri

Attention: Mr. R. N. Arthur  
Assistant Trust Officer.

Dear Sir:

This Department is in receipt of your request for an opinion, based on the following state of facts:

"This company acts as transfer agent for various corporations and is called upon from time to time to transfer stocks registered in the name of an individual who has died since the date of issue. It is our custom to require a consent from your Department before making such transfers, but the usual form provided authorizes transfer to the executor and ends with this statement:-

'We hereby release said \_\_\_\_\_ from any and all liability to the State of Missouri for the tax and penalties imposed by the Transfer and Inheritance Tax laws thereof by reason of said transfer, payment or delivery.'

In most cases a transfer is not made to the executor but to the distributees either in accordance with the will or the laws of descent and distribution. It has been our interpretation that if a consent was granted by your Department



to make a transfer that you were on notice and that the one waiver was all that would be required. The question has now been raised, however, as to the necessity of securing an additional waiver when the executor makes transfer to the distributee under the above form used by your Department.

Will you please furnish us a ruling as to whether or not there is any additional liability on the transfer agent or the corporation issuing the stock if transfer is made to a distributee under the form of waiver above mentioned?"

Section 583 R. S. Missouri 1929 provides in part as follows:

"No safe deposit company, trust company, corporation, bank or other institution, person or persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who is a resident or non-resident, or belonging to or standing in the joint names of such a decedent and one or more persons, including the shares or capital stock or other interest in a safe deposit company, trust company, corporation, bank or other institution making a delivery or transfer herein provided, shall deliver or transfer the same to the executor, administrator, or legal representatives of said decedent or the survivor or survivors when in the joint name of a decedent and one or more persons or upon their order or request unless notice of the time and place of such intended delivery or transfer be served upon the state treasurer and attorney-general at least ten days prior to said delivery or transfer; nor shall any safe deposit company, trust company, corporation, bank or other institution, person or persons, deliver or transfer any securities, deposits, or other assets belonging to or standing

in the name of decedent or belong to or standing in the joint names of a decedent and one or more persons, including the shares of capital stock of or any other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets, including the shares of capital stock or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer under the provisions of this article unless the state treasurer and the attorney-general consent thereto in writing.\* \*

The intent and purpose of this section of the Inheritance Tax Law of Missouri is to protect the State of Missouri in the collection of its inheritance taxes. To that end this section of the law was enacted in order that there might be no transfer of assets belonging to a decedent without notice being given to the state officials. The further provision is made for the protection of the State that when the transfer is made sufficient assets must be retained by the person transferring the assets to pay any inheritance tax that might be assessed against said property.

Provision is made in the statute whereby the person transferring these assets may be relieved from all liability with respect to the inheritance tax, by obtaining the written consent of the state treasurer and the attorney general. This consent is never granted unless it appears that there is no tax due to the State of Missouri or that the tax has been paid.

It is the opinion of this Department therefore, that there is no occasion for a waiver to be obtained from the state treasurer and the attorney general upon a transfer of property from the executor of the estate to the distributee, provided that a waiver has been obtained by

May 24, 1934

the bank or trust company first making delivery to the executor. In other words, it is the duty of the person, whether that person be the executor of the estate or a bank or trust company, first making a transfer of the assets of the decedent to obtain the necessary waiver from the state officials. Once that waiver has been obtained the property may be transferred without further waiver.

Very truly yours,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

JWH:LC

**INHERITANCE TAX:**

**LIFE ESTATE:** Life Estate of Widow and remainder should be taxed according to provisions of Sec. 595, R.S. Mo. 1929, and tax should be at highest rate possible under provisions of Inheritance Tax Law of Mo.

8-30

August 29, 1934.



Honorable Richard R. Nacy,  
State Treasurer,  
Jefferson City, Missouri.

Attention: Mr. E.J. Arnett, Supervisor,  
Inheritance Tax Department

Dear Sir:

This department is in receipt of your communication of August 25 with reference to the Estate of Wilhelm Scheer, deceased.

It appears that the deceased by Will left to his widow his entire estate "for and during her natural life \*\*\*\* with full power and right for her to use any and all of my personal property for her support and maintenance." Subject to this life estate in his wife, the remainder was devised to one Arthur Morgenstern. The precise question involved here, as raised in your communication, is as follows:

"How can the total interest of the widow be figured in view of the power and right she has to use and dispose of the personal property? How can the interest of Arthur Morgenstern be figured under the tables as you cannot know what his age will be when his life interest starts?"

Section 597, R.S. Mo. 1929 provides in part as follows:

"\*\*\*\*When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and

such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred:

\* \* \* \* \*

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. \*\*\*\*\*

The sections of the statutes heretofore quoted are similar to those provisions of the former New York statute. The Court of Appeals of the State of New York in the case of Matter of Zborowski, 213 N.Y. 109, in passing upon this statute, said (l.c. 116):

"The different statutes hereinbefore referred to contain evidence of a constant effort of the legislature to enlarge the class of transfers immediately taxable upon the death of the transferor. The question of the legislature's power in that regard was set at rest by the decision of this court in Matter of Vanderbilt (supra). In one aspect it may be unjust to the life tenant to tax at once the transfer, both of the life estate and of the remainder though contingent, and it may seem unwise for the state to collect taxes which it may have to refund with interest, but those considerations are solely for the legislature, who are to judge whether they are more than offset by the greater certainty which the state thus has of receiving the tax ultimately its due under the statute. However unwise and unjust it may seem in a particular case like this for the state to collect the tax at the highest rate when in all probability the remainder will vest in a class taxable at the lowest rate, it is the duty of this court to give effect to the statute as it is written."

In the case of *In Re Blun's Estate*, 160 N.Y. Sup. 731, the Court specifically approved the *Zborowski Case*, supra, and said (l.c. 733):

"Under the seventh clause of decedent's will the executors are given the power to pay out a portion of the principal of the trust fund to decedent's son if he should desire to use it for business purposes. This is undoubtedly a power to invade the principal. The appellants contend that under the law, as laid down in the *Matter of Granfield*, 79 Misc. Rep. 374, 140 N.Y. Supp. 922, *Matter of Blyn*, 160 N.Y. Supp. 730, and *Matter of Spiegelberg*, 160 N.Y. Supp. 730, this portion of the estate, owing to the fact that the power of invasion is created, should be suspended for taxation. I do not agree with this contention. An examination of the last two mentioned cases shows that they were based upon the decision in the *Matter of Granfield*, supra. This case was decided prior to the decision of the Court of Appeals in the *Matter of Zborowski*, 213 N.Y. 109, 107 N.E. 44. The theory of law as laid down in that case consequently was not applied in the disposition of the said cases. I think therefore, that in the case under discussion the *Matter of Zborowski* governs, and that the said remainder is presently taxable."

The above decisions of the New York Courts are specifically approved by the Supreme Court of Missouri in the case of *State Treasurer v. Trust Company*, 293 Mo. 545.

#### CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that the life estate of the widow and the remainder should be taxed according to the provisions of Sec. 595, R.S. Mo. 1929. The tax imposed should be at the highest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of the Inheritance Tax Law of the State of Missouri, and the tax so imposed should be due and payable forthwith by the executor, administrator or trustee out of the property transferred.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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Attorney General



INHERITANCE TAXATION:

Where property is devised to a legatee and said legatee dies before distribution two taxable transfers take place, one from the testator to the legatee and one from the legatee to the heirs.

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10-19

October 18, 1934



Mr. Martin E. Lawson  
Attorney at Law  
Liberty, Missouri

Dear Sir:

This Department is in receipt of your letter of September 28, 1934 requesting an opinion from this department as to the following state of facts:

"I am one of the executors of that estate. The other executor is Mr. William J. Kelley, of Liberty, Mo. The will in the estate gives certain property to other uses, and after the payment of debts provides that practically one half of the estate goes to a sister, Miss Nellis Costello, and the other half to a sister, Mrs. Katie F. Robison. Mrs. Robison survived James Costello by something like six or eight months, and then died, leaving two daughters. Mr. Leedy represents the daughters.

The inheritance tax return has been made out on the basis that Mrs. Robison inherited the share of the estate going to her, and that that share is liable for inheritance tax under the laws of the State of Missouri, as of the value and conditions existing at the date of the death of Mr. Costello, on December 27th, 1933.

\* \* \* \*

We are not opposing any action that will be fair and just, and we think any diminution of the tax that is possible would be



October 18, 1934

proper, under the circumstances. However, Mr. Kelley and I, as executors, want a ruling and a judgment that will protect us in our statutory liability for the taxes properly assessable against the estate."

The problem here before us has never been before the courts of the State of Missouri. In the absence of any such rulings we may have recourse as persuasive to the rulings of the courts of other states regarding similar problems.

Section 603 Revised Statutes Missouri 1929, provides as follows:

"When property or any interest therein or income therefrom shall pass to or for the use of any person, institution, association or corporation by the death of another by deed, instrument or memoranda or by any transfer or passage whatsoever, such transfer shall be deemed a transfer within the meaning of this article and taxable at the same rates and be appraised in the same manner and subject to the same duties and liabilities as any other form of transfer provided in this article."

It is clear that the daughters of Mrs. Robison are not the heirs of Mr. Costello, nor are they devisees or legatees of his estate, but the property devised by Mr. Costello goes directly to the estate of Mrs. Robison. The children of Mrs. Robison inherit from Mrs. Robison and not from Mr. Costello, and their succession to this property is only by reason of the death of Mrs. Robison.

A similar question was before the Supreme Court, Appellate Division, of New York, in the case of *In re Clinch* 90 N. Y. S. 923, wherein the court held that under the New York Inheritance Tax Law, which was at that time substantially similar to the Missouri Inheritance Tax Law, providing that a transfer shall be taxable when any person becomes

beneficially entitled, in possession or expectancy, to any property, or to the income thereof, property which passed under a father's will to his son, who in turn dies before a settlement of the father's estate, which property is afterwards delivered to the son's executors, is, when so delivered, subject to a transfer tax.

The court said:

"The statute provides that 'when any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property, or the income therefrom by any such transfer,' the transfer shall be taxable. Subdivision 4, Sec. 220, Transfer Tax Law (Laws 1896, p. 868, c. 908, as amended by Laws 1897, p. 150, c. 284). Of course, until there had been a settlement of the father's estate, it could not be definitely known there would be any transfer to tax; and, until a distribution had been made, nothing had been transferred, and for that reason no tax could be imposed. Up to that time there was a mere claim on the part of Robert or his executors against his father's executors for a share or interest in his estate, which passed by his will. Such claim was at most a mere chose in action, which followed the residence of the claimant; and, as indicated, it would be impossible to determine as to what property, if any, would be ultimately transferred by reason of it. But when an actual distribution had taken place, that which theretofore was uncertain became certain, and that moment a tax attached to the transfer. Matter of Huber's Estate, 86 App. Div. 458, 83 N. Y. Supp. 769."

The Supreme Court of Idaho, in the case of *In re Rothchild's Estate* 283 Pac. 598, also passed on a similar question. The facts, while more involved, present practically the same question as is here before us.

The Supreme Court said:

"To reach the present heirs the property had to pass through the possession and ownership of each ancestor, because

Anne Falk Rothchild died after Samuel Marx Rothchild; hence its will by its terms could not operate to vest his estate in his children.

\* \* \* \*

In Re Rohan-Chabot's Estate, 167 N.Y. 280, 60 N. E. 598, 599, Henry Hayward died leaving by will one-third of his estate to his wife, the balance to his son and daughter, referred to as the countess. The son died before his mother and sister, leaving his share to his mother for her life, then to his sister. The mother exercised her power of appointment in favor of the daughter. The mother's will was offered for probate the same day the daughter died. The court held that a tax was payable on the transfer from the mother when the amount of property so inherited should be ascertained and likewise on the property passing from the daughter's estate to her heir, Miss McClean. The mother had received the full inheritance to which she was entitled from her husband. The daughter, of course, had not, because she died the day probate was started of her mother's estate.

\* \* \* \*

Counsel for appellants argue that this was only one transfer, while here we have two. If the principle, however, be sound, that an interest in an undistributed estate is the basis for a transfer tax, it matters not how many transfers there be. Each one is a distinct taxable transaction, the only uncertain question being the value of such interest, an entirely different and distinct question to be determined when the amount of the interest should be ascertained. See also in re Hazard's Estate, 188 App. Div. 869, 177 N. Y. S. 369; In re Hubbard's Estate, 234 N. Y. 175, 137 N. E. 17.

\* \* \* \*

From a consideration of the above authorities and our statutes, we conclude that Sam-

October 18, 1934

uel M. Rothchild at his death possessed, in the interest in his father's estate, intangible property, and the transfer thereof from his estate to his widow, Anne Falk Rothchild, was taxable under sections 3371, 3378, 3387. Likewise as to the interest possessed by Anne Falk Rothchild and passing to her children."

#### CONCLUSION

In view of the foregoing it is therefore the opinion of this Department, that a taxable transfer took place with respect to the property passing from the estate of James Costello to the estate of Mrs. Katie F. Robison, and that upon her death another taxable transfer took place with respect to the property passing from her estate to her two daughters.

While this may appear at first glance to be a ruling severe in its application to the facts here under consideration, and to have the effect of double taxation with respect to the property transferred, it should be remembered that an inheritance tax is neither a property nor a personal tax but is in the nature of an excise or duty, exacted by the State, for the privilege granted by its laws of inheriting or succeeding to property on the death of the owner.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

JWH:LC

INHERITANCE TAX. Closely held stock and Good Will - when carried as an asset, value cannot be determined by par value of stock or book value, but must be determined on basis of net earnings.

Oral

11-9  
November 1, 1934.



Hon. Richard R. Nacy,  
State Treasurer,  
Jefferson City, Missouri.

Attention: Mr. E. Arnett

Dear Sir:

This department is in receipt of your request for an opinion as to the valuation of closely held stock for the purpose of inheritance taxation in the State of Missouri.

The valuation of this type of security is a very difficult and complex problem for the reason that the securities, because they are closely owned, had no market price and we are therefore faced with the necessity of establishing a fair market value of a security never offered for sale on the market.

The valuation of this type of security becomes more difficult because of the many intangible items entering into the consideration, such as Good Will; i.e., in considering Good Will we must add to the value of the stock an amount over and above the amount shown by the tangible assets of the corporation. "Commerce Clearing House, Inc., Inheritance Tax Service."

The United States Board of Tax Appeals had this question before it in the case of Appeal of the Surviving Executors of the Estate of Jacob Fish, Dec., 1 B.T.A. 882. In that case the Board said:

\*\*\*\*\*The stock of the corporation here in question was closely held, and we therefore are not able to value it upon the basis of sales in an open market. We place our valuation upon the basis of the assets underlying the capital stock and the earnings of the corporation."

The actual mechanics of the valuation are clearly set out by the Board in the latter part of its opinion. It was said:

Passing to the more material evidence in the appeal, it appears from the balance sheets submitted that the net worth of the corporation on December 31, 1921, preceding the death of the decedent, after

adjustment on account of the value of real estate, was \$2,742,850.05, being \$137.14 per share. It further appears that the total net earnings for 71 months, to and including December, 1922, were \$1,565,247.70, after deduction of taxes, or at the rate of \$264,587.66 per year. It further appears that there were included in the assets of the corporation as of December 31, 1921, real estate of the value of \$510,000 and securities of the value of \$414,508.04. If a 5 per cent return were allowed upon these assets, amounting to \$46,225.40, and the average earnings per year based upon the 71 months above mentioned, less the above return upon real estate and securities, or \$218,362.26 were capitalized at 15 per cent, the value of the going business, real estate, and securities would be as follows:

1. The average net earnings.....\$264,587.66
2. Five per cent return on  
real estate and securities.....46,225.40
3. The balance to be capital-  
ized at 15 per cent.....218,362.26
4. The above figure capital-  
ized at 15 per cent.....1,455,748.40
5. The value of real estate  
and securities to be added  
to the capitalized value of  
the business.....924,508.04
6. The total value of the assets  
and going business as of Dec.  
31, 1921, based upon the  
earnings for 71 months.....2,380,256.44  
or a value of \$119.01  
per share.

\* \* \* \* \*

In the case of In Re Felton's Estate, decided by the Supreme Court of California, 169 P. 392, the Court said (l.c. 393):

"Respondent does not question the rule that the market value of stock at the date of the death of the appellant's father is the proper basis for the fixing of the tax, nor that generally such market value is quite distinct from the ratio between the number of shares assessed and the value of the corporation's property.

\* \* \* \* \*



But the Felton Company is a close family corporation. Its shares of stock have never been upon the market and they have never been sold privately. According to the views of respondent, the only way to establish the market value of such shares of stock is to ascertain the value of the property which they represent, assigning to each share its proportionate worth. This is the method of determining market value which has been adopted in New York and approved by the courts. In re Jones, 172 N.Y. 575, 65 N.E. 570, 60 L.R.A. 476; In re Crawford, 85 Misc. Rep. 283, 147 N.Y. Supp. 235; In re Valentine (Sur.) 147 N.Y. Supp. 231."

The Commerce Clearing House, Inc. in their work "Inheritance Tax Service", in discussing this problem, quotes Article XIII of the Federal Regulations as follows:

"Thus Article XIII of the Federal Regulations (which reflects the vast administrative experience in this important field) provides: 'Stock in a close corporation should be valued upon the basis of the company's net worth, earning and dividend capacity and all other factors having a bearing upon the value of the stock. Complete financial and other data upon which the estate bases its valuation should be submitted in duplicate with the return.'"

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the value of closely held corporate stock and Good Will (being the capitalization of that portion of the earning power of a business which is not credited to other assets) where carried as an asset on the books of a corporation, must be determined largely upon the basis of net earnings of the business for a reasonable period of time, capitalized at reasonable or established rates.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General



HERITANCE TAX: Real property located in Missouri under executory contract of sale by non-resident not subject to inheritance tax upon death of the non-resident.

November 2, 1934.



Hon. Vivian S. Smith,  
Judge of Probate Court,  
Pike County,  
Bowling Green, Mo.

Dear Judge:

This department is in receipt of your request for an opinion as to the following state of facts:

\* \* \* \* The administrator takes the position that the State of Missouri is not entitled to inheritance tax and the court entertains the same opinion, but would like your advice in the matter. The facts are:

Adelia Keller, for at least 30 years prior to her death on February 29, 1932, had been a continuous resident of the city of Ottumwa, Wapello County, Iowa, and died in said city, county and state a resident and citizen thereof. During her lifetime, to-wit, November 14, 1931, she entered into a contract for the sale of certain real estate situated in Pike County, Missouri with one W.E. Lovell and wife, for the sum and consideration of \$3,000.00 payable over a period of years, and at the time of her death said contract was in full force and effect. Soon after the execution of the contract the purchasers entered upon and assumed possession of the ownership of the premises and have remained in continuous use, occupation and ownership of the premises, the only interest of Adelia Keller or Adelia Keller estate being the retention of the bare naked legal title as security for the indebtedness.

At the present time there is an unpaid balance on said contract in the sum of \$2650.00, and

under an order entered by the district court of Wapello County, Iowa, the administrator of the estate of Adelia Keller has been authorized to accept the sum of \$2413.25 as full and complete payment and discharge of the balance on the contract and to accept as payment of said sum of \$2413.25 Federal Land Bank Corporation bonds.

Counsel of the Federal Land Bank of St. Louis, Missouri, have required the administration of an ancillary estate at Pike County, Missouri, and the institution of an action for specific performance; and in compliance with their title requirement ancillary administration has been obtained with Judge R.L. Motley as administrator thereof."

The question before us in this opinion is whether or not the real estate located in Missouri is subject to inheritance tax by reason of the death of the holder of the legal title to said property, said person being at the time of his death a resident of the State of Iowa. The general principle is stated by Gleason & Otis in their work on "Inheritance Taxation", as follows:

"Where the deceased had contracted to sell real estate which was thereafter conveyed by his executors, sums due on the contract are personalty and not realty."

Tiffany on "Real Property", Vol. I, Sec. 125, says:

"It is frequently said that on the making of an executory contract for the sale of land of which specific performance would be decreed, a court of equity, regarding as done that which ought to be done, will consider the purchaser as the owner of the land."

The Canadian Supreme Court in the case of *Re Muir*, 51 Can. S.C. 428 held that under an agreement for the sale of land, a covenant to pay should be implied, and consequently that it was a specialty debt which as such constituted property within the province of Manitoba and was liable for succession duty there, and not at the situs of the real property itself.

In the case of Mahan v. Home Insurance Company, 205 Mo. App. 592, the Kansas City Court of Appeals touched on this question wherein Judge Ellison said:

"If one sells his property so that the title passes to his vendee, although it be a title in equity without deed, its destruction, total or partial, is the loss of the vendee."

The leading case on this point is the case of In Re Boshart's Estate, 177 N.Y.S. 567, wherein the court held that where a contract for the sale of a farm provided for payment of the purchase price in installments and that vendor should give a deed when the whole purchase price was paid, possession to be in the purchasers. Upon execution of the contract, vendor's interest was changed from real to personal property, she becoming the owner of the unpaid purchase price and holding the legal title merely as security, being to all practical purposes a mortgage. The court in applying this rule of law, said:

"\*\*\*\*Briefly stated, appellant contends that the legal rule which regards the vendor's interest as real property, and not the equity rule which regards the vendor's interest as personal property, should be applied in determining whether the property in question is subject to a transfer tax. I cannot assent to this contention. From the moment of the execution of the contract, the property rights and interests of the parties, and those claiming under them, are fixed and determined by this equity rule whenever the same comes in question, and on the death of the party this same rule determines whether his interest under the contract is real or personal, and, therefore, to whom it shall pass; and there seems to be no reason why the same rule should not be applied in determining whether the transfer of the property in question is subject to a transfer tax.

\* \* \* \*

In view of the authorities above cited, and especially in view of section 2672 of the Code of Civil Procedure, I have reached the conclusion that Mrs. Boshart's property at the time of her death was in the contract and amount owing thereon and

not in the farm; that said property is intangible and not tangible property; and, since she was not a resident of this state, the transfer of said property is not subject to a transfer tax."

This decision of the court was in all respects affirmed in the case of Persico v. Guernsey, 220 N.Y.S. 689 wherein the court said:

"The vendors hold title as trustees for the vendees and as security for the payment of the balance of the agreed purchase price. \* \* \* The interest of the vendors in the property is deemed in equity personalty, not realty."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the interest of a non-resident vendor in real property within the State of Missouri which at the time of his death was the subject of an executory contract for the sale of certain property, represents intangible property rather than tangible property, and it is therefore not subject to inheritance taxation in the State of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

STATE ELEMOSYNARY INSTITUTIONS:

Laws 1933, page 121, abolishing old Missouri Commission for Blind and conferring duties on Board of Managers of Eleemosynary Institutions. Section 12-U of House Bill 127 appropriating funds out of Blind Pension Fund for prevention of blindness is unconstitutional.

2-9  
February 7, 1934



Honorable W. Ed Jameson  
President Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"As President of the Board of Managers of State Eleemosynary Institutions I have to request your formal official opinion on the following questions of law.

In order that the Board of Managers may understand its powers and duties in the premises and that I as President of said Board may be fully advised of my responsibilities both to the Board as such and to the blind people of Missouri permit me to refer you first to the provisions of Section 8888 R. S. Mo. 1929, as follows:

'Sec. 8888. The Missouri Commission for the Blind shall hereafter consist of the members of the board of managers of the State eleemosynary institutions as now or hereafter provided for and constituted by Article 1, Chapter 46, Revised Statutes 1929, and wherever in any law the Commission for the Blind is referred to it shall, after the taking effect of this act, be construed as referring to the members of the said Board of Managers of the State Eleemosynary Institutions, who are by this act designated and constituted the members of said Commission for the Blind. The officers of the Board of Managers of the

February 7, 1934

State Eleemosynary Institutions shall be the officers of the Commission for the Blind as herein constituted.'

That being true am I correct in assuming that the Missouri Commission for the Blind as formerly organized and existing is now wholly dissolved and without any power or authority save as the Board of Managers of State Eleemosynary Institutions might and does name certain party or parties to carry on the work laid out in the sections of the statutes of the State of Missouri beginning with said section 8888 and including any and all other and further statutes relating to the care of the blind, by which term is meant all persons partly or wholly without sight and who must be cared for in whole or in part by rules laid down by this Board which rules are to be enforced by an executive director which office is at present held by Mrs. Mary E. Rider of St. Louis through appointment by the Governor; that upon other duties devolving upon them as the successors of the Missouri Commission for the Blind is that of adopting such measures as the Commission (Board) may deem expedient for the prevention and cure of blindness, etc.

To that end there was introduced, passed and has now been signed by the Governor, hence a part of the statute law of the state, Section 12-U of Committee Substitute for House Bill No. 127, reading as follows:

'Section 12-U. There is hereby appropriated out of the state treasury chargeable to the blind pension fund the sum of fifty thousand dollars (\$50,000.00) for the use of the Board of Managers of state eleemosynary institutions for work among the inhabitants of Missouri looking to the prevention of blindness.'

The fact that this appropriation comes out of a fund already established to assist in the important work of caring for the blind leads



February 7, 1934

me to hope you may find it to be not only a duty one owes to his fellow-men but in this instance a direct command from the law-making branch of the state government that we at once proceed to formulate a program along lines yet to be fixed whereby we may provide the machinery necessary to control, maintain and operate methods corrective in their nature and permanent in their effect to overcome many of the now usual causes of blindness or impaired vision and work out a scheme of complete and lasting restoration of sight in the greatest degree that can be done among the people of Missouri who most need this service.

I will thank you to give this matter such early attention as you may find it possible so to do that I may have your decision to present to the full Board membership at its monthly meeting in St. Louis the second Monday in February, 1934."

### I.

Chapter 50 of Article I of the Revised Statutes 1929 created the Commission for the Blind and defines the duties and powers of the Commission. Under Section 8888 as appears in the Revised Statutes 1929, the Missouri Commission for the Blind was composed of five members appointed by the Governor. The Legislature in 1933 in the Laws of 1933, page 191, repealed Section 8888 which provided for the Commission for the Blind as appointed by the Governor, and enacted a new section which you have quoted in your letter. Section 8888 above, as passed by the Legislature in 1933, bestows all the duties that heretofore had been bestowed upon the Commission for the Blind, upon the Board of Managers of the State Eleemosynary Institutions.

It is therefore our opinion that from and after July 24, 1933, at which time the Board of Managers of the State Eleemosynary Institutions became the Commission for the Blind, your Board acquired all of the powers and duties which heretofore



Honorable W. Ed Jameson

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February 7, 1934

had been placed upon the Missouri Commission for the Blind, and from that date on that your Board is the Missouri Commission for the Blind.

## II.

You call our attention to Section 12-U of House Bill 127, which is as follows:

"There is hereby appropriated out of the State Treasury chargeable to the Blind Pension Fund the sum of \$50,000 for the use of the Board of Managers of State Eleemosynary Institutions for work among the inhabitants of Missouri, looking to the prevention of blindness."

You inquire whether or not under the appropriation made by that section of the appropriation bill your Board now, as the present Commission of the Blind, may expend that money for the purpose of preventing blindness among the people of this state. We have on this date rendered an opinion to Mr. Forrest Smith, the State Auditor, in which we have held that Section 12-U of House Bill No. 127 is unconstitutional for the reason that it violates Section 47 of Article IV of the Constitution, in that it attempts to divert from the fund created by the constitution for the purpose of paying pensions to deserving blind persons, sums of money to be used for the purpose of preventing blindness, a copy of our opinion to Mr. Smith is inclosed for your information.

## CONCLUSION.

It is therefore the opinion of this Department that since the effective date of the Laws of Missouri 1933, at page 191, which abolished the old Missouri Commission for the Blind, that all the duties and powers conferred upon that Board have been transferred to the Board of Managers of the State Eleemosynary Institutions. We are of the further opinion that Section 12-U of House Bill No. 127 which seeks to appropriate

Honorable W. Ed Jameson

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February 7, 1934

\$50,000.00 out of the Blind Pension Fund created by the Constitution, is unconstitutional as being in conflict with Section 47 of Article IV of the Constitution as set out in the inclosed opinion to Mr. Smith.

Very truly yours,

FRANK W. HAYES  
Assistant Attorney General,

APPROVED:

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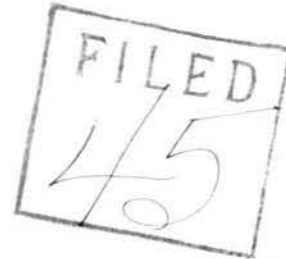
ROY McKITTRICK  
Attorney General.

FWH:LC

Inclosure

Relating to additional appropriations for maintenance of Eleemosynary Institutions for salaries etc., provided the earnings are sufficient.

2-9  
February 8, 1934.



Hon. W. Ed. Jameson, President  
State Eleemosynary Board  
Jefferson City, Missouri

Dear Mr. Jameson:

Acknowledgment is herewith made of your request for an opinion of this office which reads as follows:

"I would ask your special attention to the following sections of the Revised Statutes 1929, re salaries, etc., of various officers and employees of the several eleemosynary institutions under the control and management of the State Eleemosynary Board:

Section 8579: The superintendent of the State sanatorium at Mount Vernon, shall be a physician skilled in the treatment of tubercular diseases, and shall receive for his services the sum of \$3600.00 per annum, payable monthly, together with all necessary and actual traveling expenses.

Section 8580. The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution with special attention to the health and sanitation of the respective institution over which he has been appointed as manager, and shall devote his entire time thereto, and shall receive, unless otherwise provided for, the sum of \$3,600.00 per annum, to be paid monthly, together with all necessary and actual traveling expenses. The superintendent of the Missouri state school shall receive the sum of \$3,600.00 per annum, to be paid in monthly installments, together with all necessary and actual traveling expenses.

Section 8582. The state eleemosynary board shall appoint, upon the joint recommendation of the health supervisor and superintendent of the institution concerned, not to exceed three assistant physicians for state hospital No. 1; not to exceed four assistant physicians for state hospital No. 2; not to exceed four assistant physicians for state hospital No. 3; not to exceed three assistant physicians for state hospital No. 4; not to exceed two assistant physicians for the Missouri state school; not to exceed three assistant physicians for the Missouri state sanatorium; provided that the assistant physicians shall be classified and designated as follows: First assistant physician, who shall act for the superintendent in his absence, at a salary not to exceed \$2,500.00 per annum; second, assistant physician at a salary not to exceed \$2,250.00 per annum; third assistant physician, if any, at not to exceed \$2,000.00 per annum; fourth assistant physician, if any, not to exceed \$1,800.00 per annum; and one chief clerk of the board of managers in charge of the office at Jefferson City, to be appointed by the board of managers at a salary not to exceed \$2,800.00 per annum, payable monthly.

Heretofore appropriations in sufficient amount to meet these salaries were always made and the several employees were paid in accordance therewith.

However, at the regular session of the 57th General Assembly of the State of Missouri, under the caption; H.B. 658, p.132 Session Acts 1933, was passed:

'There is hereby appropriated out of the state treasury, chargeable to the funds herein designated, the various amounts set out to pay the salaries, wages and per diem of the officers and employees and other expenses of the eleemosynary board, state hospital No. 1, state hospital No. 2, state hospital No. 3, state hospital No. 4, the Missouri state school, and the Missouri state sanatorium for the years 1933 and 1934, as follows:

\* \* \* \* \*

'For Hospital No. 1--

Payable out of State revenue fund as follows:

A. Personal Service:

The salaries of the superintendent,  
assistant physicians, steward and  
dentist.....\$ \_\_\_\_\_'

but the usual appropriations for such eleemosynary institutions were so materially reduced, amounting in all instances to 25% or more, that it was necessary for this board, in order to keep within the amounts available to cut the salaries of officers and employees alike; and at the special or extra session of this General Assembly an effort was made to correct the seeming injustice done these employees and under the following caption:

'Section 12-7. In addition to the appropriations heretofore made by an act of the 57th General Assembly, Laws 1933, page 132, and following payable out of the earnings thereof to the support of state eleemosynary institutions, there is hereby appropriated to the following named eleemosynary institutions payable only out of their respective earnings the following sums for the years 1933, 1934, to-wit:'

the 25% reduction theretofore taken from the usual appropriations made for these institutions was restored and a sum in the aggregate equal to the original asked for by these institutions was provided for the two years 1933-1934.

This being true, I desire to ask your official opinion as to whether or not this Board can pay to these officers and employees out of the appropriations now available salaries equal to those specified in the above and foregoing sections of the statutes for the remainder of this biennium."

I

THE ELEEMOSYNARY BOARD WILL HAVE AVAILABLE FOR SALARIES, WAGES AND PER DIEM OF ALL EMPLOYEES, THE ADDITIONAL APPROPRIATIONS MENTIONED UNDER CLASS A OF THE APPROPRIATION ACT OF THE VARIOUS INSTITUTIONS THEREIN MENTIONED IN SECTION 121 THEREOF, PROVIDED THE EARNINGS OF THE INSTITUTION CREATE A SUFFICIENT FUND TO EQUAL THE APPROPRIATION, BUT NOT OUT OF ANY OTHER REVENUE.

Article IV, Section 43 of the Constitution of Missouri provides in part as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.\* \* \* \*"

Also, Article X, Section 15 of the Constitution of Missouri provides in part as follows:

"All moneys now, or at any time hereafter, in the State Treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks\* \* \*"

Section 8666 R. S. Mo. 1929, provides in part as follows:

"There are hereby established and created in the treasury department of this state the following named funds: 'State Hospital No. 1,' 'State Hospital No. 2,' 'State Hospital No. 3,' 'State Hospital No. 4,' 'Missouri State School,'\* \* \*"

Section 8667 R. S. Mo. 1929, provides as follows:

"Any moneys in the state treasury to the credit of any of the funds in this article created, paid therein under the provisions of this article, or so much thereof as may be necessary, shall be appropriated by the general assembly for the support or improvement of the institution to which the fund belongs."



Section 8659 R. S. Mo. 1929 provides as follows:

"Whenever any sum or sums of money shall be paid into the treasury of any such institution under the provisions of the preceding section, or any law of this state, and all moneys which may be received into the treasury, or by any officer or officers of any such institution, derived from the employment of the inmates thereof, or from the use or disposition of any property belonging to such institution, and all moneys coming into the treasury, or into the hands of any officer or officers of any such institution from any other source whatever for the support or improvement of such institution shall be forthwith entered on the books kept by the treasurer or other financial officer of such institution, so as to show the source from whence derived and from whom and upon what account it was received, and the same shall then be forthwith transmitted by such treasurer or other financial officer to the state treasury, and the state treasurer shall give his receipt therefor."

Section 1, page 415, Laws of Missouri 1933, provides in part as follows:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end



of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer.\* \* \* \*

It will be observed that House Bill No. 127, extra session of the 57th General Assembly, provides under Section 12T additional appropriations for the following named eleemosynary institutions for salaries, wages and per diem of all employees to-wit:

Hospital No. 1. . . . .	\$35,309.00
Hospital No. 2. . . . .	52,500.00
Hospital No. 3. . . . .	16,580.00
Hospital No. 4. . . . .	29,000.00
Missouri State School at Marshall. . . . .	320.00
Missouri State Sanatorium at Mt. Vernon . . . . .	55,279.00

These appropriations however are payable only out of their respective earnings. The income or earnings of these various institutions is derived from the various sources attested by the statutes, but no matter from what source derived it is required to be paid into the State Treasury under the provisions of Section 8669 supra, and it becomes State money,--that is money the State in its sovereign capacity is authorized to receive, the source of its authority being the Legislature.

Section 8666 supra, provides for the establishment and creation in the treasury department of special funds, and whenever any moneys are paid into the State Treasury by the various institutions as provided by law, they shall be placed to the credit of the fund to which they respectively belong. In the case of State ex rel. v. Gmelich, 208 Mo. 152 l. c. 162, the Court in part says:

"\* \* \* In our judgment, the State Treasurer has thus been made a financial officer of this institution for the purpose of collecting these moneys,\* \* \* "

Section 8667 supra, provides that all moneys in the State treasury to the credit of the various funds created under Section 8666 supra, and so much thereof as may be necessary, shall be appropriated by the General Assembly for the support or improvement of the Institution to which the fund belongs.

February 8, 1934.

CONCLUSION.

In view of the constitutional provisions, statutes and constructions of the Supreme Court thereon, this department rules that the eleemosynary board, will have available for salaries, wages and per diem of all employees, the additional appropriations mentioned in Section 127 under Class A of House Bill No. 127 of the various institutions therein mentioned, provided the earnings of the respective institutions equal the appropriations, but the appropriations therein mentioned are not payable out of the general revenue.

Our construction is made in pursuance of the purpose of the Bill itself and in line with the following authorities that hold that a legislative enactment should be construed in the light of its spirit and purpose and so as not to make any provision of it absurd or useless.

Fanny v. State, 8 Mo. 122.  
Darling Lumber Company vs. Missouri Pacific Railroad Company, 216 Mo. 658.  
Rutter vs. Carothers, 223 Mo. 631.  
State vs. General Baking Company, 283 Mo. 396.

Yours very truly,

W. W. BARNES,  
Assistant Attorney General,

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

WB:MMZ

Relating to the distinction between "materials" mentioned in Class 'C' and that of Class 'D' in Laws 1933 at pp. 133 et seq. X  
Also H. B. No. 127, Special Session--Section 12T.

5-26

February 8, 1934.



Hon. W. Ed. Jameson, President  
State Eleemosynary Board  
Jefferson City, Missouri

Dear Mr. Jameson:

Your request for an opinion of this office dated January 30, 1934, is as follows:

"Permit me to call your attention to and ask your official opinion in re Paragraphs C and D of appropriation bill passed at the regular session of the Legislature fixing sums which might be expended by State Hospitals Nos. 1, 2, 3, and 4; Missouri State School at Marshall; and Missouri State Sanatorium at Mount Vernon as shown at pp. 133 et seq. Session Acts 1933, as follows:

'C. Repairs and Replacements:

Labor, material and supplies for repairing or replacing buildings, building equipment, operative equipment, and structures other than buildings

'D. OPERATION:

General expense, and material and supplies;

and of Sections C and D of appropriation act of Special Session of 1933, as same appear in Committee Substitute for House Bill No. 127, p. 16 et seq., which contain the same language, as to whether or not the word 'material' as used in Section C in each instance can be construed to mean the same as the word "material" in Section D thereof in so far as the purchase of supplies is for the betterment and upkeep of the buildings used and being a part of the several different eleemosynary institutions under the control and management of the Board of Managers State Eleemosynary Institutions."

February 8, 1934.

I.

THE WORD 'MATERIAL' AS USED IN CLASS  
'C' AND THE WORD 'MATERIAL' AS USED IN  
CLASS 'D' OF THE APPROPRIATION ACTS  
REFERRED TO IN YOUR REQUEST ARE NOT THE  
SAME, AS THEY REFER TO DIFFERENT SUPPLIES.

In arriving at a proper determination of your question we are first directed to the provisions of the Constitution of Missouri from which we quote. Section 43 of Article IV provides in part as follows:

"All revenue collected and moneys received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law.\* \* \* \*"

Also, Section 19 of Article <sup>X</sup>MO of the Constitution of Missouri provides in part as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law;\* \* \* \*"

In the case of State ex rel. v. Gordon, 236 Mo. 142 l. c. 158, the Court in construing these Sections said:

"\* \* \*The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law. Because of this constitutional inhibition we have no difficulty in deciding that in the absence of an appropriation made by the General Assembly for that purpose no funds could be lawfully paid out of the State treasury for the support and maintenance of the game department,\* \* \* \*"

In State ex rel. Publishing Co. v. Hackmann, 314 Mo. 33 l. c. 53, the Court said:

February 8, 1934.

"It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of Section 19, Article X of the Constitution, no money may be paid out of the State Treasury, except in pursuance of an appropriation by law the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act where it is paid out of money specifically appropriated for a different purpose." \* \* \*

Laws of 1933, page 132-137, Section 1, provides by classifications A, B, C & D, the amount appropriated to each subdivision thereof for the purposes therein mentioned. The same is true with reference to Section 127, House Bill 127. It will readily be observed that a specific sum is appropriated for each class, and for a different purpose. The word "material" as used in Class 'C' is to designate any article or thing employed in repairing or replacing either buildings, building equipment, operative equipment and structures other than buildings. The word "material" as used in Class 'D' is used to designate supplies necessary in the operation of the institution. Funds appropriated for Class 'D' cannot be used for Class 'C' for the reason it could not be maintained that such a payment is made pursuant to an appropriation because specifically appropriated for a different purpose.

#### CONCLUSION.

In view of the provision of the State Constitution herein set out and the construction placed hereon by our Supreme Court, this Department holds that the Eleemosynary Board has no authority to use appropriations of one classification named in the appropriation act for a deficit existing in another classification, because that would constitute paying out money specifically appropriated for a separate and different purpose.

Yours very truly,

W. W. BARNES,  
Assistant Attorney General.

APPROVED

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ROY MCKITTRICK,  
Attorney General.

STATE PURCHASING AGENT:

Can not procure delivery of goods to departments with an agreement that the same may be considered as purchased when balance to pay therefor accumulates in State Treasury.

February 8, 1934

Honorable George C. Johnson  
State Purchasing Agent  
Jefferson City, Missouri



Dear Mr. Johnson:

The question submitted to this Department, as we understand it, is as to whether or not the proposed rule or regulation as follows:

"VENDOR - NOTICE

Although there is an unencumbered balance in the appropriation shown, sufficient to pay for the supplies listed hereon, due to lack of sufficient incoming revenue there is not at this time a sufficient cash balance in the Treasury to the credit thereof, thus creating an emergency. The State Purchasing Agent, being satisfied that these supplies are essential to the continued operation of the above department or institution, by this form invites you to furnish the supplies listed with the understanding by you that if and when the fund later shows an unencumbered cash balance sufficient to pay for these supplies, then, and not until then, shall this transaction be construed as a "purchase" by the State Purchasing Agent within the meaning of Section 4, page 412 of the laws of Missouri, 1933,\*\*\*\*\*"

may be legally promulgated and carried out under the State Purchasing Agent Act.

We are inclosing you herewith copy of opinion of this Department dated September 14, 1933 addressed to Honorable



Honorable George C. Johnson

-2-

February 8, 1934

Forrest Smith, State Auditor, Jefferson City, Missouri.  
I call your attention to what is said at pages 12 to 19, both inclusive. We further direct your attention to the definition of the word 'purchase' as found at page 18 of the opinion of this office to you dated December 6, 1933. Section 4 of the State Purchasing Agent Act (Laws Missouri 1933, page 412) specifically provides that the Purchasing Agent shall not furnish any supplies to any Department without first securing a certification from the Auditor showing, among other things, that an unencumbered balance remains in the fund from which payment for such purchase is to be made and sufficient to pay the purchase price of such purchase. A purchase without such certification renders the Purchasing Agent liable on his bond. Certainly a following out of the proposed rule and regulation would be to furnish supplies to a department and is, in legal effect, a purchase by the State Purchasing Agent, although payment therefor is delayed.

We think the promulgation and carrying out of the proposed regulation would violate the entire intent and purpose of the State Purchasing Agent Act.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

Inclosure



ELECTIONS: A village can not call an election to become a city of the fourth class and at the same time call an election to vote on proposition of erecting a water-works system.

2-24  
February 22, 1934.



Mr. Arch A. Johnson,  
Attorney at Law,  
824 Landers Building,  
Springfield, Missouri.

Dear Sir:

This department is in receipt of your letter of February 9 requesting an opinion on the following matter:

"To recapitulate: Can a village call an election to vote itself into a city of the fourth class and also call an election for the same time to vote upon the issuing of bonds to be issued by the city of the fourth class for the erection of water works?"

Section 6094, R.S. Mo. 1929 provides:

"All towns not now incorporated in this state containing less than five hundred inhabitants, are hereby declared to be villages. Provided, that any village in this state now or hereafter having more than two hundred inhabitants may by majority vote of the qualified electors therein elect to become a city of the fourth class."

Sections 7664 and 7671, R.S. Mo. 1929 provide for the manner of calling an election by a city of the fourth class to erect a waterworks plant.

Section 7671, R.S. Mo. 1929 provides:

"The council shall then, by ordinance, submit the proposition to erect the waterworks system as provided in the contract, ordinance and other proceedings,

and to pay for same by bonds issued as aforesaid, to the voters of said city, as provided in section 7664. \*\*\*\*\*

Section 7664 referred to Section 7671 provides:

"The city shall have the right to acquire by purchase any waterworks system in operation in such city at its fair and equitable value, to be agreed upon by the city and the person, firm or corporation owning the waterworks system, and whenever a proposition is made in writing to the city by the person, firm or corporation owning such plant to sell to the city under sections 7661 and 7682 its waterworks system at a price that the city council deems fair and equitable, the council or other proper authorities shall, by ordinance, order a special election to be held, of which they shall give not less than fifteen days' previous notice, by publication in some newspaper published in such city, stating the purpose of such election. Such election shall be held and judges and clerks thereof appointed as in cases of other elections in such cities, and all the general provisions of the election laws applicable to such cities and not inconsistent with the provisions hereof shall apply to and govern such election, and the proposition to be submitted at such election shall be:

'To acquire the waterworks system and property and issue bonds in payment therefor, which shall be a first lien on the waterworks system and property, but no general or personal obligation of the city --Yes.'

'To acquire the waterworks system and property and issue bonds in payment therefor, which shall be a first lien on the waterworks system and property, but no general or personal obligation of the city--No.'

And if a majority of the voters of said city voting on said proposition shall vote 'yes', then such city shall acquire said property

Feb. 22, 1934.

at the price and on the terms named  
in the proposition."

It will be noticed that the proposition to erect the water-works must be submitted to the voters of the city at a special election through the city council by ordinance. In the case here under consideration there is no "city council" to make the required "ordinance"--in fact, there are no "voters of the city" as, at the time of the proposed election, Walnut Grove will not be a city of the fourth class and can not be until the election results are determined.

In view of the foregoing, it is the opinion of this department that a village cannot call an election to become a city of the fourth class and at the same time call an election to vote on the proposition of erecting a waterworks system.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

JWH:AH

COUNTY WARRANTS: If County Court has carried out <sup>its</sup> duties under the County Budget Law, warrants should be paid out of funds mentioned in warrants in the order in which they were protested.

3-5  
February 26, 1934.



Hon. W. Irvin Jackson,  
Prosecuting Attorney,  
Wright County,  
Hartville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of January 23, which is as follows:

"The County Treasurer of this county has given notice that he will on the 25th day of January 1934 pay a portion of the county warrants drawn on 1933 county revenue. I might further say that in May 1933, our County Court met and set aside a certain per cent of the anticipated county revenue for 1933 into the following funds, to-wit: Pauper Fund, Jury and Election Fund, Salary Fund and Contingent Fund.

Before the Treasurer gave notice of the payment of a portion of these warrants as aforesaid, I advised him that under Sections 9985, 9986, 12139 and 12140 of Rev. St. of Mo. 1929, he was bound to apportion the funds to be paid as the County Court had apportioned them in May 1933, and that each warrant presented for payment should be paid out of the funds mentioned in such warrant in the order in which said warrants were protested.

The Treasurer is not inclined to take my opinion in this matter or to pay these warrants without first having your opinion thereon and so I am accordingly asking that you mail me your opinion on the following question, to-wit:

Shall the warrants presented for payment be paid out of the funds mentioned in said warrants, in the order in which said warrants were protested, or shall the warrants presented for payment be paid in the order in which they were protested without regard to the funds on which they were drawn."

We note you have advised your County Treasurer that he should apportion the funds to be paid in the manner in which the County Court apportioned them at the regular May term 1933, and that each warrant presented for payment should be paid out of the funds designated in the warrant in the order in which said funds were protested. It appears that you base your opinion according to Sections 9985, 9986, 12139 and 12140, R.S. Mo. 1929. As you appear to be familiar with these sections, we will not quote them in this opinion; however, you might have rendered your opinion according to the decision in the case of State ex rel. v. Johnson, 162 Mo. 621, which in substance is as follows:

"A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary, the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years.

Such warrants are to be paid in the order of their presentation and registration, and are not payable pro tanto if there is not a sufficient fund to pay all.

Where such surplus is applicable to the payment of the warrants of previous years in the order of their registration, it is the duty of the county treasurer to pay them without waiting for an order of the county court distributing such surplus among the various county funds. No further appropriation or order by the court is necessary. The warrant itself is the voucher the law recognizes as the treasurer's authority for paying it."

We call your attention to the fact that the Legislature of 1933 in the new Budget Law, Laws of Mo. 1933, Section 22, page 351, repealed Sections 9985 and 9986. Section 22, supra, provides as follows:

"All laws or parts of laws and expressly sections 9874, 9985 and 9986 in so far as they conflict are hereby repealed."

Feb. 26, 1934.

Sec. 12139, R.S. Mo. 1929, dealing with the manner in which the Treasurer shall keep books for entering warrants, and Sec. 12140, dealing with the payment of warrants, were not expressly repealed by the Legislature and do not appear to be in conflict with the County Budget Law.

In this connection we call your attention to Section 2, Laws of Mo. 1933, page 341. This section deals with the classification of expenditures, under which section Wright County should be subjected, as its population so classifies it that it comes within the first eight sections of the County Budget Law. Section 2, supra, sets out six classes of proposed expenditures, Class 6 being as follows:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

We also call your attention to the last proviso, "providing that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

#### CONCLUSION

Assuming that your County Court has carried out the duties incumbent upon it under the County Budget Law up to the present time, it is the opinion of this department that the warrants in question should be paid out of the funds mentioned in said warrants in the order in which the warrants were protested, and that no conflict exists with the County Budget Law.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General

APPROVED:

ROY McKITTRICK,  
Attorney General

OWN:AN



ELEEMOSYNARY BOARD - Superintendent of Children's Home " Bond. X

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5-23  
May 21, 1934.



Honorable W. Ed Jameson, President  
Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion upon the following facts:

"Heretofore, it has been necessary for Mrs. W. W. Henderson, in the position she has occupied with the Board of Charities and Children's Bureau, to give a bond, the premium of which has been paid by the state.

With the change of conditions surrounding this position, of which she is still the head, and placing it under the Board of Managers of the State Eleemosynary Institutions I am writing to inquire whether or not it will be necessary for her to still have a surety bond."

In answer to your inquiry, we call your attention to Section 14099, Revised Statutes of Missouri, 1929, which is as follows:

"The board shall appoint a superintendent whose salary shall be \$2,500.00 per annum, who shall have power to employ and discharge such employees as may be necessary.



#2 - Honorable W. Ed Jameson

The said board shall determine the number of employees and the salary for each one, which shall not exceed the sum of \$1,500.00 per annum, and it shall prescribe regulations for the government and conduct of the institution."

We have been unable to find any statute which requires the superintendent of the Children's Home to give a bond. It is the opinion of this office that such bond may or may not be required by the board. The board would have ample authority to require such bond if in the judgment of the board such bond was necessary, as the giving of a bond could be required under the board's power to "prescribe regulations for the government and conduct of the institution".

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General

FER:FE

X

CONVICTS - - Governor's warrant necessary to transfer  
ELEEMOSYNARY BOARD - insane convict from penitentiary or other  
place of detention to insane hospital.

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June 5th, 1934.

6-8



Honorable W. Ed Jameson, President  
Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Sir:

We have your request of June 2, 1934 upon the following facts:

"Most of the criminal insane patients that have been transferred to the different mental hospitals from the state penitentiary have been cared for in Fulton. The few that have been sent to the other institutions are gradually being removed to Fulton where we are not quite so crowded and where we are making a special provision to take care of them.

I wish you would let me know whether or not it is necessary under the law for the Governor to issue an order for a criminal who has become mentally unbalanced and sent from the penitentiary to one of these hospitals to be transferred from one institution to another. The original assignment or transfer from the penitentiary to the mental hospital requires an order from the Governor. If it is necessary for him to make a new order to change from one institution to another I would like to know."

#2 - Honorable W. Ed Jameson

There are two sections of the statutes relating to this matter, and these sections are virtually identical.

Section 3801:

"If any person, after having been convicted of any crime \* become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor \* to inquire into the facts, and he may pardon \* commute or suspend \* and may, by his warrant \* order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason. \*\* "

Section 8659:

"If any person, after being convicted of any crime \* and before the execution, in whole or in part, of the sentence of the court, become insane, it shall be the duty of the governor\* by his warrant to \* order such lunatic to be conveyed to a state hospital and there kept until restored to reason. \* "

The power to remove a prisoner legally confined in the penitentiary is vested in the governor. In the case of insane convicts, he may,

(1) Pardon;

(2) Commute;

or, (3) Suspend the sentence.

Any transfer of an insane convict from the penitentiary to the custody of the authorities of an insane

#3 - Honorable W. Ed Jameson

asylum shall be by warrant issued by the governor. The transfer of an insane convict by warrant to one insane asylum does not destroy the governor's power to transfer said convict to another insane asylum. Neither does the placing of an insane convict in one hospital create in the authorities of that insane asylum the right or power to transfer said convict to another hospital. In the last analysis, the legal authority of an insane asylum to retain a convict, while under sentence to the penitentiary, is the authority contained in the governor's warrant transferring said convict from the penitentiary to that particular hospital.

It is, therefore, the opinion of this office that no insane asylum in the state should receive an insane convict from the penitentiary or from the temporary custody of some other insane asylum, except wherein such insane convict is accompanied by the governor's warrant directing that such convict be placed in that particular hospital.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

X

ELEEMOSYNARY BOARD - No authority to pay transportation expenses  
of non-resident patients.

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June 23d, 1934.

6-28



Honorable W. Ed Jameson, President  
Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Sir:

We have your request of June 4, 1934 for an opinion as to whether or not the Eleemosynary Board has the authority to arrange to have insane patients who are out of the state brought back to Missouri, and to assume care therefor.

We call your attention to the provisions of Section 8663, Revised Statutes of Missouri, 1929, which, in part, provides as follows:

"No person shall be entitled to the benefit of the provisions of this article as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, " "

9326

Before patients can be admitted and any particular county charged for the keeping of such patient, the county court of the county involved shall conduct a hearing on such matter - Section 8636 R. S. Mo. 1929, and shall follow the proceedings outlined under Section 8643 R. S. Mo. 1929. The sending of such a patient to an insane asylum from a county, upon an order of the county court, places the cost of the transportation and the support and maintenance of such patient upon the county sending such patient to the hospital.

#2 - Honorable W. Ed Jameson

We have made a diligent search of the authorities in this state, and we find none authorizing the Eleemosynary Board to pay the transportation of non-resident insane persons either to or from Missouri. Insane poor patients can only be admitted to state hospitals by an order of the county court of the county in which they reside.

It is, therefore, the opinion of this office that the Eleemosynary Board is without authority to pay the transportation charges of insane persons in returning such patients to Missouri or in sending such patients from Missouri to some other state.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

PURCHASING AGENT. COAL MINES: Right of operator of truck line to bid wholesale prices to governmental agencies.

June 29, 1934.

7-3



Mr. George C. Johnson  
State Purchasing Agent  
Capitol Building  
Jefferson City, Missouri

Dear Mr. Johnson:

Your letter requesting an opinion of this office dated June 27, 1934, is as follows:

"On the purchase of coal for governmental agencies and departments of the State of Missouri, I, as State Purchasing Agent, am expecting to ask for bids.

"Please give me an opinion as follows: The code of fair competition for the retail solid fuel industry approved February 14, 1934, by President Roosevelt, Article #2, Sections two and three defining retailing and wholesaling and under the provisions of Article #3, Section 13 reading in part 'any business included in this definition of retailing in Article #2, Section Two of this code, which has been by custom served by the wholesale coal industry in any trade area, shall be included within the definition of wholesaling'. The Administrative order No. X-48, dated June 20, 1934, Release No. 5911, signed by Hugh S. Johnson, Administrator for industrial recovery, entitled, 'Granting Limited Exemption from provisions of codes of fair competition in connection with quotations made to governmental agencies' gives any person complying with a code the exemption from compliance with provisions of such codes governing quotations to governmental agencies, and any person may (a) 'quote prices in terms of sale to governmental agencies as favorable of those permitted to be quoted to any commercial buyer for like quantities.'



"It has been customary for governmental agencies in Missouri in the past to buy coal wholesale from truck mines and any purchase by retail has been the exceptional case. In fact these truck mines are not located on a railroad.

"Please advise whether the truck mines in Callaway County can bid wholesale prices rather than retail prices on coal for state institutions or political subdivisions of this state, under the provisions of the code and administrative order X-48 above set out."

The code of fair competition for the Retail Solid Fuel Industry approved by President Roosevelt, February 14, 1934, provides in part as follows on page 473, Article II, entitled "Definitions":

"SECTION 1. 'Solid fuel' shall mean any anthracite, semi-anthracite, bituminous, semi-bituminous or lignite coal, brisquettes, boulets, coke, gas-house coke, petroleum coke, petroleum carbon or any other manufactured or patented fuel not sold by liquid or metered measure, and wood or wood-fuel products except charcoal.

"SECTION 2. 'Retailing' shall mean the selling or selling and delivering of solid fuel in other than railroad cars or cargo vessels, subject, however, to the provisions of Article III, Section 13, of this Code.

"SECTION 3. 'Wholesaling' shall mean the selling or selling and delivering of solid fuel in railroad cars or cargo vessels, subject, however, to the provisions of Article III, Section 13, of this Code.

The same code provides in part as follows on page 476 under Article III, entitled "Administration".

"SECTION 13. Any business included in the definition of 'wholesaling' in Article II, Section 3, of this Code, which has been by custom served by the Retail Solid Fuel Industry in any trade area, shall be included

within the definition of 'retailing', and any business included in the definition of 'retailing' in Article II, Section 2, of this Code, which has been by custom served by the wholesale coal industry in any trade area, shall be included within the definition of 'wholesaling'. Any dispute arising out of these provisions and involving any related industry or industries for which a Code of Fair Competition shall exist, shall be forthwith reviewed and determined by the procedure established in the last preceding Section, provided that no such determination shall prevent any retailer doing wholesale business, or the converse."

#### CONCLUSION.

There are so many codes approved by the President that it is an impossibility for this office to review all industrial codes approved by our President for the purpose of aiding in national recovery, and for the purpose of this opinion we confine ourselves to an interpretation of the above code, which is submitted by your letter as the code applicable to the coal industry in Missouri.

It is common knowledge that the definition of "Solid fuel" under Article II, Section 1, of said code, will include the kind of coal which is sold wholesale and retail in Missouri, and that it includes the kind of coal mined in Callaway County, Missouri/

Under the provisions of Article II, Sections 2 and 3, it is readily discernable that the "Retailing" as used by said code means selling and delivering coal in other than railroad cars, subject to the provisions of Article II, Section 13, of the code, and that the term "wholesaling" as used by the code means the selling and delivering of coal in railroad cars, subject to the provisions of Article II, Section 13, of the code. Hence, we must look to the provisions of Article II, Section 13, in order to fully apply the terms "wholesaling" and "retailing" as used in the Code, to a concrete state of facts.

Article III, Section 13, modified the clear cut distinction between "wholesaling" and "retailing" as used in the code whenever such a statutory distinction is contrary to the custom of the wholesale and retail industry serving any trade

June 29, 1934.

area. That is to say, that where the "Retail Solid Fuel Industry" by custom has been selling coal to the consumer in railroad cars, then he is not at all events to be treated as a "Wholesaler" while construing the code for the "Wholesale Solid Fuel Industry", and visa versa, when the owner of the mine by custom has been selling coal to the consumer in other than railroad cars, for instance in trucks, for in many Missouri mines the railroad facilities have not been provided but said mines have depended solely on motor vehicle transportation for delivering to the consumer, then said mine operator is not at all events to be treated as a "retailer", when construing the code for the "Retail Solid Fuel Industry." The custom by which a trade area has been served, by the provisions of the code itself, may determine whether one is a "wholesaler" or a "retailer" under the code of fair competition for the "Retail Solid Fuel Industry".

Your state in your letter that it has been customary for governmental agencies in Missouri to buy coal wholesale from truck mines. Such being the case, it is the opinion of this office that the operators of said truck mines are not subject to the provisions of the code regulating the "Retail Solid Fuel Industry", when supplying said governmental agencies with Missouri coal, and said mine operators can bid wholesale prices to the State Purchasing Agent, notwithstanding the provisions of the above set out code. The Administrative Order No. X-48, paragraph (a), which is set out in your request, which order applies to all administration codes, allows operators of any coded industry to quote prices to governmental agencies as favorable as prices quoted to commercial buyers for like quantities, and when the operator of a truck mine in Callaway County, or any other county in Missouri, who by custom has been selling coal to governmental agencies wholesale, submits a bid to you as favorable as his prices quoted to commercial buyers, and said bid is in all other respects in compliance with the code regulating the "Wholesale Solid Fuel Industry", then said bid should be considered as other bids are considered by your department.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H

ELIEMOSYNARY INSTITUTIONS - Board of Managers have right to  
compromise judgment against county.

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July 12, 1934.  
7-16



Honorable W. Ed Jameson, President  
Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Mr. Jameson:

This department acknowledges receipt of your  
letter dated July 3, 1934. Your letter is as follows:

"Buchanan County owes State Hospital  
#2, at St. Joseph, for their account  
to Jan. 1, 1934 the principal sum  
of \$39,401.50. Suit was brought on  
this account and judgment rendered  
with interest to Feb. 1, 1934 amounting  
to \$3743.14, making the total amount of  
judgment, principal and interest,  
\$43,144.64. This amount bears interest  
at 6% from Feb. 1, 1934.

Buchanan County owes something like one  
and one half million dollars and prepara-  
tions have been made by the county to  
issue bonds to each individual creditor  
to take up these obligations. They will  
be owing us, therefore, \$43,144.64 plus  
interest from Feb. 1, 1934 to July 16,  
1934.

What we are endeavoring to do is to collect  
our accounts against Buchanan County. Our  
board has expressed its willingness to ac-  
cept the principal of this account, or in  
other words if we are permitted to do so  
we are willing to square this account on  
our books for \$39,401.50 in cash. In so

July 12, 1934.

doing, of course, we will be allowing discount to the amount of the interest on the indebtedness.

At your earliest possible convenience, and particularly before July 16th, I will be very glad if you will have an opinion rendered from your office as to our right to accept the principal on this account and release this judgment."

Article 2 of Chapter 46 of the Revised Statutes for the year 1929, and particularly Sections 8636 and 8642 thereof, authorize the payment by the several counties of this state of the amounts due for the support and maintenance of the insane poor of such counties in the respective state eleemosynary institutions.

Section 8615, R. S. Mo. 1929 provides as follows:

"For all debts and demands whatsoever due any eleemosynary institution, and all damages for failure of contract, and for trespass and other wrongs to the institution or any property thereof, real or personal, actions in any court of competent jurisdiction may be maintained in the name of the board of managers of such institution, naming it. Interest shall be recovered on any and all sums due the institution from the time when the cause of action accrued. In actions for any indebtedness, or for any damages due the institution on account of any patient or inmate thereof, the account therefor, certified by the superintendent, with the seal of the institution attached, shall be prima facie evidence of the amount due."



From the foregoing it appears that the various counties are liable for the payment to the state eleemosynary institutions for the support and maintenance of insane poor of such county and that the Board of Managers of such institution where such patients of the institution may be supported and maintained are entitled to maintain an action in court for the collection of such sum or sums so due.

With the foregoing as a background, we think the applicable rule and answer to your inquiry is found in *Railway Company v. Anthony*, 73 Mo. 431, l.c. 434:

"The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise, questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the Supreme Court of New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary'. The same doctrine was sanctioned in the *Supervisors of Chenango County v. Birdsall*, 4 Wend. 453."

Honorable W. Ed Jameson

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July 12, 1934

We see no reason why the reasoning of the court in the quotation above set out would not apply as well to the Board of Managers of the state eleemosynary institutions as to a county. The fact that Section 8615 requires judgment to be recovered for interest does not alter the situation, as it is now a question of what is to the best interest of the state eleemosynary institutions, in view of all of the circumstances which might surround an attempt to enforce the judgment you have obtained against Buchanan County.

It is our opinion, that if the Board of Managers of the state eleemosynary institutions are of the opinion that the acceptance of the principal sum of the judgment obtained by you against Buchanan County would be for the best interest of the state eleemosynary institutions, that you are authorized and warranted under the law in accepting that amount in full satisfaction of the judgment so obtained.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

GL:FE



K

ELEEMOSYNARY BOARD - Board may accept bonds of county in lieu of judgments against the county.

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July 13, 1934.

7-16



Honorable W. Ed Jameson, President  
Board of Managers  
Jefferson City, Missouri

Dear Mr. Jameson:

Your request for an opinion dated July 5, 1934 is acknowledged. Your letter is as follows:

"With reference to the enclosed letter from the Prosecuting Attorney in St. Joseph will state I would like to have some assurance from your office if possible that it will be all right for us to accept bonds for the accounts owing to the several eleemosynary institutions from Buchanan County. Some of these accounts have been reduced to judgment. Others are open accounts on the books of the several institutions.

I would be very glad if you will give me the benefit of your opinion in regard to this matter at an early date, and oblige."

Section 8636, Revised Statutes of Missouri, 1929, among other things, provides:

"The several county courts shall have power to send to a state hospital such of their insane poor as may be

Honorable W. Ed Jameson

-2-

July 13, 1934

entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding eighteen dollars (\$18.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; \* \* \*

It is apparent from your letter and from the letter set out in the opinion which we wrote you on yesterday with reference to accepting the principal of the judgments rendered against Buchanan County in satisfaction of the judgment for principal and interest, that the provision of Section 8636, above set out, has not been complied with with reference to the payment for support and maintenance of the insane poor in cash. Hence, the Board of Managers of state eleemosynary institutions have proceeded, under Section 8615, Revised Statutes of Missouri, 1929, to secure judgments against the county for such sums except certain amounts still due and on which judgments have not been rendered.

The county having failed to make payments as required, and the judgments having been rendered, the question is, - What are the respective rights and duties of your Board and Buchanan County under the circumstances as they now exist? Section 2892, Revised Statutes of Missouri, 1929, as amended by Laws 1931, page 133, reads:

"The various counties in this state for themselves as well as in behalf of any township or parts of townships for which said counties may have heretofore issued any bonds, and the several cities, villages, incorporated towns, school districts and road districts in this state, are hereby authorized by their respective county courts and the said cities, villages, incorporated towns, school districts and road districts by their proper authorities,

to fund or refund any part or all of their bonded or judgment indebtedness, including bonds, coupons or any judgment, whether based or bonded or other indebtedness, and for that purpose may make, issue, negotiate, sell and deliver renewal, funding or refunding bonds, and with the proceeds thereof pay off, redeem and cancel such judgments or old bonds and coupons as the same mature or are called for redemption, or such renewal, funding or refunding bonds may be issued and delivered in exchange for the judgments, bonds or coupons to fund or refund which the renewal, funding or refunding bonds were issued: PROVIDED, that in no case shall the amount of the debt of any such county, township or parts of townships, or city, village, incorporated town, school district or road district be increased or enlarged under the provisions of this chapter, AND PROVIDED ALSO that no renewal, funding or refunding bonds issued under this chapter shall be payable in more than twenty years from the date thereof, and that such renewal, funding or refunding bonds shall be of the denomination of not more than one thousand dollars (\$1,000) nor less than one hundred dollars (\$100) each, and shall bear interest at a rate not to exceed six per centum (6%) per annum, payable annually or semi-annually, and to this end each bond shall have annexed thereto interest coupons, and such bonds and coupons shall be made payable to bearer: PROVIDED FURTHER, that nothing in sections 2892 to 2894, inclusive, shall be so construed as prohibiting any county, city, township, school district or road

district from renewing, funding or refunding such debt without the submission of the question to a popular vote: PROVIDED, HOWEVER, that no indebtedness, judgment or claim founded on bonds or coupons issued in the aid of or in payment for the capital stock of any railroad company shall be funded, nor shall any bonds be issued in lieu thereof or in compromise therefor until authorized by a majority of the qualified voters of such county, city, township or parts of townships voting at an election held for that purpose pursuant to an order entered of record by the county court of such county or council or aldermen of such city on petition of at least fifty of the resident taxpayers of such county, city or township, after public notice by advertisement in some weekly newspaper printed and published in such county or city, if there be such paper, and if not, then in such paper nearest to such county or city, setting forth the object of the election, for four weeks, and in addition posting up ten written or printed handbills in public places in such county or city, before the time for such proposition to fund its said indebtedness shall be voted on, which said notice shall contain the object and general nature of the proposition to fund said indebtedness. The election herein provided for shall be held in conformity with the statutes of the state covering state, county or municipal elections. And when such indebtedness has been once compromised and funded, the funding bonds issued in lieu thereof may again be refunded according to the other provisions of this article without such election."

July 13, 1934

The foregoing section would seem to give the counties of the state the affirmative right to issue and deliver funding or refunding bonds in exchange for judgment indebtedness. It does not seem to be a question of whether, in your case, you desire to accept the bonds in lieu of the judgments procured, but you are required to accept such bonds.

The letter of the Prosecuting Attorney of Buchanan County attached to your letter seems to imply that it is the purpose to issue the bonds payable to your Board as the holder of the judgments, but you will note that the section above set out requires the bonds to be made payable to bearer.

While not passing directly on the validity of the section above set out, the right of the county to refund its judgment indebtedness by the issuance of bonds seems to be recognized in State ex rel. Clark County v. Hackmann, 280 Mo. 686; State ex rel. Johnson v. Railroad Company, 315 Mo. 430; State ex rel Wayne County v. Hackmann, 272 Mo. 600.

What we said in our opinion to you on yesterday in reference to the acceptance of the principal amount of the judgment applies as well to the situation presented by your letter above set out as if you received the principal amounts of judgment in cash.

It is our opinion that the State Board of Elee-mosynary Institutions may accept the refunding bonds of Buchanan County in lieu of and as a cancellation of the judgments heretofore obtained by the State Board of Elee-mosynary Institutions against Buchanan County on account of the amounts due by such county for the support and main-tenance of its insane poor, but you are not entitled to accept bonds in lieu of open or outstanding accounts due by Buchanan County.

In expressing the above opinion, we have assumed that the bonds have been, or will be, issued in accordance

Honorable W. Ed Jameson

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July 13, 1934

with the Constitution and other laws of the State of Missouri.

We are preserving in our files the letter from the Prosecuting Attorney of Buchanan County attached to your letter.

This opinion will also serve as an answer to your letter to the Attorney General dated July 9, 1934.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

GL:FE

**ELECTIONS:**

Absentee Ballots - Voter may cast absentee ballot in office of County Clerk within time prescribed by law and leave the ballot with said Clerk to be opened and counted in manner prescribed by law.

September 18, 1934.



Hon. Walter C. Jackson,  
Clerk of County Court,  
Bloomfield, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of some time ago relative to the absentee ballot. We regret that due to the numerous requests which we received for opinions prior to the primary election, in addition to our many other duties, we were unable to furnish you the opinion at that time; however, we assume this question will again present itself in the coming general election and we presume the opinion will be of value to you at that time. The question contained in your letter is as follows:

"Can a qualified elector in applying to the County Clerk in his county at the time of making his affidavit for an absentee ballot obtain that ballot then and there within the time specified, vote his ballot at that time and have the same held up by the County Clerk or Board of Election Commissioners, or will it be necessary for the Clerk to take the application for the ballot and mail the same to the address given in the affidavit, and mailed back to the clerk when voted?"

The Legislature of Missouri in 1933 enacted the new sections relating to absentee ballots, same to be found in Laws of Mo. 1933 beginning on page 219. Due to the fact that this law has been so recently enacted, there are no court decisions construing the various sections; hence, we must construe the sections according to the plain wording of the same.

Section 10185, Laws of Mo. 1933, page 222, provides as follows:



"Such absentee voter shall make and subscribe to the affidavits provided for in the application, and on the return envelope for said ballot before an officer authorized by law to administer oaths in this state, and such voter shall exhibit the ballot to such officer unmarked, and shall thereupon in the presence of such officer and of no other person mark such ballot or ballots, but in such manner that such officer cannot see or know how such ballot is marked, and such ballot or ballots shall then in the presence of such officer deposited in such envelope and the envelope securely sealed. Such officer shall then write or print upon said envelope the following: 'Absentee Ballot of (insert name of voter) marked and sealed in my presence' which certificate shall be signed by such officer and his official title noted thereon, and the envelope shall be by such voter sent by mail, postage prepaid, to the officer issuing the ballot, or, if more convenient, it may be delivered in person and such official issue his written receipt therefor, but in any event it must be returned into the hands of the issuing official not later than 6 o'clock P.M. of the day next succeeding the day of such election."

We specifically call your attention to the phrase in the above quoted section "or, if more convenient, in may be delivered in person and such official issue his written receipt therefor, but in any event it must be returned into the hands of the issuing official not later than 6 o'clock P.M. of the day next succeeding the day of such election."

There is a proviso in Section 10186, Laws of Mo. 1933, page 223, which is as follows:

"Provided, however, that no ballot shall be counted by said judges which has not been received and filed by the issuing official or officials within the time by this act required."

#### CONCLUSION

By a close scrutiny of the statute we find no provision against a person casting an absentee ballot in the office of the

Sept. 18, 1934.

County Clerk within the time prescribed by law and leaving the ballot with said County Clerk to be opened and counted in the manner prescribed by law.

The County Clerk has the seal and is authorized by law to administer oaths, and it is the opinion of this department that by reason of such facts he is in the same position as any other officer authorized by law to administer oaths; hence, he may accept and retain the absentee ballots until such time as is prescribed by law for the opening and counting of the same.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

ELEEMOSYNARY BOARD - Leases of land for, made by State  
Purchasing Agent.

November 8, 1934.



Honorable W. Ed Jameson, President  
Board of Managers  
State Eleemosynary Institutions  
Jefferson City, Missouri

Dear Sir:

We have your request of October 19,  
1934 for an opinion as follows:

"I am the owner of 160 acres  
of land adjoining State Hos-  
pital #1 grounds at Fulton.  
This farm has been leased to  
the state for the last five  
years, the lease expiring March 1,  
1935. This farm is mortgaged to  
the Northwestern Mutual Life In-  
surance Co., for \$7200.00, my  
interest being an uncertain  
quantity acquired by the fore-  
closure of the second mortgage  
on said farm.

"The company has made a propo-  
sition to me to take over the  
farm under the standard form of  
'grant of possession', a copy  
of which I enclose herewith.

"I wish you would advise me upon  
execution of this instrument,  
putting the whole management of  
the farm as well as the leasing  
of same in the hands of the North-  
western Mutual Life Insurance Co.,

#2 - Honorable W. Ed Jameson

if they would be permitted to rent same to State Hospital #1, Fulton, Mo."

The Grant of Possession form submitted to us with your request provides that you transfer to the insurance company,

"the full right, power and authority to enter into possession of the above described real estate \*\* expressly assigning and conveying to the Company all of said Owner's right, title and interest in and to the crops, produce and returns from said premises, and the right to collect all the rents and profits therefrom, beginning on the date aforesaid. Said Company may rent and re-rent said premises, pay taxes thereon, obtain insurance coverage, and make repairs and improvements on the buildings located thereon and in general manage said real estate in such manner as it may deem proper and as though absolute owner thereof."

The purport of the above written instrument removes from you any right, authority or power of possession over the premises, and places such power in the hands of the insurance company, wherein the insurance company is given the absolute right to rent or lease the property upon such terms and conditions as the insurance company may see fit.

Furthermore, in accordance with the previous opinion of this office to you under date of December 16, 1933, we held that the Eleemosynary Board is without authority to purchase real estate, and under the provisions of Section 2, Laws 1933, p. 411, the State Purchasing Agent.

#3 - Honorable W. Ed Jameson

"shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the Constitution of the State."

Therefore, any lease of land to be made on behalf or for the use and benefit of the Eleemosynary Board, would have to be made by the State Purchasing Agent.

It is, therefore, the opinion of this office that the Northwestern Mutual Life Insurance Company, under and by virtue of the Grant of Possession hereinabove referred to, would be possessed of the authority to lease or rent the above premises to the State Purchasing Agent.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

COUNTY BUDGET LAW: Costs in criminal case should be paid out of funds in Class 2, Sec. 2, Laws 1933, p. 341, rather than revenue of year in which defendant entered plea of guilty.

November 9, 1934.

11-20-34



Hon. W. Irvin Jackson,  
Prosecuting Attorney,  
Wright County,  
Hartville, Missouri.

Dear Sir:

This department is in receipt of your letter of some time ago requesting an opinion as to the classification of certain criminal costs under the new Budget Law. Your letter is as follows:

"Under the County Budget law found at page 340 of the 1933 Session Acts, circuit court costs, including the fees of all witnesses, are classified and payable out of Class No. 3.

In my county the following state of facts has arisen on which you will please render your opinion:

In the latter part of 1931 one J.S. was charged in the circuit court of Wright County, Missouri by information filed by the Prosecuting Attorney with the crime of leaving the scene of an accident. Later a change of venue was granted from this county and the case was sent to Webster County. At the fall term 1932 of the Webster County Circuit Court J.S. entered a plea of guilty to the crime charged and was fined \$500.00 and the costs. A part of the costs was paid by the said J.S. but none of the fine was ever paid, and at the January Term of the 1934 Circuit Court of Webster County the Hon. C.H. Skinker paroled the said J.S. as to the fine and costs. The Circuit Clerk of Webster County in turn made his cost bill, which was in due course approved by myself and the Circuit Judge.

The question is, shall this cost be paid out of Class No. 3 of the 1934 county revenue or shall it be paid out of that year's revenue at which the plea of guilty was made?"

Section 2 of the County Budget Law, Laws of Mo. 1933, page 341 is as follows:

"\* \* \* Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1. \*\*\*\*"

Under Section 5 of the County Budget Law, classes of expenditures, Laws of Mo. 1933, page 344, the estimated expenditures are explained. Class 3 is as follows:

"Expense of conducting circuit court and election, not to include the salary of any officer or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 3 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years."

By the wording as contained in Class 3, supra, it is plainly set forth that "witnesses if properly paid by the county, and other incidental court costs" shall be paid out of said class. We assume that the defendant in the instant case finally entered a plea of guilty to the misdemeanor charged.



Section 3827, R.S. Mo. 1929 provides as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under the above section, the county is liable for the costs when the defendant is insolvent. The question next arises, following the steps you have set forth in your letter, as to when the costs are finally due and payable in a criminal case, disregarding the fact that it may or may not be the county's duty to pay the costs. In the case of *State ex rel. v. Buchanan County Court*, 41 Mo., 1.c. 257, the Court said:

"The judgment for costs in every criminal case where there is a conviction necessarily follows as a part of the punishment inflicted. The conviction of the defendant is the evidence fixed by the statute for determining his liability to pay the costs of the prosecution. If the conviction is for a felony and he is unable to pay them, the costs are then paid by the State; if for a misdemeanor, by the county. What difference can it make to the county whether he is tried and convicted of the offense charged against him, or voluntarily confesses the charge to be true? In either case he would be required by the judgment of the court to suffer the penalty imposed by law. In this case the judgment of the court entered upon his own voluntary assumption to pay the costs was sufficient to bind him for that purpose. In other words, he has by his own act fixed his liability to pay the costs, and if unable to pay them, the county is just as much bound as if his liability had been fixed by law. We can perceive no reason why the services rendered in issuing the execution were not as necessary as any others charged for. It was perhaps the most satisfactory way in which the ability of the defendant to pay costs could be determined. In any event it followed as a necessary incident to the judgment against the defendant,

and should be paid as well as the remainder of the bill."

In the decision in the case of State ex rel. v. Appleby, 136 Mo.1,c. 411, the Court said:

"Certain criminal costs are payable by the county, and, when bills of such costs, duly certified, are presented to the county court, a warrant for the payment of the amount thereof should be drawn upon the treasurer. R.S., Secs. 4397, 4400 and 4415."

Section 3841, R.S. Mo. 1929 provides:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Likewise, Section 3842, R.S. Mo. 1929 provides as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and

correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

#### CONCLUSION

From the above sections and decisions, we are of the opinion that the costs in the criminal case as detailed in your letter are to be paid out of the funds in Class 2 of Section 2, Laws of Mo. 1933, page 341, rather than the revenue of the year in which the defendant entered his plea of guilty. This conclusion is based on the assumption that the defendant was insolvent and that the cost bill was properly certified by the Circuit Judge and the Prosecuting Attorney.

The costs in a criminal case sometimes extend over a period of years. The defendant may be charged by complaint, a preliminary held one year, and after numerous continuances, may be tried three years subsequent. In the end he may be acquitted, or he may be convicted and be insolvent, all of which conclusively proves that no costs are due in a criminal case until it is finally adjudged as to the party who is liable for the costs. When it is finally adjudged as to the proper party who should pay the costs, if it be the county, it is our opinion that it should be paid out of the funds in the year in which it was finally adjudged to be paid.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

COUNTY BUDGET LAW: Liability of counties for failure to pay  
eleemosynary accounts when due; liability of  
counties under budget of eleemosynary board for  
insane patients of the county. X

12-27  
December 10, 1934.



Hon. W. Ed Jameson,  
President, Board of Managers,  
State Eleemosynary Institutions,  
Jefferson City, Missouri.

Dear Sir:

In accordance with your recent request  
of this department, we submit you the following relative  
to questions which have arisen under the new Budget  
Law relating to counties of fifty thousand population  
and less:

Your first question relates to counties  
of less than fifty thousand population, and is as  
follows:

"What can be done under the  
new Budget Law with reference  
to delinquent eleemosynary  
accounts owned by counties  
less than fifty thousand  
population for the current  
year 1934?"

The first eight sections of the County Budget  
Law relate to counties of less than fifty thousand popu-  
lation. Class 1 of Section 2, page 341, Laws of Missouri  
1933 deals solely with insane pauper patients in state  
hospitals, and is as follows:

"The county court shall set  
aside and apportion a sufficient  
sum to care for insane pauper  
patients in state hospitals.  
Class 1 shall be the first ob-  
ligation against the county and  
shall have priority of payment  
over all other classes."

#2 - Honorable W. Ed Jameson

From the above and foregoing, it is apparent that the county court and county officers are without authority to pay any claims of any kind until Class 1 of the Budget Law has been paid in full. In the event the county court does pay out county revenue for classes other than Class 1, and at the end of the year leaves Class 1 unpaid, in whole or in part, then the issuance of warrants and the payment of county money to be applied on other classes of claims prior to the full payment of Class 1, would be in violation of the Budget Law.

Section 8 of the Budget Act, l.c. 346, provides:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

It is, therefore, the opinion of this office that the county court, county clerk and county treasurer who participate in any manner in the issuance and payment of second, third, fourth, fifth or sixth class claims prior to the full payment of Class 1 of the Budget Law may be held personally liable for the balance due Class 1 claims. Suits may be instituted against such officials, against themselves, and against those who have posted the bond.

It is now established that public officers are liable for the wrongful payment of money in their hands. Consolidated School District No. 6 of Jackson County v. Shawhan et al, 273 S. W. 182. The Eleemosynary Board is given authority to institute suits in courts of law to collect all debts and demands whatsoever due the Eleemosynary Institutions, Section 8615, R. S. Mo. 1929, and upon the rendition of a judgment in any suit instituted in behalf of an Eleemosynary Institution, the court shall assess and tax as costs a reasonable attorney's fee in favor of the attorney in behalf of the institution, Section 8616, R. S. Mo. 1929

Your second question states:

"What can be done with reference to the collection of accounts due eleemosynary institutions by counties over fifty thousand population for the current year 1934, and also for delinquent accounts of prior years? "

In discussing your first question, we included a portion of Section 14, Laws of Missouri 1933, page 348, but in order to clarify the answer to the question, we again quote as follows:

"Any cash surplus at the end of any fiscal year shall be carried forward and merged with the revenues of the succeeding year. Payments of any legal unpaid obligations of any prior year, however, shall be a first charge in the budget against the revenues of the budget year; \*\*\*"

The portion of Section 14, above quoted, has heretofore been fully discussed in an exhaustive opinion rendered by this department on December 12, 1934; therefore, we will not again discuss the same. Copy of the opinion is hereto attached and we believe it will properly answer the above question.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General.



X

ELEEMOSYNARY INSTITUTIONS: COUNTY COURTS: INSANE PERSONS.

When revenue is 'provided for' within the meaning of the Constitution, defined. Obligation incurred by county, in 1934 can not be paid out of income and revenue provided for such county in the year 1935. Insane county patients may be returned to sending county upon failure to pay keep or expenses of such persons.

December 12, 1934

Honorable W. E. Jameson  
Chairman State Eleemosynary Institutions  
Jefferson City  
Missouri



Dear Mr. Jameson:

Receipt of your letter dated December 10, 1934, in reference to moneys due from Jasper County to State Hospital No. 3, is acknowledged.

Your letter follows:

"The County of Jasper owes to State Hospital #3, Nevada, the sum of \$86,527.18. I have been unable to get any action toward the payment of any part of this account from this court.

Does the eleemosynary board have any recourse in a situation of this kind? Would we be justified under the law in returning to Jasper County the patients in this institution for which they so far have failed to pay? They owe other institutions and I would like to have your opinion also cover the other institutions, in the same letter, or I can write you different letters in regard to each one if that is desirable."

1.

Answering first what remedy you have in the situation set out in your letter. Section 8636 Revised Statutes Missouri 1929, reads:



"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding eighteen dollars (\$18.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to re-refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for. And state hospitals are hereby expressly prohibited from receiving any county warrant in payment of any such sum as may be due by this section."

Section 8642, same statutes, provides:

"The superintendent shall, under the direction of the managers, cause, once in every six months, to be made out and forwarded to any county court which may send to a state hospital an insane poor person, an exact account of the sum due and owing by such court on account of such insane person. Said court, at its first session thereafter,

shall proceed to allow, and cause to be paid over to the treasurer of such state hospital, the amount of said account."

Section 8615, same statutes, clothes the board of managers of eleemosynary institutions with the power to maintain actions for all debts and demands due any state eleemosynary institution. This authority is recognized in *Shields v. Johnson County* 144 Mo. 76.

The time for payment of the sums due the respective eleemosynary institutions from the respective counties is fixed by the statute, and the time fixed by the statute is the date when the indebtedness, as to each county patient, becomes due and payable by the county. The Board of Managers of the eleemosynary institutions are prohibited from accepting warrants in payment for the keep of county patients. Section 8636, *supra*. Therefore the question of whether or not the indebtedness from a county to the institution becomes fixed and payable when a warrant is issued, as has been the question in some cases, is not presented here.

We take it that the course above pointed out will not sufficiently answer your inquiry so that we turn to other suggested remedies for the collection of the moneys due you from counties in order to ascertain to what further relief you may be entitled.

2.

(a) The only other means for the collection of moneys due your board, if it be legal, is to be found in Section 14, Laws of Missouri 1933, page 348, being a part of what is known as the County Budget Act. The part of the section referred to reads as follows:

"Payment of any legal unpaid obligations of any prior year, however, shall be a first charge in the budget against the revenues of the budget year; provided, that any deficit existing at the end of the year preceding that in which this

act takes effect may be paid over a term of years, or in such other manner as the county court may determine."

We understand that the amounts of money due your board from Jasper County, accrued, became due and payable and was an indebtedness of that county in the year 1934. We assume that the above quoted part of Section 14 means, in your case, that the unpaid sums would be entitled to priority of payment out of the revenues provided for and collected in Jasper County in the year 1935. The quoted part of the above section undertakes to make legal unpaid obligations a first charge against the revenues for 1935. The word 'charge' is used, apparently, as meaning a lien is created. A lien is defined in *Koenig v. Leppert-Roos Fur Co.* 260 S. W. 756, 758, in the following language:

"A lien is not a property in or right to the thing itself, but constitutes a charge or security thereon."

The validity of that part of Section 14, above set out, must be tested by an application of that part of Section 12 of Article X of the Constitution of Missouri, which reads as follows:

"No county \* \* \* shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year \* \* \* \* \*."

The word 'indebted' is defined in *Jewell v. Nuhn, et al.* 155 N.W. 174, 177, in the following language:

"Webster defines the word 'debt' as: 'That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to

another, or to perform for his benefit; things owed; obligation; liability.'

He defines 'indebted': (1) Brought into debt; being under obligation; held to payment or requital; in debt. (2) Placed under obligation for something received, for which restitution or gratitude is due. And 'indebtedness,' as 'a state of being indebted.' "

Since the above quoted portion of Section 14 seeks to make the unpaid obligation of a county a charge against the revenues for the next subsequent year, the Legislature evidently intended to create a statutory obligation or indebtedness on the part of a county to be paid out of revenues coming in in the year subsequent to that in which the obligation and indebtedness actually accrued.

Such section 14 applies to counties having a population of over fifty thousand and we take notice of the fact that Jasper County has a population of over fifty thousand.

(b) The real question presented is, when and by what means is income and revenue provided for in a year within the meaning of Section 12, Article X, of the Constitution.

(c) Section 9756 Revised Statutes Missouri 1929, requires the assessor or his deputies to take a list of the taxable personal property in his county, between the first days of June and January of each year. The foregoing section does not refer to or include assessments against merchants or manufacturers; that is provided for in other articles of the statute. Section 9756 also requires such assessor to assess real estate as of the first day of June of each year. Section 9779 requires real estate to be assessed and the assessment commenced on the first day of June, 1893, and each year thereafter. The assessor is required to return the assessment list to the county clerk of his county.

Section 9811 provides for a county board of equalization which shall meet at the office of the county clerk on the first Monday of April in each year, the board having power to hear complaints and to equalize the valuations and assessments upon all real and personal property within the county.

Section 9813 provides that the county board of equalization shall meet on the fourth Monday of April, except in counties containing a population of more than seventy thousand and less than one hundred thousand, in which counties such board shall meet on the fourth Monday of March in each year as a board of appeals.

Section 9862 provides that the state board of equalization shall meet at the Capitol in the City of Jefferson on the last Wednesday in February, 1894, and every year thereafter, at which time the State Auditor, by virtue of Section 9863, shall lay before the state board of equalization abstracts of all the taxable property in the state.

Section 9865 provides that when the state board of equalization shall have completed its deliberations, the State Auditor shall immediately transmit to each county clerk the result of the deliberations and orders of the board, to the county clerk of the respective counties affected. Whereupon the clerk of such county shall furnish a copy of the orders of such board to the county assessor and to the county board of equalization for compliance therewith.

Section 9866 Revised Statutes Missouri 1929, provides as follows:

"There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property, subject by law to taxation in this state, five cents on each one hundred dollars valuation for state revenue. (R. S. 1919, Sec. 12858. Amended, Laws 1921, p. 679; 1921, 1st Ex. Sess. p. 186; 1923, p. 366; 1925, p. 369; 1929, p. 433.)"

Section 9867 also provides:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

Section 9871 is as follows:

"As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Section 9874 of the statutes, authorizing county courts at the regular May term of each year, to appropriate, apportion and subdivide revenues, was repealed by Laws of Missouri 1933, at page 351. Section 12 of Laws of Missouri 1933, page 348, which appears to have been intended to take the place of section 9874 so far as counties having a population of more than fifty thousand is concerned, reads:

"Sec. 12. Budget document - contents. -

The budget document shall include the following: (1) a budget message outlining the fiscal policy of the government for the budget year and describing



the important features of the budget plan, giving a general budget summary setting forth the aggregate figures of the budget in such manner as to show the balanced relations between total proposed expenditures and total expected income and other means of financing the budget compared with the corresponding figures for the last completed fiscal year and the current fiscal year, and including explanatory schedules classifying expenditures by organization units, objects, and funds, and income by organization units, sources, and funds;

(2) the detailed budget estimates, as provided for in the preceding section of this act, showing the recommendations of the budget officer compared with the figures for the last completed fiscal year and the estimates for the current fiscal year;

(3) complete drafts of appropriation and revenue orders to put the budget into effect when approved by the county court.

The appropriation order shall be drawn in such form as to authorize appropriations for expenditures classified only as to the various spending agencies and the principal subdivisions thereof and as to principal items of expenditure within such subdivisions. Appropriations for the acquisition of property and for expenditures from bond funds shall be in such detail as the budget officer shall determine."

All of the foregoing shows that taxes to be levied against the assessment made in 1933 could not be levied and collected until the year 1934, and that the assessment valuations made by the assessors as of June 1, 1934, would be the basis of the rate of taxation levied and the taxes becoming due in the year 1935, except as to merchants' and manufacturers'



taxes which are assessed, levied and collected in the same year.

In State ex rel. v. Allison 155 Mo. 325, 333, the court, discussing assessments of property and the time for payment of county warrants, said:

"The county assessor is required to complete his assessment, and return his book to the county court on or before February 20th. (Sec. 7571.). Those persons who conceive themselves aggrieved may appeal from the assessment so returned, to the county board of equalization (sec. 7572), which board is to meet on the first Monday in April (sec. 7515) to equalize and correct the assessments and adjust the assessor's books, which are then returned to the county court, and that court is required as soon thereafter as may be to 'ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation' (sec. 7660), the limit of which is prescribed, as the Constitution requires, in section 7662. Then it is made the duty of the county court at its May term to appropriate, apportion and subdivide the revenue for the various purposes as prescribed in section 7663.

It thus appears that it is not until the May term that the county court knows exactly what the aggregate assessment of the county is, and it is not until then that the rate of taxation is fixed and the exact amount of revenue to be levied is ascertained. And in view of that condition and of the constitutional provision that forbids a county to incur debts in any one year to exceed its income and revenue provided for that year (sec. 12, art. 10, Constitution), the relator contends that it conclusively follows that the

fiscal year for the county begins on May 1st. The argument is not without persuasive force to show that it would be a convenient provision if the legislature should see fit to so enact, but it does not demonstrate that the statutes in their present form must receive that construction or fail of their purpose. And we must be forced to that result before we would be justified in giving to the word 'year' an artificial meaning in the face of the rule of construction and definition laid down in the contemporaneous statute above quoted. But really whilst there is some uncertainty it is not very serious. True, from January to May, one-third of the year, the county court can not know the exact amount of revenue that the taxpayers will be called on to furnish. This uncertainty exists because the exact valuation of the taxable property in the county is then unknown, and the rate of taxation has not then been fixed, yet expenses are necessarily incurred in carrying on the county government and maintaining its duty to the State. But is certainty to that degree necessary? Can not the revenue for the ensuing year be estimated on the first of January with sufficient approximation for the purpose of putting reasonably safe limits to the debts to be incurred? Even after May 1st, there must be an element of uncertainty in the amount of the county's income because all may not be collected that is assessed. Ordinarily there is not such a difference between the aggregate assessment of the county for one year, and the following, as would put the county judges to sea, and if any unusual event had taken place since the last assessment likely to produce an extraordinary diminution or

increase in the value of the county's property, the county judges would be apt to know it. The economic problem for them to solve is the amount of indebtedness it will be prudent to incur for the county for four months in view of the probable income. As a common sense business problem there is nothing very difficult about it, and if county judges are not to be accredited with sufficient discretion to determine a matter of that kind, then our whole system is wrong. The county court can keep safely within the constitutional limitation, and follow strictly the provisions of the statutes above quoted, and still count the fiscal year as beginning on January first, and ending December thirty-first. We have followed the learned counsel for the relator in his brief but we see no reason to question the soundness of the decision in *Wilson v. Knox County*, supra, or in *State ex rel. v. Appleby*, supra, to the same effect. Upon a review of the whole subject, we again conclude that the fiscal year for the county as well as the State, begins January first, and ends December thirty-first."

Distinguishing between 'assessment' and 'levies' as related to taxation, Cooley on Taxation, Vol. 3, at page 2114, section 1044, Fourth Edition, said:

"The word 'assessment,' as used in the decisions and statutes, has various meanings. Properly speaking it does not include the levy of taxes although sometimes the words 'assess,' 'assessed,' or 'assessment' are used in a statute as including both the levy and the assessment. An assessment,

strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed. Sometimes the word 'assessment' is used as implying the completed tax list; that is to say, the list of persons or property to be taxed, with the estimates with which they are chargeable, and the tax duly apportioned and extended upon it; But this employment of the word is unusual except in the cases in which the levy is apportioned by benefits; and in those cases the act of determining the amount of the benefits is of itself, under most statutes, a determination of the individual liability, and the result only needs to be entered upon the roll list to complete the levy. Assessment proper includes valuation but valuation alone is not the assessment but instead only its most important element."

And in section 1045 of the same treatise, it is further said:

"An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. If there is no valid assessment, a tax sale of lands is a nullity. A want of assessment is not a mere irregularity remedied by a curative statute."

We reach the conclusion that where assessment valuations on property are fixed by the assessor in one year, and the levy of the tax rate and the tax thereunder collectible in the next subsequent year, then the revenue and income is 'provided for', within the meaning of the constitutional provision above quoted, in the latter year.

(d) Can the income and revenue provided for in the year 1935 be used to pay obligations of the county accruing and maturing and being due and payable in the year 1934?

In Book v. Earl 87 Mo. 246, 252, dealing with this question the court said:

"The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year

to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

Note from the above decision that the revenue may be anticipated only for the year in which the revenue or income is provided for.

In Andrew County ex rel. v. Schell 135 Mo.31, the Supreme Court had the same question, in principle, under discussion. At page 39 of the opinion it is said:

"It is indisputable, however, from the facts disclosed by the record, that the warrants are for past indebtedness, and not indebtedness for the current year in which they were presented for payment. A fund to pay such indebtedness can only be raised by compliance with section 7654, Revised Statutes, and in obedience to an order of the circuit court of the county as provided thereby, directing the county court of the county to make a levy for that special purpose. Or in case of an excess of funds in the treasury over and above a sufficient amount to pay the current expenses of the county for any given year, then such excess may be applied to the payment of valid warrants outstanding, in the order in which they may be presented for payment, as provided by section 3166, Revised Statutes."



In Railroad v. Thornton 152 Mo. 570, county warrants issued in 1893, 1894 and 1895 were presented by the railroad company in tender of payment for the taxes levied against the railroad company for the year 1896. Discussing prior decisions of the court, at page 574 it was said:

"It was also pointed out in Payne's case that it was decided in Schell's case, that: 'County warrants for past indebtedness, though valid, can not be paid from the revenue provided for current expenses, until all warrants, drawn for expenses of the year for which the taxes were levied, have been paid.' It is also a fact that the prior cases and the statutory provisions relied on by the plaintiff, were fully considered in Schell's case. The result reached in the Payne case was not hastily or ill advisedly arrived at, but was the logical effect of a gradually developed understanding and appreciation of the true meaning of the provision of the Constitution quoted."

Analyzing the meaning of the constitutional provision under construction, the court at page 575 of the opinion further said:

"Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet



the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenues collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish a cash system in public business. If this rule results in any county not having money enough to pay as it goes or to run its governmental affairs, the remedy is not with the courts. Having reached this understanding of the meaning of the Constitution it follows, without the necessity of any analytical examination or comparison of statutes or prior decisions, that all statutes or decisions providing or holding a contrary rule must give way."

In the case of *Trask v. Livingston County* 210 Mo. 582, the Supreme Court had under consideration the question of the right of the defendant to pay an obligation incurred in 1889 out of the revenue of 1890. The court quotes with approval from *Book v. Earl*. Discussing the right to make payment of an 1889 obligation out of 1890 revenue, the court at page 599 of the opinion said:

"The record shows that the county court on the 5th of September, 1889,

made an appropriation to pay for the building of the bridges. Now, out of what revenue was it authorized to make this appropriation, that of 1889 or that of 1890? We think the Constitution answers this question: they could only make it out of the revenue of 1889, and in this particular case this conclusion is reinforced by the fact that the bridges contracted for were to be completed in the year 1889, and as the obligation was completed in the year 1889, and as the obligation was incurred in 1889 and the bridges were to be built in that year and the appropriation was made in that year, we think there can be no escape from the conclusion that the indebtedness thereby created was a charge against the revenues provided for the year 1889, and not the revenues of 1890. Clearly the county court was not authorized to appropriate revenues which were to be derived from taxation in the year 1890, which such taxes had never been assessed, levied or collected. While the county court may in any one year draw warrants, after the revenue has been provided and the taxes levied within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years; If not, all that has been said in regard to the force and effect of section 12 of article 10 of the Constitution to the effect that its purpose was to put counties upon a cash system instead of the old credit plan, has been made in vain.

In our opinion, the bridge warrants offered and read in evidence were, if valid at all, chargeable against the revenues of said county for 1889, and

we think should be deducted from the total amount of warrants issued in 1890, and this being so the plaintiff's warrants were a legal and valid charge for the current expenses of the said county for the year 1890 and the judgment of the circuit court awarding plaintiff judgment therefor was correct and is affirmed."

We think it is 'too plain for argument that the Constitution forbids the payment of obligations incurred by a county in 1934 out of income and revenue provided for such county in the year 1935' and that in so far as section 14, Laws of Missouri 1933, page 348, undertakes to authorize the payment of county obligations becoming due and payable in one year out of revenue and income provided for in a subsequent year, such part of section 14 violates section 12 of article 10 of the Constitution of the State of Missouri, and in that respect is void.

What we have said in the foregoing conclusion is upon the assumption that the revenue and income provided for in Jasper County in the year 1935 will be sufficient only to pay the obligations of the county accruing or becoming due in the year 1935.

What we have said herein applies to each and every county in the State, and the City of St. Louis.

3.

Answering further your inquiry, viz:

Will we be justified, under the law, in returning to Jasper County patients in this institution for which they so far have failed to pay?

We have pointed out above that the several county courts of the state have power to send to a state hospital their insane poor and that the sending county shall pay semi-annually, in cash, in advance, such sums

for the support and maintenance of their insane poor as the Board of Managers may deem necessary, not exceeding \$18.00 per month for each patient and in addition there- to other necessary costs.

In 32 C. J. 686, Section 373, it is stated:

"The liability for supporting insane persons may be, and often is, imposed by statute upon various public authorities upon certain conditions. This liability being statutory, the particular public authorities can be held liable in no case, and in no other manner, except as prescribed by statute."

The validity of Section 8636, above referred to, in reference to the liability of counties for the keep of their insane poor, has been upheld by the Supreme Court of this state. In State ex rel. Yarnell v. The Cole County Court 80 Mo. 80, 84, the Supreme Court of this state said:

"We think it apparent from the above statutory provisions and the general law regulating asylums,\* \* \* \* that it was the intention of the legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement.\* \* \* \*"

We are unable to find any decision of any court on facts similar to those submitted by you. If the county court is required to pay in advance for the keep of its insane poor, then undoubtedly the Board of Managers of a state eleemosynary institution would have the right to refuse to receive a patient where the county court has not complied with its statutory duty. If the Board of Managers of the state eleemosynary institutions was compelled to retain patients when counties refuse to comply with their statutory duty of paying, in advance, in cash, semi-annually, then it might and logically would result that such state

institution could not be maintained for the keep and care of the insane persons from the counties who were willing to and did pay for the keep of such patients, according to the requirements of the statutes. While the solicitude for the helpless insane is naturally great, yet, so far as the Board of Managers of the state eleemosynary institutions is concerned, it is to operate such institutions according to the mandates of the statutes and with a due regard for all persons whom such institutions were intended to serve.

We are of the opinion that the Board of Managers of the state eleemosynary institutions has the right to return to the custody of the respective counties such county patients where payments for their keep or other expenses, as provided by Section 8636 Revised Statutes Missouri 1929, have not been made by the respective counties from which such payments were due.

The above, of course, does not apply to insane persons transferred from penal institutions to state eleemosynary institutions on order of the Governor.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

1

TAXATION; COUNTY COURTS; COUNTY WARRANTS; THE WORDS 'Provided for' as used in section 12 of article 10 of the Constitution of the State of Missouri, defined.

Obligations incurred by county in one year can not be paid out of revenue provided for in subsequent year.

December 12, 1934

Honorable W. E. Jameson  
Chairman State Eleemosynary Institutions  
Jefferson City, Missouri

*July* # <sup>45</sup>  
FILED  
45

Dear Mr. Jameson:

Receipt of your letter dated December 10, 1934, in reference to moneys due from Jasper County to State Hospital No. 3, is acknowledged.

Your letter follows:

"The County of Jasper owes to State Hospital #3, Nevada, the sum of \$86,527.18. I have been unable to get any action toward the payment of any part of this account from this court.

Does the eleemosynary board have any recourse in a situation of this kind? Would we be justified under the law in returning to Jasper County the patients in this institution for which they so far have failed to pay? They owe other institutions and I would like to have your opinion also cover the other institutions, in the same letter, or I can write you different letters in regard to each one if that is desirable."

1.

reads;  
Section 8636 Revised Statutes Missouri 1929,

"The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding eighteen dollars (\$18.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the managers of such hospital to re-refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the County entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for. And state hospitals are hereby expressly prohibited from receiving any county warrant in payment of any such sum as may be due by this section."

Section 8642, same statutes, provides:

"The superintendent shall, under the direction of the managers, cause, once in every six months, to be made out and forwarded to any county court which may send to a state hospital an insane poor person, an exact account of the sum due and owing by such court



on account of such insane person. Said court, at its first session thereafter, shall proceed to allow, and cause to be paid over to the treasurer of such state hospital, the amount of said account."

Section 8615, same statutes, clothes the board of managers of eleemosynary institutions with the power to maintain actions for all debts and demands due any state eleemosynary institution. This authority is recognized in *Shields v. Johnson* County 144 Mo. 76.

The time for payment of the sums due the respective eleemosynary institutions from the respective counties is fixed by the statute, and the time fixed by the statute is the date when the indebtedness, as to each county patient, becomes due and payable by the county. The Board of Managers of the eleemosynary institutions are prohibited from accepting warrants in payment for the keep of county patients. Section 8636, supra. Therefore the question of whether or not the indebtedness from a county to the institution becomes fixed and payable when a warrant is issued, as has been the question in some cases, is not presented here.

We take it that the course above pointed out will not sufficiently answer your inquiry so that we turn to other suggested remedies for the collection of the moneys due you from counties in order to ascertain to what further relief you may be entitled.

2.

(a) The only other means for the collection of moneys due your board, if it be legal, is to be found in Section 14, Laws of Missouri 1933, page 348, being a part of what is known as the County Budget Act. The part of the section referred to reads as follows:

"Payment of any legal unpaid obligations of any prior year, however, shall be a first charge in the budget against the revenues of the budget year; provided, that any deficit existing at the end of the year preceding that in which this

act takes effect may be paid over a term of years, or in such other manner as the county court may determine."

We understand that the amounts of money due your board from Jasper County, accrued, became due and payable and was an indebtedness of that county in the year 1934. We assume that the above quoted part of Section 14 means, in your case, that the unpaid sums would be entitled to priority of payment out of the revenues provided for and collected in Jasper County in the year 1935. The quoted part of the above section undertakes to make legal unpaid obligations a first charge against the revenue for 1935. The word 'charge' is used, apparently, as meaning a lien is created. A lien is defined in *Koenig v. Leppert-Roos Fur Co.*, 260 S. W. 756, 758, in the following language:

"A lien is not a property in or right to the thing itself, but constitutes a charge or security thereon."

The validity of that part of Section 14, above set out, must be tested by an application of that part of section 12 of Article X of the Constitution of Missouri, which reads as follows:

"No county \* \* \* shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year \* \* \* \* \*."

The word 'indebted' is defined in *Jewell v. Nuhn, et al.*, 155 N. W. 175, 177, in the following language:

"Webster defines the word 'debt' as: 'That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or to perform for his benefit; things owed; obligation; liability.'"

He defines 'indebted': (1) Brought into debt; being under obligation; held to payment or requital; in debt. (2) Placed under obligation for something received, for which restitution or gratitude is due. And 'indebtedness,' as 'a state of being indebted.' "

Since the above quoted portion of Section 14 seeks to make the unpaid obligation of a county a charge against the revenues for the next subsequent year, the Legislature evidently intended to create a statutory obligation or indebtedness on the part of a county to be paid out of revenues coming in in the year subsequent to that in which the obligation and indebtedness actually accrued.

Such section 14 applies to counties having a population of over fifty thousand and we take notice of the fact that Jasper County has a population of over fifty thousand.

(b) The real question presented is, when and by what means is income and revenue provided for in a year within the meaning of Section 12, Article X, of the Constitution.

(c) Section 9756 Revised Statutes Missouri 1929, requires the assessor or his deputies to take a list of the taxable personal property in his county, between the first days of June and January of each year. The foregoing section does not refer to or include assessments against merchants or manufacturers; that is provided for in other articles of the statute. Section 9756 also requires such assessor to assess real estate as of the first day of June of each year. Section 9779 requires real estate to be assessed and the assessment commenced on the first day of June, 1893, and each year thereafter. The assessor is required to return the assessment list to the county clerk of his county.

Section 9811 provides for a county board of equalization which shall meet at the office of the county clerk on the first Monday of April in each year, the board having power to hear complaints and to equalize the valuations and assessments upon all real and personal property within the county.

Section 9813 provides that the county board of equalization shall meet on the fourth Monday of April, except in counties containing a population of more than seventy thousand and less than one hundred thousand, in which counties such board shall meet on the fourth Monday of March in each year as a board of appeals.

Section 9862 provides that the state board of equalization shall meet at the Capitol in the City of Jefferson on the last Wednesday in February, 1894, and every year thereafter, at which time the State Auditor, by virtue of Section 9863, shall lay before the state board of equalization abstracts of all the taxable property in the state.

Section 9865 provides that when the state board of equalization shall have completed its deliberations, the State Auditor shall immediately transmit to each county clerk the result of the deliberations and orders of the board, to the county clerk of the respective counties affected. Whereupon the clerk of such county shall furnish a copy of the orders of such board to the county assessor and to the county board of equalization for compliance therewith.

Section 9866 Revised Statutes Missouri 1929, provides as follows:

"There shall be annually levied, assessed and collected on the assessed value of all the real estate and personal property, subject by law to taxation in this state, five cents on each one hundred dollars valuation for state revenue. (R. S. 1919, Sec. 12858. Amended, Laws 1921, p. 679; 1921, 1st Ex. Sess. p. 186; 1923, p. 366; 1925, p. 369; 1929, p. 433.)"

Section 9867 also provides:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools. "

Section 9871 is as follows:

"As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book. "

Section 9874 of the statutes, authorizing county courts at the regular May term of each year, to appropriate, apportion and subdivide revenues, was repealed by Laws of Missouri 1933, at page 351. Section 12 of Laws of Missouri 1933, page 348, which appears to have been intended to take the place of section 9874 so far as counties having a population of more than fifty thousand is concerned, reads;

"Sec. 12. Budget document - contents.-

The budget document shall include the following: (1) a budget message outlining the fiscal policy of the government for the budget year and describing the important features of the budget plan, giving a general budget summary setting forth the aggregate figures of the budget in such manner as to show the balanced relations between total proposed expenditures and total expected income and other means of financing the budget compared with the corresponding figures for the last completed fiscal year and the current fiscal year, and including explanatory schedules classifying expenditures by organization units, objects, and funds, and income by organization units, sources and funds; (2) the detailed budget estimates, as provided for in the preceding section of this act, showing the recommendations of the budget officer compared with the figures for the last completed fiscal year and the estimates for the current fiscal year; (3) complete drafts of appropriation and revenue orders to put the budget into effect when approved by the county court.

The appropriation order shall be drawn in such form as to authorize appropriations for expenditures classified only as to the various spending agencies and the principal subdivisions thereof and as to principal items of expenditure within such subdivisions. Appropriations for the acquisition of property and for expenditures from bond funds shall be in such detail as the budget officer shall determine."

All of the foregoing shows that taxes to be levied against the assessment made in 1933 could not be levied and collected until the year 1934, and that the assessment

valuations made by the assessors as of June 1, 1934, would be the basis of the rate of taxation levied and the taxes becoming due in the year 1935, except as to merchants' and manufacturers' taxes which are assessed, levied and collected in the same year.

In State ex rel. v. Allison 155 Mo. 325, 333, the court, discussing assessments of property and the time for payment of county warrants, said:

"The county assessor is required to complete his assessment, and return his book to the county court on or before February 20th. (Sec. 7571.). Those persons who conceive themselves aggrieved may appeal from the assessment so returned, to the county board of equalization (sec. 7572), which board is to meet on the first Monday in April (sec. 7515) to equalize and correct the assessments and adjust the assessor's books, which are then returned to the county court, and that court is required as soon thereafter as may be to 'ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation' (sec. 7660), the limit of which is prescribed, as the Constitution requires, in section 7662. Then it is made the duty of the county court at its May term to appropriate, apportion and subdivide the revenue for the various purposes as prescribed in section 7663.

It thus appears that it is not until the May term that the county court knows exactly what the aggregate assessment of the county is, and it is not until then that the rate of taxation is fixed and the exact amount of revenue to be levied is ascertained. And in view of that condition and of the constitutional provision that forbids a county to



incur debts in any one year to exceed its income and revenue provided for that year (sec. 12, art. 10, Constitution), the relator contends that it conclusively follows that the fiscal year for the county begins on May 1st. The argument is not without persuasive force to show that it would be a convenient provision if the legislature should see fit to so enact, but it does not demonstrate that the statutes in their present form must receive that construction or fail of their purpose. And we must be forced to that result before we would be justified in giving to the word 'year' an artificial meaning in the face of the rule of construction and definition laid down in the contemporaneous statute above quoted. But really whilst there is some uncertainty it is not very serious. True, from January to May, one-third of the year, the county court can not know the exact amount of revenue that the taxpayers will be called on to furnish. This uncertainty exists because the exact valuation of the taxable property in the county is then unknown, and the rate of taxation has not then been fixed, yet expenses are necessarily incurred in carrying on the county government and maintaining its duty to the State. But is certainty to that degree necessary? Can not the revenue for the ensuing year be estimated on the first of January with sufficient approximation for the purpose of putting reasonably safe limits to the debts to be incurred? Even after May 1st, there must be an element of uncertainty in the amount of the county's income because all may not be collected that is assessed. Ordinarily there is not much a difference between

the aggregate assessment of the county for one year, and the following, as would put the county judges to sea, and if any unusual event had taken place since the last assessment likely to produce an extraordinary diminution or increase in the value of the county's property, the county judges would be apt to know it. The economic problem for them to solve is the amount of indebtedness it will be prudent to incur for the county for four months in view of the probable income. As a common sense business problem there is nothing very difficult about it, and if county judges are not to be accredited with sufficient discretion to determine a matter of that kind, then our whole system is wrong. The county court can keep safely within the constitutional limitation, and follow strictly the provisions of the statutes above quoted, and still count the fiscal year as beginning on January first, and ending December thirty-first. We have followed the learned counsel for the relator in his brief but we see no reason to question the soundness of the decision in *Wilson v. Knox County*, supra, or in *State ex rel v. Appleby*, supra, to the same effect. Upon a review of the whole subject, we again conclude that the fiscal year for the county as well as the State, begins January first, and ends December thirty-first."

Distinguishing between 'assessment' and 'levies' as related to taxation, *Cooley on Taxation*, Vol. 3, at page 2114, section 1044, Fourth Edition, said;

"The word 'assessment', as used in the decisions and statutes, has various meanings. Properly

speaking it does not include the levy of taxes although sometimes the words 'assess', 'assessed', or 'assessment' are used in a statute as including both the levy and the assessment. An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed. Sometimes the word 'assessment' is used as implying the completed tax list; that is to say, the list of persons or property to be taxed, with the estimates with which they are chargeable, and the tax duly apportioned and extended upon it; But this employment of the word is unusual except in the cases in which the levy is apportioned by benefits; and in those cases the act of determining the amount of the benefits is of itself, under most statutes, a determination of the individual liability, and the re-

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And in section 1045 of the same treatise, it is further said:

"An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. If there is no valid assessment, a tax sale of lands is a nullity. A want of assessment is not a mere irregularity remedied by a curative statute."

We reach the conclusion that where assessment valuations on property are fixed by the assessor in one year, and the levy of the tax rate and the tax thereunder collectible in the next subsequent year, then the revenue and income is 'provided for', within the meaning of the constitutional provision above quoted, in the latter year.

(d) Can the income and revenue provided for in the year 1935 be used to pay obligations of the county accruing and maturing and being due and payable in the year 1934?

In *Book v. Earl* 87 Mo. 246, 252, dealing with this question the court said:

"The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit

system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

Note from the above decision that the revenue may be anticipated only for the year in which the revenue or income is provided for.

In Andrew County ex rel. v. Schell 135 Mo. 31, the Supreme Court had the same question, in principle, under discussion. At page 39 of the opinion it is said:

"It is indisputable, however, from the facts disclosed by the record, that the warrants are for past indebtedness, and not indebtedness for the current year in which they were presented for payment. A fund to pay such indebtedness can only be raised by compliance with section 7654, Revised Statutes, and in obedience to an order of the circuit court of the county as provided thereby, directing the county court of the county to make a levy for that special purpose. Or in case of an excess of funds in the treasury over and above a sufficient amount to pay the current expenses of the county for any given year, then such excess may be applied to the payment of valid warrants outstanding, in the order in which they may be presented for payment, as provided by section 3163, Revised Statutes."

In *Railroad v. Thornton* 152 Mo. 570, county warrants issued in 1893, 1894 and 1895 were presented by the railroad company in tender of payment for the taxes levied against the railroad company for the year 1896. Discussing prior decisions of the court, at page 574 it was said:

"It was also pointed out in Payne's case that it was decided in Schell's case, that: 'County warrants for past indebtedness, though valid, can not be paid from the revenue provided for current expenses, until all warrants, drawn for expenses of the year for which the taxes were levied, have been paid.' It is also a fact that the prior cases and the statutory provisions relied on by the plaintiff, were fully considered in Schell's case. The result reached in the Payne case was not hastily or ill advisedly arrived at, but was the logical effect of a gradually developed understanding and appreciation of the true meaning of the provision of the Constitution quoted."

Analyzing the meaning of the constitutional provision under construction, the court at page 575 of the opinion further said:

"Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants

issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenues collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish a cash system in public business. If this rule results in any county not having money enough to pay as it goes or to run its governmental affairs, the remedy is not with the courts. Having reached this understanding of the meaning of the Constitution it follows, without the necessity of any analytical examination or comparison of statutes or prior decisions, that all statutes or decisions providing or holding a contrary rule must give way."

In the case of *Trask v. Livingston County* 210 Mo. 582, the Supreme Court had under consideration the question of the right of the defendant to pay an obligation incurred in 1889 out of the revenue of 1890. The court quotes with approval from *Book v. Earl*. Discussing the right to make payment of an 1889 obligation out of 1890 revenue, the court at page 599 of the opinion said:

"The record shows that the county court on the 5th of September, 1889, made an appropriation to pay for the building of the bridges. Now, out of what revenue was it authorized to make this appropriation, that of 1889 or that of 1890?



We think the Constitution answers this question: they could only make it out of the revenue of 1889, and in this particular case this conclusion is reinforced by the fact that the bridges contracted for were to be completed in the year 1889, and as the obligation was completed in the year 1889, and as the obligation was incurred in 1889 and the bridges were to be built in that year and the appropriation was made in that year, we think there can be no escape from the conclusion that the indebtedness thereby created was a charge against the revenues provided for the year 1889, and not the revenues of 1890. Clearly the county court was not authorized to appropriate revenues which were to be derived from taxation in the year 1890, which such taxes had never been assessed, levied or collected. While the county court may in any one year draw warrants, after the revenue has been provided and the taxes levied within the scope of the levy and income for such year, it is too plain for argument that the Constitution forbids the anticipation of the revenues of any subsequent years: If not, all that has been said in regard to the force and effect of section 12 of article 10 of the Constitution to the effect that its purpose was to put counties upon a cash system instead of the old credit plan, has been made in vain.

In our opinion, the bridge warrants offered and read in evidence were, if valid at all, chargeable against the revenues of said county for 1889, and

we think should be deducted from the total amount of warrants issued in 1890, and this being so the plaintiff's warrants were a legal and valid charge for the current expenses of the said county for the year 1890 and the judgment of the circuit court awarding plaintiff judgment therefor was correct and is affirmed."

We think it is 'too plain for argument that the Constitution forbids the payment of obligations incurred by a county in 1934 out of income and revenue provided for such county in the year 1935' and that in so far as section 14, Laws of Missouri 1933, page 348, undertakes to authorize the payment of county obligations becoming due and payable in one year out of revenue and income provided for in a subsequent year, such part of section 14 violates section 13, of article 10 of the Constitution of the State of Missouri, and in that respect is void.

What we have said in the foregoing conclusion is upon the assumption that the revenue and income provided for in Jasper County in the year 1935 will be sufficient only to pay the obligations of the county accruing or becoming due in the year 1935.

What we have said herein applies to each and every county in the State, and the City of St. Louis,  
3.

Answering further your inquiry, viz:

Will we be justified, under the law, in returning to Jasper County patients in this institution for which they so far have failed to pay?

We have pointed out above that the several county courts of the state have power to send to a state hospital their insane poor and that the sending county shall pay semi-annually, in cash, in advance, such sums

for the support and maintenance of their insane poor as the Board of Managers may deem necessary, not exceeding \$18.00 per month for each patient and in addition thereto other necessary costs.

In 32 C. J. 686, Section 373, it is stated:

"The liability for supporting insane persons may be, and often is, imposed by statute upon various public authorities upon certain conditions. This liability being statutory, the particular public authorities can be held liable in no case, and in no other manner, except as prescribed by statute."

The validity of Section 8636, above referred to, in reference to the liability of counties for the keep of their insane poor, has been upheld by the Supreme Court of this state. In State ex rel. Yarnell v. The Cole County Court 80 Mo. 80, '84, the Supreme Court of this state said:

"We think it apparent from the above statutory provisions and the general law regulating asylums, \* \* \* that it was the intention of the legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement." \* \* \* "

We are unable to find any decision of any court on facts similar to those submitted by you. If the county court is required to pay in advance for the keep of its insane poor, then undoubtedly the Board of Managers of a state eleemosynary institution would have the right to refuse to receive a patient where the county court has not complied with its statutory duty. If the Board of Managers of the state eleemosynary institutions was compelled to retain patients when counties refuse to comply with their statutory duty of paying, in advance, in cash, semi-annually, then it might and logically would result that such state

institution could not be maintained for the keep and care of the insane persons from the counties who were willing to and did pay for the keep of such patients, according to the requirements of the statutes. While the solicitude for the helpless insane is naturally great, yet, so far as the Board of Managers of the state eleemosynary institutions is concerned, it is to operate such institutions according to the mandates of the statutes and with a due regard for all persons whom such institutions were intended to serve.

We are of the opinion that the Board of Managers of the state eleemosynary institutions has the right to return to the custody of the respective counties such county patients where payments for their keep or other expenses, as provided by Section 8636 Revised Statutes Missouri 1929, have not been made by the respective counties from which such payments were due.

The above, of course, does not apply to insane persons transferred from penal institutions to state eleemosynary institutions on order of the Governor.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General.

GL:LC

123 mo 424 224 mo 2c468 X  
3,5 mo 2c564 - The Sections 1-2-3  
261 mo. 6 44 Constitutional

ELEEMOSYNARY INSTITUTIONS: ACCOUNT - CITY HOSPITALS:

St. Louis City Sanitarium entitled to be paid according to the provisions of Laws of Missouri 1931, page 221.

12-18

December 15, 1934

Honorable W. E. Jameson  
President Board of Managers  
Eleemosynary Institutions  
Jefferson City  
Missouri



Dear Mr. Jameson:

Receipt of your letter dated December 10, 1934 is acknowledged. Your letter follows:

" I enclose you herewith claim presented to the Board of Managers of the Eleemosynary Institutions by the City Sanitarium of St. Louis.

I would be very glad if you would give this claim your consideration and let me have your official opinion in regard to same, and oblige."

You do not point out in what respect you question the propriety of the account mentioned in your letter. Sections 1, 2 and 3, Laws of Missouri 1931, page 221, read as follows:

"Section 1.

Any county or city in this state, which shall maintain from public funds a hospital for the care, detention or treatment of the insane, which hospital is properly equipped as to facilities, staff and personnel, shall be entitled to \$8.00 per month per patient, upon proper report filed

and sworn to by superintendent or surgeon in chief of such hospital for the insane, when such proper report is filed with the state eleemosynary board. Such reports shall be filed quarterly and shall show name, address and other necessary data so as to properly identify and authenticate the patients of such insane institution.

#### Section 2.

The state eleemosynary board of Missouri shall have authority to examine by proper medical authorities any and all such institutions for the insane, so as to determine if said hospital is efficiently equipped and if said list as filed by the superintendent is correct and authentic and shall have power to make suggestions where they find conditions which need correction or improvement.

#### Section 3.

Upon receipt of sworn statement of the superintendent or surgeon chief of such hospitals for the insane, state treasurer shall pay over to the county treasurer or city treasurer or any county or city containing such hospital for the insane, the sum of \$8.00 per month per patient out of the general revenue funds of the state or any other funds which may be provided or set aside for this purpose."

We assume that the St. Louis City Sanitarium referred to in the stated account, is a city hospital maintained from public funds for the care, detention or treatment of the insane and is properly equipped as to facilities, staff and personnel and comes within the provisions of the

Honorable W. E. Jameson

-3-

December 15, 1934

sections above mentioned, and that the account presented accrued on or subsequent to July 1, 1933, and, if so, and if the account is correct as to the persons cared for and the dates of their care, we see no reason why the St. Louis City Sanitarium is not entitled to receive \$8.00 per month per patient out of the general revenue funds of the State or any other funds which may be provided or set aside for that purpose.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



JURORS, PAYMENT OF:

Effect of County Budget Law of 1933 (Laws of 1933, page 340) upon statutes regulating pay of jurors (R. S. Mo. 1929, Sections 8765, 8767.

February 9, 1934. 2-17-34

FILED  
46

Honorable Alvin H. Juergensmeyer,  
Prosecuting Attorney Warren County,  
Warrenton, Missouri.

Dear Sir:

A letter has been received from you under date of December 26, 1933 containing a request for an opinion, such letter being in the following terms:

"Sections 8765, 8766 and 8767 R. S. Mo. 1929 provide that the Clerk of the Circuit Court shall issue scrip for the payment of jurors and that the treasurer shall pay same when presented.

Our Circuit Court will be in session on January 8, 1934 and no doubt will adjourn by the 15th of January, 1934.

Under section 8 of the Laws 1933 page 345 the treasurer cannot pay any warrant until the budget has been approved by the County Court and the State Auditor, this will not be done until after the February Term of the County Court, which will mean that the County Treasurer cannot pay any warrant until probably in March.

Under the law can the Circuit Clerk issue the scrip and if so can the treasurer legally pay same."

I.

LAWS CONCERNING PAYMENT OF JURORS

Revised Statutes of Missouri 1929 Section 8765 which follows the statute relating to compensation of jurors, provides as follows:

"Sec. 8765. Scrip to issue on demand of juror.--Upon the demand of such juror, the clerk shall give him a scrip, verified by his official signature, showing the amount which such juror is entitled to receive out of the county treasury."

and Revised Statutes of Missouri 1929, Section 8767, provides as follows:

"Sec. 8767. Jury scrip, how paid--for what debts receivable.--The treasurer of the county is hereby required, upon the presentation to him of any scrips given by the clerk aforesaid, to pay the same out of any money in the treasury appropriated for county expenses, in the same manner and subject to the same rules as county warrants; and said scrip shall be received

February 9, 1934.

by the sheriff, collector or other proper officer in the payment of any debt due the county."

The characteristics of the "scrip" referred to in the above statutes show it to be similar to a warrant. Section 8765 says that such scrip shall show on its face the amount which it entitles its holder to receive out of the County Treasury, and Section 8767 requires the treasurer of the county to pay out such amount upon presentation and requires other county officials to accept it in payment for any debt due to the county. The last feature referred to shows that at the time it is presented it must be an obligation of the county to pay, in the nature of an acknowledgment of indebtedness so that it would not seem to differ materially from a warrant. It might be observed that the provisions of these two sections of the statute allow no option to the officials of the county in that Section 8765 provides that the Clerk "shall" give the juror a scrip upon demand and Section 8767 provides that the treasurer "is hereby required, upon the presentation to him of any scrips" to make payment thereof.

## II.

EFFECT OF THE COUNTY BUDGET LAW OF 1933 ON THE LAW GOVERNING  
PAYMENT OF JURORS.

(A) The County Budget Law enacted as Laws of 1933, page 340, deals in its first eight sections with counties having a population of 50,000 inhabitants or less (Section 1) and it provides a general scheme whereby each county included must draw a written estimate of expenditures and receipts for the calendar year which must be approved by the County Court at its regular February term, entered on the record of such Court and a certified copy thereof filed with the County Treasurer and the State Auditor (Section 8). The County Budget Law includes the pay of jurors (Section 5).

(B) As to the payment of any scrip which might be issued to jurors, Section 5 of the County Budget Law provides in part as follows:

"The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail."

It is apparent that the part of the County Budget Law just quoted is inconsistent and in conflict with R. S. Mo. 1929, Section 8767 insofar as the latter statute requires payment of scrip issued to jurors by the County Treasurer upon demand, if such scrip is presented before the filing of the budget estimate, and since the County Budget Law is the more recent of the two statutes

February 9, 1934.

it must repeal section 8767 insofar as the latter section requires payment of scrip issued to jurors where such scrip is presented for payment prior to the filing of the budget estimate. It might be observed at this point that the use of the word "warrant" in Section 8 of the County Budget Law would seem to cover scrip issued to jurors for the reason that practically and in legal effect the two are substantially identical as was set out in I, supra, for the reason that the pay of jurors is to be included in the budget estimate, and for the further reason that section 8767 provides that scrip of jurors is to be paid "in the same manner and subject to the same rules as county warrants."

(3) As to the issuance of scrip for the payment of jurors Section 8 of the County Budget Law provides in part as follows:

"Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

No positive prohibition has been found in the statute against merely issuing a warrant before the filing of the budget estimate. However, since jury pay (which by statute must mean scrip issued to jurors) is within the County Budget Law and must be included in the estimate to be filed (Section 5) and since that part of Section 8 just quoted clearly indicates that there could be issuances of warrants which would involve the persons participating in such issuances in liability on their bonds, and since the only possible kinds of issuances which might be referred to in such liability provision would be issuances for items not included in the budget estimate, either because such estimate did not include them when filed and approved, or because the budget estimate itself had not yet been filed and approved, in view of the personal liability upon the officials participating in such issuance we should not be willing to advise the Circuit Clerk to issue any scrip for the payment of jurors before the filing and approval of a budget estimate providing for such payments and, therefore, the part of Section 8 of the County Budget Law just quoted repeals section 8765 as to demands of a juror upon the Circuit Clerk for the issuance of scrip when such demands are made before the filing and approval of the budget estimate for that year.

It is our opinion that the Circuit Clerk of a county containing not over 50,000 inhabitants is under no duty to issue scrip for the payment of jurors prior to the filing and approval of the County Budget Law of that county for the current year, that such Circuit Clerk might be liable on his bond for such issuance, and that the Treasurer of such county would be liable on his bond for paying out of the County Treasury any such scrip before the filing and approval of the budget estimate of his county for such current year, and that any statute providing to the contrary, and especially R. S. No. 1929, Sections 8765 and 8767 are repealed to the extent that they are in conflict, which means that Sections 8765 and 8767 are repealed insofar as they impose duties of issuance and payment of scrip to jurors prior to the filing and approval

4. Honorable Alvin R. Juergensmeyer

February 9, 1934.

of such budget estimate although such statute would remain effective from such filing and approval until the end of such calendar year.

Yours very truly,

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

**ITINERANT VENDOR:**

**RELATING TO THE SALE OF MERCHANDISE BY  
TRUCKERS AT PUBLIC AUCTION.**

3.13

March 10, 1934.



Mr. W. C. Jones  
Jones Hardware Company  
Glasgow, Missouri.

Dear Sir:

This department is in receipt of your letter dated February 22, 1934, wherein you state as follows:

"There is a new kind of competition sprung up lately in this section, and I understand it is pretty general throughout the state.

"Truck loads of merchandise are being brought to our country farm sales and sold at auction; parties who are operating this kind of business are telling the farmers that this merchandise is goods left on hand at railroad freight depots, and they are obtaining it from the railway company.

"After the farmer's sale is finished they employ the auctioneer to do their selling, the items offered consist of a general run of items, such as found in hardware stores, grocery stores, harness etc.

"Would you please advise if there is a ruling against this practice to protect us against this kind of competition, if not, could there be one formed?"

Section 10103, R. S. No. 1929, sets out the statutory definition of an itinerant vendor in the following language:

"The words 'itinerant vendor,' for the purposes of this article, shall mean and include all persons, both principal and agents, who engage in, or conduct, in this state, either in one locality or in traveling from place to place, a temporary or transient business of selling goods, wares and merchandise with the intention of continuing in such business in any one place for a period of not more than one hundred and twenty days, and who, for the purpose of carrying on such business, hire, lease or occupy, either in whole or in part, a room, building, or other structure, for the exhibition and sale of such goods, wares and merchandise. The provisions of this article shall not apply to sales made to dealers by commercial travelers or selling agents in the usual course of business, nor to bona fide sales of goods, wares and merchandise by sample for future delivery, nor to hawkers on the streets or peddlers from vehicles, nor to any sale of goods, wares or merchandise on the grounds of any agricultural society during the continuance of any annual fair held by such society."

Section 10104, R. S. No. 1929, sets out the statement required of "itinerant vendor" before he may procure a State license and reads as follows:

"An itinerant vendor shall not advertise, represent or hold forth a sale of goods, wares or merchandise as an insurance, bankrupt, insolvent, assignee, trustee, estate, executor, administrator, receiver, wholesale, manufacturers' wholesale, or closing out sale, or as a sale of any goods damaged by smoke, fire, water, or otherwise, unless before so doing he shall state, under oath, to the secretary of state, either in the original application for a state license, or under a supplementary application subsequently filed and copied on the license, all the facts relating to the reasons and character of such special sale so advertised, held forth, or represented, including a statement of the names of the persons from whom the said goods, wares or merchandise were obtained, the date of delivery of the



3/10/34

same to the persons applying for the license, the place from which said goods, wares and merchandise were last taken, and all details necessary to exactly locate and fully identify all goods, wares and merchandise to be sold."

The following Section 10105 of R.S. Mo. 1929, provides for the purchase of a State license by an itinerant vender in this language:

"An itinerant vender, whether principal or agent, before beginning business, shall take out state and local licenses in the manner hereinafter set forth, but the right of a municipal corporation to pass such additional ordinances relative to itinerant vendors, as may be permissible under the general law, or under its charter, shall not be affected. Every itinerant vender desiring to do business in this state shall deposit with the secretary of state the sum of five hundred dollars as a special deposit, and thereafter, upon application in proper form, and the payment of a further sum of twenty-five dollars, as a state license fee, such secretary shall issue to him an itinerant vender's license, authorizing him to do business in this state, in conformity with the provisions of this chapter, for one year from the date thereof. Such license shall set forth a copy of the application upon which it is grafted. The license shall not be transferable, nor permit more than one person to sell goods as an itinerant vender, either by agent or clerk, or in any other way than in person, but any licensee may have the assistance of one or more persons, who may aid him in conducting his business, but not act for him or without him."

Section 10106, R. S. Mo. 1929, provides the manner in which an application for license shall be made and reads as follows:

"Applications for licenses shall be sworn to, shall disclose the names and residences of the owners, or persons in whose interest such business is conducted, to be kept on



file by the secretary of state, and a record shall be kept by him of all licenses issued upon such applications. All files and records of the secretary of state shall be in convenient form and open for public inspection. Before selling under a state license an itinerant vendor shall exhibit it to the county clerk of the county, license collector, or other authorized officer of any municipal corporation, in which he proposes to make sales. Upon payment to such county clerk, license collector, or other authorized officer of any local license fee provided by law or ordinances, and the proof of payment of all such other license fees legally chargeable upon local sales, the local officer shall record such state license, indorse upon it the words "local license fees paid," and affix his official signature, with the date of such indorsement, for which service a fee of \$2.00 shall be paid to said officer. Failure to obtain proper indorsement made on the state license shall be subject to a like penalty as if state license had not been issued."

Section 10107, R. S. Mo. 1929, provides the manner in which the law may be enforced and reads as follows:

"The informing or prosecuting officer of the counties and municipal corporations in this state shall enforce the provisions of this law, and prosecute violations thereof. Such officers may demand the production of the proper state license from an itinerant vendor advertising or actually engaged in business, and a failure to produce such license shall be prima facie evidence against such vendor that he has none."

Section 10110, R. S. Mo. 1929, provides for penalty in failing to comply with the preceding sections and reads as follows:

"Every itinerant vendor who sells or exposes for sale, at public or private sale, any goods wares or merchandise without state license therefor, \* \* \* shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars, nor less than two hundred dollars, or by imprisonment for not more than

3/10/34

six months, or both."

From the foregoing, we are of the opinion that the owners of such merchandise are "itinerant vendors". The fact that the hardware, groceries and harness are being sold at public auction by an auctioneer does not change their position, since the latter is clearly acting as their agent.

We are also of the opinion that if there are any misrepresentations by the parties as to the place and manner in which they are obtaining their merchandise, such statement will have to be corrected in order to comply with Section 10104 of the Revised Statutes of Missouri, 1929, as hereinbefore stated.

We are further of the opinion that if such license has not been purchased, nor application made as provided for in Sections 10105 and 10106, R. S. of 1929, as above set out, the prosecuting attorney should demand the production of the proper license as provided for in Section 10107, R. S. of Mo. 1929, and upon failure to produce same should prosecute the violation, subject to the penalties as prescribed in Section 10110 of the Revised Statutes of 1929, as above set forth.

Yours very truly,

WOS/afj

WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

S. HOO S: Sendin; school must pay entire tuition of pupil,  
receiving credit up to \$50.00 if the State has the money.

9'  
August 28, 1934.

e 7.2  
Mr. G. C. Jones  
County Superintendent of Education  
Laclede County  
Lebanon, Missouri



Dear Mr. Jones:

This is to acknowledge your letter which, in part,  
reads as follows:

"I am enclosing a clipping from the local  
paper here regarding the last decision  
given by the Supreme Court. I want you  
to read it and tell me if it corresponds  
to the Court's words on the matter. I  
think it is misleading."

The clipping enclosed referred to the recent case of  
State ex rel. Mildred Burnett, Relator, v. School District of  
the City of Jefferson, et al., Respondents (not yet officially  
reported).

The facts in that case showed that Mildred Burnett was  
"a minor between the ages of six and twenty years; that she and  
her parents are residents of School District No. 114, Callaway  
County, Missouri, a common school district; that the school  
district of her residence maintains no high school and no classes  
beyond the eighth grade; that she has completed the course of  
study provided in her district and is fitted in every way to  
enter and pursue the courses of study provided in respondents'  
high school; that the high school maintained by respondents is  
in an adjoining county and the most convenient high school for  
relator to attend; that respondents have denied her admission  
therein; that the respondent school district is a city school  
district within the meaning and under the provisions of Article  
4 of Chapter 57 R. S. Mo. 1929 and all amendments thereto;  
that it applies for and receives state aid for the maintenance  
of said high school; that it has not received and will not  
receive during the current school year the full sum of fifty  
dollars from the State of Missouri; that the average cost of

furnishing high school education for the current year is seventy-five dollars per pupil; that the school district of relator's residence has paid and is willing and able to pay to respondent district for relator's tuition the sum of twenty-five dollars for the current school year in the manner and upon the terms prescribed by law; that respondents have demanded and now demand that in addition to the sums so paid and to be paid by the school district of relator's residence and paid or to be paid by the State of Missouri, relator or her parents pay to respondent district an incidental fee of three dollars per month; that relator and her parents have refused to pay this fee and that she is refused admission to the high school conducted by respondents solely because of such failure to pay the same."

This was the second submission of the original proceedings by mandamus. In the first proceedings the court granted its alternative writ and upon motion for rehearing quashed its alternative writ, holding:

"It must be conceded that upon rehearing 'a case stands just as if it had not been previously heard and submitted.'"

Thus, the former opinion rendered by this court in the same cause is not of any force and effect. We call attention to this fact for the reason that when the court's first opinion in this case was handed down we caused same to be digested and copies sent to various parties interested in this matter. See our opinion dated May 25th, 1934. As far as our former opinion (or opinions) conflicts with this one, such is (are) overruled.

The controversy relative to non-resident high school pupils hinges upon the construction to be given Section 16, Laws of Missouri, 1931, pp. 343,344, amended 1933. Said section provides:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher

grades is offered; but the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota; if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year; but the attendance of such pupil shall not be counted in determining the teaching units of the district maintaining the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final: Provided further, that when any school district makes provision for transporting any or all of the children of such district to a central school or schools and the method of transporting and the amount paid therefor is approved by the state superintendent of schools, the amount paid in state funds for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district; Provided, the provision of this act regarding the payment of tuition and transportation shall apply if the students attend any school supported wholly or in part by state funds."

The court in its opinion, relative to the above section, held the following:

"A complete scheme for the payment of the tuition of non-resident pupils thus having

been provided we cannot escape the conclusion that it was intended to be exclusive and that respondents are without power to charge tuition in any other way. With respect to payment of tuition of non-resident pupils the provisions of old section 9207 and section 16 of the new law are inconsistent and the later enactment must prevail."

Thus, we start with the premise that Section 16 prevails in the matter of high school tuition of non-resident pupils.

I.

Although Section 16 governs with reference to tuition of non-resident pupils, yet, the court held that the high school, even though it receives state aid, could not be compelled to admit non-resident pupils, and its refusal to admit does not deprive it of state aid. Quoting from the opinion:

"However, as we have already suggested, even though respondents are without legislative authority to require relator or her parents to pay tuition, it does not necessarily follow that they can be compelled to admit her."

And further,

"Though repeatedly questioned at the rehearing as to other forms of state aid received by respondent school district, counsel for relator and the Attorney General have failed to cite any that would place respondents under mandatory legal obligation to admit relator, or to state any valid reason why respondent school district, even though it receives state aid, should be compelled to admit non-resident pupils."

Thus one of the holdings of the court in the above case being: That the high school does not have to admit non-residents.



## II.

The court held, however, that if non-resident pupils are admitted then the high school could not charge the pupils or their parents any tuition fee (or any other fee) but that the provisions of Section 16 govern. We quote from the court's opinion:

"If respondents admit relator they must do so under the provisions of section 16, because it is conceded that respondent school district receives state aid and section 16 expressly provides that the provision of the act, of which it is a part, regarding the payment of tuition 'shall apply if the students attend any school supported wholly or in part by state funds'."

And further,

"A complete scheme for the payment of the tuition of non-resident pupils thus having been provided we cannot escape the conclusion that it was intended to be exclusive and that respondents are without power to charge tuition in any other way."

## III.

Above we have shown that a high school receiving state aid does not have to admit non-resident pupils but if they admit such pupils, then they are powerless to charge tuition in any other way other than as prescribed by Section 16, supra.

The question now arises, that if the high schools accept non-resident pupils, then, who pays the tuition, and the amount? We quote further from the court's opinion:

"Now, although section 16 contains no express provision that a non-resident pupil shall not be required to pay tuition, it does provide a complete and apparently exclusive scheme for its payment. First, it unequivocally requires



the district of residence to (*italics ours*) 'pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county where work of one or more higher grades is offered'. Second, it expressly limits the amount of tuition by providing that (*italics ours*) 'the rate of tuition paid shall not exceed the per-pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, \* \* \* and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental expenses. In case of any disagreement between districts as to the amount of tuition to be paid, the facts shall be submitted to the state superintendent of schools, and his decision in the matter shall be final'. Third, as already stated, it specifies that (*italics ours*) 'the provision of this act regarding the payment of tuition \* \* \* shall apply if the students attend any school supported wholly or in part by state funds'."

And further.

"It is now conceded by all parties hereto that the provision in section 16 for payment by the state of \$50.00 tuition per non-resident attending pupil is in reality state aid to the sending district and not to the receiving district."

Thus, the court has said that the sending district must pay the tuition of its pupils attending a high school and the fifty dollar deduction to be paid by the State is state aid to such sending district. In other words, the aid is one to the sending district and not to the receiving high school. Thus it

follows that the sending school district is liable to the receiving school district for all of the tuition of the pupils from its (sending district) school to the receiving high school. If the state pays \$50.00 or any part thereof, it is applied as a credit to the sending district's obligation of tuition payment. In other words, the sending district is primarily liable for all of the tuition (per-pupil cost) due the receiving high school district, and if the state has the money it will pay the first \$50.00 of the per-pupil cost on this obligation of the sending district. But, the state does not give anything to the sending district, but pays it direct to the receiving high school, thus making the payment of the state's part a matter of bookkeeping only and the effect of same being an aid by the state to the sending district. However, if the state only has enough money to pay a part of the \$50.00, then only the part the state pays is credited on the tuition.

We conclude, and such is our opinion, that: (1) The highschool does not have to accept non-resident pupils and by doing so it does not forfeit its state aid; (2) if the high school accepts non-resident pupils, then it cannot charge the pupil any fee (tuition or incidental); (3) the sending school district must pay the entire per-pupil cost of the pupils attending the high school, receiving a credit of what the state pays to the receiving districts, an amount not to exceed, however, \$50.00.

#### IV.

We desire to have you bear in mind that we are only interpreting the law as it is written without regard to the equities involved, and remind you of our inability to change or remedy the difficulties surrounding the schools. We quote the language of the court in the above case:

"It is true that in the present condition of the state's revenue the ambitious hope, which seems to have inspired section 16 of the act of 1931, that gratuitous instruction would be thus afforded non-resident attending pupils, becomes highly

illusory. But the remedy is legislative rather than judicial. If unforeseen difficulties have disrupted the plan it may be repaired or changed by appropriate legislation. We should not try to meet the emergency by judicial misinterpretation of the plan."

We are mindful of the fact that the law as now written may cause many pupils to be refused admittance to high schools because the districts in which they reside may not have sufficient funds with which to pay the tuition charge of 1934-35 or because of the state's failure to pay all of that provided by statute, to-wit, \$50.00. Therefore, we take the liberty of offering a suggestion, due to the unusual financial conditions that exist, that the rural district, the high school and the pupil cooperate so that an unnecessary burden will not inure to either party. If the receiving high school cannot accept non-resident pupils because the sending school district does not have funds with which to pay the tuition (and such due to no fault of the sending district), then we see no reason why the pupil should be denied admission to the high school if such voluntarily pays the deficiency, if any, of either the state or sending district. If the pupil voluntarily pays what the state or district fails to pay will result in: (1) That the pupil will be allowed to attend the high school, and (2) the high school will obtain a sufficient reimbursement of what it cost to educate the pupil. We earnestly hope that the high schools will make all possible concessions so as to effect the noble purpose of the Legislature in attempting to provide a high school education to all that desire one. Of course, the high school cannot make a ruling to the effect that the pupil must pay such deficiency, if any. However, if it is a voluntary act on the part of the pupil in paying so that such may attend the high school, then, in our opinion, whatever the pupil would pay would be legal and the high school would be within the law in accepting such voluntary contribution. School District of Barnard v. Matherly, 90 Mo. App. 403.

Mr. G. C. Jones

-9-

August 28, 1934.

Possibly such a plan as above outlined will temporarily relieve the tuition problem until the Legislature can correct the difficulty.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

CRIMES: -- Venue for arson committed in Arkansas cannot be placed in Missouri for purposes of prosecution under Missouri law.

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11-9  
October 23, 1934.

Mr. J. T. Jones  
State Fire Marshal  
State of Oklahoma  
Oklahoma City, Oklahoma.



Dear Sir:

Your request for an opinion dated October 13, 1934, reads as follows:

"On March 18, 1932 a fire occurred in the City of Okemah, Oklahoma, which was of incendiary origin. This property was owned by a citizen of Missouri who was residing in Missouri at the time the fire occurred. Shortly after the occurrence of this fire, our office made an investigation, attempting to ascertain who set the fire to this dwelling house, but without much success. However, since that time we have continued our investigation and have finally secured statements from two citizens in Missouri, stating that they were employed by the owner of this property to come to Oklahoma and burn it. Their statements or confessions state that they were paid a certain sum of money by this assured in Missouri after they had agreed with him to come down here and burn his property. That they did come to Oklahoma and burn this property, and after they returned to Missouri they were paid an additional sum by this assured.

"We desire and respectfully request that you give us an opinion as to whether or not any crime has been committed by this owner of the property in Oklahoma in the State of Missouri, and if so, what crime has been committed."

Section 4040, R. S. Mo. 1929, provides:

"Any person who shall wilfully and with the intent to injure or defraud the insurer set fire to, burn or cause to be burned any goods, wares, merchandise or other chattels or personal property of any kind which shall at the time be insured by any person, persons, co-partnership or corporation against loss or damage by fire shall be deemed guilty of a felony and upon conviction therefor be punished by imprisonment in the penitentiary for not less than two nor more than five years."

Section 3377, R. S. Mo. 1929, provides:

"Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

Above you see the Missouri Statutes on arson of insured property, also the Statute on venue which must be construed with the arson statute when prosecuting for said crime.

Since "arson" is the physical act which constitutes the offense, the criminal act must have a situs within the territorial confines of some county in this State, before a venue can be established, necessary as a condition precedent before the criminal courts of this State can assume jurisdiction.

This arson statute is for the government of

persons and things within this State and the Legislature had no intention of creating the offense of arson committed without this State and regulate the conduct of persons beyond the territorial limits of this State.

CONCLUSION.

The facts stated in your letter do not state a crime over which the State of Missouri has any jurisdiction.

Respectfully submitted,

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WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

WOS/afj



- SCHOOLS: (1) Persons over 20 years of age not entitled to gratuitous instruction.
- (2) Board of directors may provide for persons between 5 and 6 and over 20 years of age and pay tuition just so long as it is <sup>not</sup> paid out of funds derived by virtue of Section 6, Article XI, of the Constitution of Missouri.

October 30, 1934.

11-9

Hon. Alvin H. Juergensmeyer  
Prosecuting Attorney  
Warren County  
Warrenton, Missouri



Dear Sir:

This is to acknowledge your letter dated October 20, 1934, as follows:

"The question has arisen whether a pupil who is past 20 years of age is entitled to free tuition under the High School law that requires the district to pay tuition for resident pupils who attend High School in another district. The new law does not say anything about age, yet the old law places the age limit from 6 to 20 inclusive. Also there is another section which provides that districts in some instances may pay the expenses of children under 6 and over 20 years of age. Could that section apply in the case of High School Tuition."

I.

Section 1, Article XI, of the Constitution of Missouri, provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

At an early date, namely, in 1895, the appellate courts of this State have held that unless one be within the age limit of the above section of the Constitution such was not entitled to attend the public school at the expense of the public school fund. Such was the holding of the St. Louis Court of Appeals in the case of Rogers v. McCraw, 61 Mo. App. 407, and as it is a short opinion we quote same in its entirety as follows:

"This is an action for damages against the defendants, who are directors of a school district, for refusing to allow the plaintiff to attend a public school in the district. The petition states that school was taught in the district from September, 1892, to February, 1893; that the plaintiff became a resident of the district in October, 1892; that, at that time, the plaintiff was over the age of six years and under twenty-one years, and that the defendants, acting as directors aforesaid, wrongfully, willfully, maliciously and illegally made and enforced an order prohibiting the plaintiff from attending the school.

"The court sustained a demurrer to the petition and final judgment was rendered thereon, the plaintiff having refused to amend the pleading.

"The action of the court sustaining the demurrer must be affirmed. The school age as fixed by the constitution is between the ages of six and twenty years. (Constitution, article 11, section 1.) Section 6, of the same article declares that the public school fund 'shall be faithfully appropriated for establishing and maintaining the free public schools \* \* \* in this article provided for, and for no other uses or purposes whatsoever.'

"To entitle the plaintiff to maintain the action, she must have been within the school age (as fixed by the constitution) at the time she was prohibited from attending the school. Roach v. Board of Public Schools, 77 Mo. 484. This is one of the essential facts of her alleged cause of action. Under the code every constitutive fact must be distinctly set forth in the petition; otherwise it is the subject of demurrer. The averment is that at the time the plaintiff was excluded from the school 'she was over six and under twenty-one years of age.' It is manifest that the petition failed to state a cause of action.

"There are other objections urged against the petition, which we need not discuss.

"With the concurrence of the other judges the judgment of the circuit court will be affirmed. It is so ordered."

From the above it is our opinion that the board of directors cannot pay the tuition of a pupil past twenty years of age out of the public school fund even though Section 16, Laws of Missouri, 1933, page 393, requires the board of directors to pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school of said district and attends an approved high school in another district, because of Section 6, Article XI, Missouri Constitution.

## II.

In 1913, Laws of Missouri, 1913, page 717, present Section 9213 was enacted, which is as follows:

"The board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district. Such gratuitous education,

"however, shall be provided only out of revenues derived by such school district from sources other than those described in section 6, article XI of the Constitution of this state, and only with so much of such revenues as are not required for the establishing and maintaining of free public schools in such school districts for the gratuitous instruction of persons between the ages of six and twenty years: Provided, that nothing in this section shall be construed as affecting the basis of apportionment of the public school fund of this state as now fixed by law."

You will note from reading the above section that "the board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district." Your attention is invited to the word "may" and also directed to the fact that a pupil may be between five and six years of age and over twenty years of age and, yet, if the board of directors provide to teach such pupils gratuitously, then such is left to their discretion. However, in view of the constitutional provision, namely, Section 6, Article XI, the board of directors may not use any part of the public school fund provided for therein for the purpose of giving gratuitous education to such persons not between the constitutional ages provided in Section 1, Article XI, *supra*.

Section 6, Article XI, of the Constitution, provides in part as follows:

"\* \* \*; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

In *Lincoln University v. Hackmann*, 243 S. W. 320, the Supreme Court of Missouri, en Banc, said the following (l. c. 322):

"It is thus seen that the income from the public school fund and the money required to be set apart from the ordinary revenue of the state must be devoted exclusively to the support of the public schools. To this there is only one exception, the State University. So that when the Legislature set apart one-third of the ordinary revenue of the state for the support of the public schools, that fund, together with the annual income from the public school fund, was devoted to the purpose designated by the Constitution, and the Legislature was without power to divert or appropriate any portion thereof to any use or purpose other than establishing and maintaining the free public schools and the State University."

From the above it is our opinion that if the board of education provides gratuitous instruction for persons between five and six and over twenty years of age, resident in such school district, then the school board may not use any of the funds derived by virtue of Section 6, Article XI, of the Constitution of this State. It therefore follows that Section 9213, supra, does not give the board of directors the right to pay tuition of students attending high school in another district from funds, if any, derived from the state by virtue of Section 16, supra. And if the board of directors pay the tuition of any such pupil then it must be paid from sources other than those received by the school district by virtue of Section 6, Article XI, supra.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

AUTOMOBILE REGISTRATION: Owner of vehicle does not need a  
Chauffeur's or registered operator's  
license.

2-24

February 22, 1934.



Hon. Roy L. Kay,  
Prosecuting Attorney,  
California, Missouri.

Dear Sir:

This department is in receipt of your request  
for an opinion as to the following facts:

"There is here a partnership  
composed of three brothers who  
are engaged in the business of  
distribution of beer. They have  
two trucks in the partnership  
and all three of the brothers,  
at different times drive the  
trucks in their business. They  
inform me that they buy the beer  
from the brewery and pay cash  
for it before they put it on the  
trucks.

Do they have to have either a  
chauffeur's or a registered  
operator's license? They inform  
me that the State Patrol and an  
agent in the Automobile Department  
told them they do not as they are  
hauling their own goods in their  
own trucks and for that reason do  
not fall within either rule.  
Please let me know at your very  
earliest convenience for the pro-  
tection of these men."



Feb. 22, 1934.

I.

The owner of a vehicle does not need a chauffeur's or registered operator's license.

Section 7758, R.S. Mo. 1929 defines the term "chauffeur" as follows:

"An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employe operates a motor vehicle carrying passengers or property for hire."

The term "registered operator" is defined as follows:

"An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

In the case here under consideration, a partnership composed of three brothers own two trucks which they use in the transportation of property owned by the partnership. The definitions as heretofore set out in no wise include the owners of trucks transporting property belonging to the owner. However, every motor vehicle owner in the State of Missouri must register the motor vehicle in accordance with the provisions of Sec. 7761, R. S. Mo. 1929.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General



221  
CIRCUIT CLERK: Compensation of person appointed to fill out unexpired term same as salary of predecessor until the end of the term.

4-9  
11786 Law 35  
March 27, 1934.

Mr. John H. Keith,  
Attorney at Law,  
Ironton, Missouri.



Dear Sir:

This department acknowledges receipt of your letter of March 10 relative to the following question:

"The clerk of the circuit court and recorder of deeds for this county has resigned, and another person has been appointed in his place.

The question arises as to the salary of the one who succeeds the one resigned.

Section 11786, Laws 1933, Page 369 concludes as follows: 'Provided further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law.'

The question to be determined is whether or not the person appointed as successor to the one who held the office at the time of the passage of this law would come under the provision above set out, or would his salary be fixed by this statute, and not the statute before this enactment. How about the selection of deputy of the one appointed?"

March 27, 1934.

As you appear to be familiar with Sec. 11786, Laws of Mo. 1933, p. 369, the same relating to the compensation of the Circuit Clerk on and after January 1, 1935, we will not quote same.

We are enclosing copy of an opinion rendered by Assistant Attorney General Reagan on March 7, 1934 relating to this matter, which we believe will contain information beneficial to you. We are also enclosing copy of an opinion rendered by the writer to the Honorable Stanley Wells, County Clerk, Warrensburg, Missouri wherein the status of the deputy Circuit Clerk is discussed. You will note in this opinion it was held that the Laws of 1933 relating to the deputy Circuit Clerk became effective on July 24, 1933.

### I.

We will now discuss the main question in your letter, i.e., the compensation of the person appointed to fill the vacancy in the office of Circuit Clerk.

Sec. 11786, Laws of Mo. 1933, page 369 deals with the compensation of Circuit Clerks and except for the proviso contained at the close - "Provided further, that until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law" - we would have no hesitancy in holding the salary relating to the Circuit Clerks became effective on July 24, 1933. It is reasonable to assume that a person receiving an appointment to fill out an unexpired term occupies the same position as his predecessor, his rights, powers and compensation being neither greater nor less.

There are no decisions in Missouri direct in point on this question; however, we quote from the case of Carter v. State, 177 Okla. 31, as follows:

"Where a person is appointed to fill an unexpired or fractional term of a public office, his 'term of office' begins with his appointment and qualification, and he is entitled to receive the salary provided by law at the time of such appointment although such law is enacted subsequent to the date of the election or appointment of his predecessor."

### CONCLUSION

It is the opinion of this department that the person

March 27, 1934.

appointed to fill out the unexpired term of the Circuit Clerk in your county is entitled to receive the same compensation, until the end of the term, as was received by his predecessor.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

April 10, 1934.

As I understand the new law, which repealed certain sections of the statute and enacted new ones in lieu thereof, it repealed Section 9952 R. S. 1929, which provided for the employment by the collector of a 'tax attorney' to institute suit for taxes, on real estate. Section 9940 R. S. 1929, provides for the method of collecting personal taxes, and also provides that

'said actions shall be prosecuted by attorneys employed as provided in ARTICLE 9 of this chapter of the general statutes and the fees and compensation allowed in said article shall apply to the above actions.'

Section 9940 R. S. 1929, has not been repealed and I presume the collector is authorized to sue for personal tax as always, under the provision of that section, but the provisions for the employment of a tax attorney to prosecute such actions, namely Sec. 9952, has been repealed. Therefore the question is, in what manner shall the collector institute actions for the collection of personal taxes, against parties who do not own real estate against which he can charge the same? "

Article 9, Chapter 59, R. S. Mo. 1929, relates to "Delinquent and Back Taxes." The "delinquent and back taxes" referred to in that article and chapter concern personal and real estate taxes. In said article and chapter a scheme is provided for the collection of these two classes of taxes. The Legislature in 1933 made radical changes as to the collection of delinquent back real estate taxes (Laws of 1933, p. 425, Senate Bill 94; and Laws of 1933, p. 465, Section 9952, House Bill 44).

Senate Bill 94 was approved by the Governor April 7, 1933, without an emergency clause, which made that act become effective 90 days after the adjournment of the Legislature, to-wit, July 24, 1933. House Bill 44, supra, was approved April 28, 1933, with an emergency clause, becoming effective upon that date.

Your inquiry concerns the right of the collector to hire attorneys to collect and/or place in judgment delinquent personal taxes. As stated above, the Legislature by changes in the law confined their efforts to delinquent real estate taxes and in so doing have overlooked to some extent collection of personal delinquent taxes.

Section 9940, R. S. Mo. 1929, pertains to the collection of personal taxes; said section provides the following:

"Said actions shall be prosecuted by attorneys employed as provided in Article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions."

And further,

"This section shall not apply to counties having a population of more than eighty thousand and less than one hundred fifty thousand in which circuit court is held in more than one place."

It is thus seen that provision is made for the employing of attorneys to prosecute actions for the collection of personal taxes.

Section 9952, R. S. Mo. 1929, provides this:

"\* \* \* \* \*; and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court \* \* \* to employ such attorneys as he may deem necessary, who shall receive as fees such sum, etc. "

Section 9952 was authority to hire attorneys to prosecute for delinquent real estate taxes as well as personal taxes. Thus, the Legislature, in 1933, in changing the law relative to the collection of delinquent real estate taxes repealed and reenacted said section; doing so by two bills, namely, Senate Bill 94 and House Bill 44.

House Bill 44 repeals Section 9952 and enacts the same section with only one change in it, to-wit:

"Provided, however, that in all counties of this State that now have or may hereafter have a population of not less than eighty thousand nor more than ninety five thousand, according to the last decennial census of the United States, the collector shall have no power or authority to employ such attorneys, that the prosecuting attorney of such counties shall be the back tax attorney, and that all fees collected as such by the collector shall be paid into the county treasury; and each of the prosecuting attorneys in such counties shall be entitled to such additional temporary clerk and deputy hire as in the judgment of the prosecuting attorney and the county court may deem necessary, for such time and at such salary as may be fixed by the Prosecuting Attorney and the County Court."

This change affects only one county, namely, Greene County, and took away from the collector of that county the right to employ a back tax attorney, and vested that duty in the prosecuting attorney. The emergency clause reads as follows:

"The financial condition of the counties and of the people therein, to which this act applies, and relief of the same being imperative without delay, creates an emergency in the meaning of the Constitution and this act shall be in force and effect upon its passage and approval."

In determining the legislative intent, it is well settled that the emergency clause may be considered. In *State v. Bengsch*, 170 Mo. 81, 1. c. 109, the Supreme Court of Missouri said:

"Now, if laws passed at remote periods, laws in *pari materia*, or cognate-subject



laws, laws that have expired or been repealed, unconstitutional laws, may have the shell of their legislative nuts cracked by the hammer of judicial investigation, in order to extract the kernel of their intention, then a fortiori, may a similar result be reached where the shell of the legislative nut has been cracked by the legislators them selves, and the kernel of their intention extracted and spread on the platter of an emergency clause ready for immediate use. We hold the emergency clause in this instance as conclusive evidence of the legislative purpose, \* \*."

Directing your attention now to Senate Bill 94, Laws of Missouri, 1933, p. 429, the following is found:

"That sections 9952 \* \* \* \* \*, Article 9, Chapter 59, Revised Statutes of Missouri, 1929, entitled "Taxation and Revenue", and relating to "Delinquent and Back Taxes", be and the same are hereby repealed and fifty-one new sections enacted in lieu thereof, pertaining to the same subject, to be known as sections 9952 etc."

Section 9952 then as enacted makes no provision for the hiring of attorneys for the collection of delinquent taxes because the Legislature was only attempting to change the law respecting collection of delinquent real estate taxes. And, in so doing, repealed Section 9952 R. S. Mo. 1929, which was the only section under which attorneys could be employed. The collection of delinquent real estate taxes now does not need the aid or assistance of an attorney.

The determination of this question, then, is a matter of statutory construction.

The Supreme Court, en Banc, in *Gasconade County v. Gordon*, 241 Mo. 569, said the following:

"Especially is it true that legislative enactments passed upon the same day or at the same session, and relating to the same subject, are to be read as part of the same act."

Section 9940, supra, provides that "said actions shall be prosecuted by attorneys employed as provided in article 9 of this chapter of the general statutes." And, as shown above, in 1933 the Legislature twice repealed Section 9952 R. S. 1929 (Senate Bill 94 and House Bill 44, supra); but House Bill 44 leaves Section 9952 whereby attorneys may be employed to prosecute delinquent personal tax actions. True, Senate Bill 94 likewise repealed Section 9952 R. S. Mo. 1929, and it being unnecessary at this time to determine the issue as to whether House Bill 44 was intended to be operative only and insofar until Senate Bill 94 became effective, we do not determine same (however, see our opinion dated August 8th, 1933, to the State Tax Commissioner, copy of which is hereto attached.). Thus, our present duty is (1) to harmonize these statutes (9940 and Senate Bill 94 and House Bill 44), if possible, and (2) determine if Section 9952 R. S. Mo. 1929 (even though repealed ?) remains and is incorporated into Section 9940.

Section 9940 refers and adopts into it any sections pertaining to the employment of attorneys found in article 9, chapter 59, so that section 9952 by the method of adoption was incorporated into Section 9940, and became a part thereof.

In *Crohn v. Telephone Co.*, 131 Mo. App. 313, l. c. 320, the Kansas City Court of Appeals, in discussing such a method of adoption by reference in statutes, said the following:

"In *Endlich on Interpretation of Statutes*, section 85, it is said: 'An act adopting by reference the whole or a portion of another statute, means the law as existing at the time of adoption and does not adopt any subsequent addition thereto or modification thereof.' This rule is generally recognized. (*Sutherland on Statutory Construction*, section 257; 26 Am. and Eng.

Ency. of Law (2 Ed.), 714; Postal Tel. Co. v. Railroad, 89 Fed. 190; Jones v. Dexter, 8 Fla. 276; Culver v. People, 161 Ill. 96; 43 N. E. 812; Darmstaeter v. Maloney, 45 Mich. 621, 8 N. W. R. 574; Matter of Main Street, 98 N. Y. 454; Commonwealth v. Kendall, 144 Mass. 357; Gaston v. Lamkin, 115 Mo. 20.) Further it is said by the same author (section 492): 'Where the provisions of a statute are incorporated by reference in another (where one statute refers to another for the powers given or rules of procedure prescribed by the former), the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if the earlier statute is afterwards repealed, the provisions so incorporated, the powers given, or rules of procedure prescribed by the incorporated statute, obviously continue in force, so far as they form part of the second enactment.' To the same effect is Gaston v. Lamkin, 115 Mo. 20, where the Supreme Court of this State said: 'The general rule governing in such cases seems to be that where one statute refers to another for rules of procedure prescribed by the former, the former statute, if specifically referred to becomes a part of the referring statute, and the rules of procedure prescribed by the earlier statute so far as they form a part of the second enactment, continue in force, although the earlier statute be afterwards modified or repealed.'

Under these rules, that part of section 2864 relating to parties and procedure became by adoption an integral part of section 2866 to the same extent as though it had been written into the latter statute and neither a subsequent amendment nor repeal of section 2864 could affect the referring section."

April 10, 1934.

The above case is analogous to the situation at hand and is authority for our conclusion.

It is our opinion that when Section 9940 is now read that the following should be incorporated and read into it, namely, that part which is found in Section 9952, R. S. Mo. 1929, and/or House Bill 44, Laws of Missouri, 1933, page 465, to-wit:

"and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court \* \* \* \*, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed etc.";

the force and effect of our opinion being, that the collection of delinquent personal taxes is in the same category as formerly and that attorneys may be employed in the same manner as before the repeal of Section 9952 by Laws of Missouri, 1933, page 425 (Senate Bill 94).

We are also enclosing copy of opinion rendered by this Department to Hon. William S. Gabriel, on January 18th, 1934.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

Construction of Section relative to time required  
to be done for costs.

8-23  
August 9, 1934



Honorable Ray L. Kay  
Prosecuting Attorney  
California, Missouri

Dear Sir:

This department is in receipt of your letter dated  
June 25, 1934, requesting an opinion upon the following inquiry:

"I would like to have your opinion of the construction of Section 3859, R. S. Mo. 1929, regarding to the time required to be done for costs. I have always construed it to mean, if the costs exceeds the sum of \$40.00, then the insolvent is allowed \$2.00 per day on the payment of his costs. And if the costs is \$40.00 or less, then the insolvent does twenty days, regardless of the amount of costs. My reason for so construing it is that the last clause of the Section is a modification of the first clause, and also that the legislature intended to penalize those who have a small cost bill for failure to pay costs.

Please give me your opinion on this matter. Take for example an insolvent who has a cost item of \$300.00 assessed against him and one who has a cost bill of \$10.00 assessed against him. In the first clause of the Section, as I see it, the one having \$300.00 assessed would have to serve 150 days before he could be released, and could not be released on serving 20 days. In the last clause of the Section, as I understand it, if the one against whom \$10.00 is assessed, if he fails to pay the amount, he would do 20 days as a penalty for failure to pay."

August 9, 1934

Section 3859, R. S. No. 1929, seems to control the point which this opinion covers. Said Section reads as follows:

"Any person detained in prison for the non-payment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being imprisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs, if he be unable to pay the same. (R. S. 1919, 4202)".

You will note that the first underscoring includes the phrase "fine or costs", that likewise the second underscoring includes the phrase "fine and costs". Up to this point I believe the statute, undoubtedly, must be interpreted to mean that the total amount of the fine and costs must be worked out at the rate of \$2.00 per day.

The last clause of this paragraph beginning with the underscored "or" contemplates only the nonpayment of the costs by the prisoner, as you will perceive "costs" in this clause is not joined with the word "fine". In the event of such a situation occurring, i.e., payment of the fine and the nonpayment of the costs, then the prisoner is required to serve twenty days in order to discharge the costs. Under this construction of the statute, the prisoner must serve twenty days for the nonpayment of costs, and no more.

It is, therefore, the conclusion of this department that any prisoner detained in prison for nonpayment of fine and costs must discharge the said fine and costs at the rate of \$2.00 per day for each day of imprisonment, but that if only a cost bill is due the county by the prisoner, he must be detained twenty days in lieu of nonpayment of costs.

Respectfully submitted,

Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General



**MATTRESSES:** Use of old material in the manufacture and sale of mattresses.

9-3  
August 30th, 1934



Jacob Kaiser Manufacturing Co.,  
3rd & Elm Streets  
St. Louis, Missouri.

Attention: Mr. Otto A. Schnieder.

Dear Sir:

This is to acknowledge receipt of your letter dated June 20th, 1934, which reads as follows:

"We would like to have your opinion on Senate Bill 747 passed by the 65th General Assembly as to whether or not a manufacturer can purchase old cotton materials, place same in new tickings and offer these mattresses for sale to furniture dealers.

Awaiting your reply, we are."

At the outset, may I state that there has been no 65th General Assembly of the State of Missouri. The last General Assembly of this State being termed the 57th General Assembly to which there was a Special Session. I find that no amendment was passed by the Legislature at either the 56th or 57th General Assembly which changes the law as is set forth in Article 12, Chapter 95, Revised Statutes of Missouri 1929, referring to the manufacture and sale of mattresses. You mention Senate Bill 747 which is of no practical value at this time in answering your question.

In order that you may understand the statutory requirements for the manufacture of mattresses, when using previously used materials, I refer you first to sub-section 3, Section 13300 Revised Statutes of Missouri 1929, which reads as follows:



"The word 'new' as used in this article shall mean any material which has not been used in the manufacture of another article or used for any other purpose. The words 'previously used' as used in this article shall mean any material which has been previously used in the manufacture of another article or used for any other purpose."

With these definitions as to phraseology, we find Section 13301 to contain the following provision:

"No person shall use in the making of bedding any material known as 'shoddy' and made in whole or in part from any old or worn clothing, carpets, burlap or other fabric or material from which shoddy is constructed; any material not otherwise prohibited by this article of which prior use has been made; unless any and all of said materials have been thoroughly sterilized, and disinfected by a reasonable process, approved by the Missouri State Board of Health."

Section 13303 contains the following provision:

"No person shall sell, offer for sale, deliver, consign for sale, or have in his possession with intent to sell, deliver or consign for sale any article of bedding which has been used unless the said article of bedding shall first be thoroughly sterilized and disinfected by a process approved by the Missouri State Board of Health."

From the statutory law I have just set forth, it is apparent that old cotton materials cannot be used in the manufacture of mattresses, unless the same have been sterilized and disinfected by a process approved by the Missouri State Board of Health. It will be necessary for you to communicate with the said Board of Health in order to determine just what the approved methods of disinfection and sterilization are.

Section 13311, R.S.Mo. 1929 contains penalty for the violation of this article. Said section reads as follows:

Aug. 30, 1934.

"Any person or corporation violating the provisions of this article shall be guilty of a misdemeanor."

We also respectfully call your attention to Section 13308, R.S. Mo. 1929 which provides that no person shall make, remake or renovate bedding excepting persons making, remaking or renovating bedding for their own use until a permit has been secured so to do.

It is therefore the opinion of this department that old cotton materials cannot be purchased by a manufacturer, placed in new tickings and offered for sale to the retail trade, unless said old cotton materials have been properly disinfected and sterilized according to the statutory requirements as have been hitherto set forth.

Respectfully submitted,

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JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

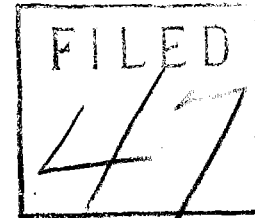
APPROVED:

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ROY MCKITTRICK,  
Attorney General.

CONTRACT HAULER:-Persons whose principal business is that of hauling property or persons for another is a "contract hauler" and is required to obtain license from the Public Service Commission.

September 14, 1934.



Mr. Roy L. Kay,  
Prosecuting Attorney,  
California, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Mose Newburger of St. Louis, Missouri is buying mules from the farmers in this county, Moniteau County, Missouri, and some truckmen are hauling them from the farm direct to the St. Louis market for Newburger. Do the truckmen in hauling these mules after Newburger has bought them violate the truck law? The Truckmen do not have a certificate of Convenience and Necessity from the Public Service Commission.

"I am sending this down by Mr. A. C. Yontz of Tipton, Missouri. Please advise me as I understand that this act will be repeated here in this county on to-morrow, April 7th."

Subdivision (c) of Section 5264, Laws of Missouri 1931, page 305, provides as follows:

"The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

Section 5265 of the same act, which deals

September 14, 1934.

with exemptions, provides that the act shall not apply to "motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market." It appears from your letter that these truckmen are not transporting farm and dairy products to market so as to come within the above exemption. The mules which they haul do not belong to them, but belong to Mr. Newburger and they are furnishing transportation for him. Subdivision (c) of Section 5264, quoted above, provides that any person who engages as his or its principal business in the transportation of property from a particular place under a special or individual agreement and not operating as a common carrier is a "contract hauler." It is obvious that these truckmen are not common carriers. It appears to us that the solution of your inquiry therefore depends upon whether the principal business of the persons involved is that of hauling property for other persons. Since you term them "truckmen" it would seem that that must be their principal business, but whether or not it is their principal business so as to bring them in as a "contract hauler" is a question of fact.

We do not understand that because a man owns a truck and because he occasionally hauls for another person that this fact makes him a "contract hauler;" for instance, a farmer may own a truck and occasionally haul for hire for some of his neighbors or others, but such fact would not make him a "contract hauler" as we interpret the Statute. The term "contract hauler", as we understand it from the definition of the Statute, was meant to cover those individuals whose principal business or livelihood was derived by hauling persons or property for others.

It is therefore our opinion that whether or not the man in question can be required to take out a license from the Public Service Commission depends upon the facts and circumstances of the particular case. If the principal business of the man in question is that of hauling property or persons for other people, then he is a "contract hauler" within the meaning of the Statute, and if he operates as such without having obtained a license from the Public Service Commission he has violated the law. If, on the other hand, hauling is not his principal business and he occasionally hauls for another we do not believe that he comes within the definition of a "contract hauler."

Very truly yours,

APPROVED:



(Acting, Attorney General.

FRANK W. HAYES,  
Assistant Attorney General.

SCHOOLS: COMPROMISE OF SCHOOL FUND MORTGAGES.

11-17

November 7, 1934.



Hon. Ray L. Kay,  
Prosecuting Attorney,  
Moniteau County, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter dated October 13, 1934, wherein you inquire as follows:

"The County Court in years preceding my term of office made some loans of the Capital School Funds on real estate, when the value of real estate was inflated, and took the bond as provided by Statute. The real estate is now of such little value that it will not pay the loan, and the bond is insolvent, also the property holdings of the parties are insufficient to realize on a deficiency judgment. May the County Court legally compromise the debt without sale of the security for a smaller amount than the loan, or must the court advertise under the school fund mortgage the security and sell same to the highest and best bidder?"

Section 9243 R. S. Mo. 1929 is the statute authorizing the investment of school funds. Said section reads as follows:

"It is hereby made the duty of the several county courts of this state to diligently collect, preserve and securely invest, at the highest rate of interest that can be obtained, not exceeding eight nor less than four per cent. per annum, on unencumbered real estate security, worth at all times at least double the sum loaned, and may, in its discretion, require personal security in addition thereto, the proceeds of all moneys, stocks, bonds and other property belonging to the county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected

in the several counties for any breach of the penal or military laws of this state, and all moneys which shall be paid by persons, as an equivalent for exemption from military duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund, the income of which fund shall be collected annually and faithfully appropriated for establishing and maintaining free public schools in the several counties of this state."

Section 9246 R. S. Mo. 1929 refers to the collection of school moneys.

"The county treasurer shall collect, or cause to be collected, all school moneys mentioned in section 9243, and all other moneys for school purposes in his county, and shall give the party paying duplicate receipts therefor, and said party shall file one of said receipts with the county clerk, who shall file the same and charge the same to the county treasurer; said clerk shall thereupon credit the bond and mortgage with the amount of said receipt, and when the amount of said receipts is in full of all interest and principal of said bond and mortgage, then the clerk shall satisfy said mortgage of record. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine not to exceed five hundred dollars."

Section 9245 and Section 9254 R. S. Mo. 1929 provide the method and manner of foreclosure in the event debtor has defaulted in his payment of the principal or interest.

The above cited sections of the statutes of Missouri create a trust, so far as said school funds are concerned, of which the county courts are trustees. They have no authority to dispose of the principal entrusted, or any of the interest, other than is prescribed by law. *Veal v. Chariton County Court*, 15 Mo. 412.

The underscored portion of Section 9246 clearly indicates the only condition under which the county clerk can satisfy said mortgage of record. It is clear that a mortgage cannot be satisfied in the absence of full payment of the principal and interest. Foreclosure is the only statutory remedy presented for the enforcement

November 7, 1934.

of the lien of the county, or for the liquidation of said debt. A compromise would be in effect a remission of a portion of the principal and interest, and regardless of the good faith of such action, there is no statutory authority therefor.

To invest the authority of compromise of a debt owing the county to the county court, or any other official, would open the door wide to a great deal of fraud and bad faith. Apparently the legislature was willing to forfeit any benefits of a compromise, believing that it was better to take an occasional loss by legal procedure, rather than a possible greater loss by unfair compromises.

In any event, this office is bound by a strict construction of the statutes in question.

It is, therefore, the opinion of this department that the county court cannot legally compromise the debt in question for a smaller amount than the principal and interest, but rather the court, in the event of non-payment, must foreclose the school fund mortgage strictly in accordance with the statutes.

Respectfully submitted,

COVELL R. HEWITT,  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK,  
Attorney-General.



TOWNS AND VILLAGES:

Method of collecting delinquent taxes--  
qualifications of town trustees--method  
of removal of unqualified members of a  
school board.

March 28, 1934.

4/11



Mr. C. C. Kennett  
Town Clerk  
Granger, Missouri

Dear Sir:

We acknowledge your request for an opinion dated  
March 16, 1934. Your request is as follows:

"I am writing to you for information in  
regard to the collection of town taxes.  
Will you please outline the necessary pro-  
cedure in order to force the payment of town  
taxes? We are organized with a board of  
five trustees.

"In view of the fact that it would be much  
better to collect the taxes without taking  
the natural course of the law, I should  
like to know if it is proper for a person  
who is delinquent in taxes to serve on a  
school board or a town board? If not what  
course should be taken to remove or prevent  
such persons from serving?

"The above information is very necessary in  
order for our town to pay it's bills, such  
as street lights and other necessary ex-  
penses. We shall be very grateful to you  
if you can give us a prompt reply. I thank  
you\*."

The last National Census for the town of Granger,  
Missouri, shows it to be incorporated with 142 inhabitants.

By the contents of your letter, we are assuming that  
the town of Granger is not incorporated under any special charter  
from the Legislature, but rather under the general provisions of  
law relating to towns and villages in Missouri.

Section 7092, R. S. Mo. 1929 provides as follows:

"The corporate powers and duties of every village so incorporated shall be vested in a board of trustees, to consist of five members, unless such town shall contain more than twenty-five hundred inhabitants, in which case such board shall consist of nine members; the first board of trustees shall be appointed by the county court at the time of declaring such town incorporated, who shall continue in office until their successors are elected and qualified; and such successors shall be chosen by the qualified electors residing in such town on the first Tuesday of April in every year in the manner hereinafter provided."

Section 7097, R. S. Mo. 1929, provides in part as follows:

"Such board of trustees shall have power to pass by-laws and ordinances \* \* \* to levy and collect taxes; \* \* \*."

The town of Granger having provided by ordinance a tax levy and provided for the collection of same, this city tax is collectable as state and county taxes are collected by the city of Granger, and is a civil obligation, and payment can be forced under the provisions of Section 7109 R. S. Mo. 1929 which provides:

"All assessments on real and personal property within the limits of such town, which may be certified and transmitted to the board of trustees, from time to time, as provided in the preceding section, shall be taken and considered as the lawful and proper assessment on which to levy and collect the municipal taxes of the town, and the payment of all taxes authorized by this article shall be enforced by the collector in the same manner and under the same rules and regulations as may be provided by law for collecting and enforcing the payment of state and county taxes, and for that purpose it shall be the duty of the board of trustees to require the collector, annually, to make out and return under oath, a list of delinquent taxes remaining due and

uncollected on the first day of January of each year, to be known as the delinquent list. It shall be the duty of the board of trustees, at the next meeting after such delinquent list shall be returned, or as soon thereafter as convenient, carefully to examine the same, and if it shall appear that all property and taxes contained in said list are properly returned as delinquent, they shall approve such list and cause an order of approval to be entered on the journal, and the amount of taxes in such list to be credited on the account of the collector; and shall also cause said delinquent list or a certified copy thereof, with the bills therefor, to be placed in the hands of the county collector, who shall give a receipt therefor and proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected. The said collector shall pay over the taxes collected to the city treasurer, at the times and in the manner provided by law for the payment of county taxes to the county treasurer, and shall make the same statements and settlements for such taxes with the board of trustees, and at the same time as may be provided by law for statements and settlements with the county court for county taxes, and all taxes shall bear the same rate of interest, and the same penalties shall attach to the non-payment thereof when due, as may be provided by law in cases of county taxes. A certified copy of any tax bill included in the delinquent list, approved by the board of trustees, shall in all cases be prima facie evidence that the amount therein specified is legally due by the party against whom such tax bill is made out, and that all provisions of the law and ordinances have been duly complied with, and that the same is a lien on the property therein described."

This tax may be a lien on property, for Section 7107, R. S. Mo. 1929 provides as follows:

"All general and special taxes levied by the board of trustees of any town upon property therein, in conformity to the laws of the state and the ordinances of such town, shall constitute a lien upon the property upon which they are levied, until paid."

Laws of 1933, page 450, Section 9970, provides as follows:

"The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first Monday in March, annually, return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer of the city or town, and shall stand as evidence of indebtedness upon the part of the county collector and his bondsmen to such city or town, until settlement in full has been made by payment to said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

#### CONCLUSION.

It is the opinion of this office that the town of Granger must follow the civil remedy provided in the statutes to recover delinquent taxes due the city from assessments on real and personal property. As provided in Section 7109, R. S. Mo. 1929, the board of trustees must require the collector to make out and return under oath a list of delinquent taxes, due and uncollected on January 1st, of each year. Then no sooner than the next meeting of the board after the delinquent tax list is returned to them they must examine the list and if true approve the list and let the journal show their approval, and also let the record show the amount of the tax credited on the account of the city collector. Next the trustees should certify to the delinquent tax list and attach thereto the original tax

bills and deliver to the county collector. It is their duty to take, and the county collector's duty to give a receipt therefor. The duty to collect then falls upon the county collector in the same manner as state and county taxes are collected and it is his duty to make settlements with the trustees at the same time and in like manner as statements and settlements are made with the county court for county taxes.

## II.

Section 7, Article XIV. of the Constitution of Missouri, deals with the removal from office of county, city, and all public officers and reads as follows:

"The General Assembly shall, in addition to other penalties, provide for the removal from office of county, city, town and township officers, on conviction of willful, corrupt or fraudulent violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Section 11302, R. S. Mo. 1929, providing when an officer shall forfeit office and be removed, reads as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall, knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."



March 28, 1934.

Section 9328 R. S. Mo. 1929, provides:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resident taxpayers of the district, and who shall have paid a state and county tax within one year next preceding their election or appointment, and who shall have resided in this state for one year next preceding their election or appointment, and shall be at least thirty years of age, who shall hold their office for three years and until their successors are duly elected and qualified; and all vacancies in the board shall be filled for the unexpired term."

CONCLUSION.

It is our further opinion that there is nothing in the qualifications of directors of the School Board requiring the payment of a city tax. (Should any person be elected to the School Board who does not qualify under the provisions of Section 9328, R. S. Mo. 1929, any qualified elector within the district could bring a quo warranto proceeding in the circuit court, and upon sufficient proof said officer would be ousted from the School Board.) Although the General Assembly has the constitutional power to pass laws disqualifying office holders, there is nothing in the qualifications of a trustee of your town disqualifying one for being delinquent in any tax payments and subjecting him to an ouster as trustee, nor have you submitted facts which would disqualify him under the general law.

Respectfully submitted

WM. ORR SAWYERS,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

WOS:H

**TAXATION:**

Senate Bill No. 94.

Lands and lots to be offered yearly for three years if necessary, and not to be re-offered in the same year in which they have theretofore been offered.

November 20, 1934

Mr. W. C. Kerckhoff  
Collector of Revenue  
Hillsboro  
Missouri



Dear Sir:

Receipt of your letter dated November 9, 1934 is acknowledged. Your letter is as follows:

"In compliance with Missouri Tax Laws, I started the sale of 1928-29 delinquent tax accounts, November 5, 1934 and have proceeded with said sale since.

Out of a total list of some 115 accounts, about one half have been offered to date, with only five sales being made. I have only offered a limited number for sale each day, in the hope that the next day would see an increase in attendance and interest.

I am desirous of securing an opinion now, before closing the auction, as to whether or not, I am permitted to re-offer for sale, those accounts that were offered for sale during the early part of the sale but were not sold.

Trusting you will let me hear from you in regard to above at your earliest convenience and thanking you in advance for the favor, I am."



Section 9952a Laws of Missouri 1933, in part,  
reads:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year."

Section 9952b, in part, reads:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November."

And further,

"To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered."

Section 9952c, in part, provides:

"On the day mentioned in the notice, the county collector shall commence the sale of such lands, and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon, or chargeable to such person in said county."

Section 9953 is as follows:

"If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or lots shall be again offered for sale, at the next sale of delinquent lands and lots as in this act provided, if such lands or lots be at such time delinquent. If at the second offering for sale no person shall bid therefor a sum equal to the then delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of the sale, and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots."

Section 9953a in full reads:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9952a provides that all delinquent lands and lots shall be subject to sale for the payment of such delinquencies on the first Monday of November of each year. Section 9952b provides that the sale shall commence on the first Monday in November and continue from day to day until all the delinquent lands and lots are offered for sale.

Section 9953 provides that if at the first offering of sale any tract of land or lot does not bring the amount of the delinquent taxes, with interest and penalty, a notation thereof shall be made by the county clerk and collector and then it is provided that if at the second offering for sale the taxes, interest and penalty shall not be bid thereon there shall again be entered a recital of that fact on your records, and Section 9953a provides that when two such offerings have been made and upon the third offering the lands or lots shall be sold to the highest bidder. It seems to us that construing all of the quoted sections together, that there is not any authority vested in you to re-offer the land for sale in the same year in which it has been offered; that the act appears to contemplate that the offerings will be made yearly and for

Mr. W. C. Kerckhoff

-5-

November 20, 1934

three years, if that be necessary in order to comply with the act, and such is our opinion.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

- I. RELATING TO THE METHODS OF COLLECTING DELINQUENT POLL TAX.
- II. RELATING TO THE AUTHORITY OF TOWN AND VILLAGES TO PASS ORDINANCES DISFRANCHISING THOSE SUBJECT TO PAYMENT OF POLL TAX, WHO BECOME DELINQUENT.

September 14th, 1934



Mr. C. J. Kriegshauser  
Baring, Missouri

Dear Sir:

We acknowledge your letter of September 1st, 1934, in which you state and inquire as follows:

"As city clerk of the town of Baring, I have been requested by the town board of said town, to make inquiry of you as to the paying of poll tax. Is there a way we can collect poll tax from those not inclined to pay it? And also do we have the right to refuse the privilege of voting to any one who is entitled to pay the tax and refuses to do so? Thanking you in advance for this information, I remain,"

I.

The law provides method of collecting delinquent poll tax.

Section 7110 Revised Statutes of Missouri 1929, provide as follows:

"The board of trustees shall also, from time to time, provide, by ordinance, for the levy and collection of all other taxes and licenses, including poll taxes, wharfage and other dues, and to fix the penalties for neglect or refusal to pay same, which now or hereafter may be authorized by law or ordinance. All able-bodied male persons, between the age of twenty-one and fifty years, who may have resided within the corporate limits of such village thirty days next preceding the levy of any poll tax for any given year, shall be liable to work on the streets and alleys of such village not to exceed three days, or to pay such sum in lieu thereof as may be provided by ordinance, not in any case, however, to exceed the sum of three dollars; and

upon failure to pay such poll tax, either in cash or by labor, when notified so to do, according to law and the ordinance of such village, it shall be the duty of the town marshal, when ordered so to do by the board of trustees of such village, to bring suit before some justice of the peace, if there be any in such village, and if not, then before some justice of the peace nearest such village, and proceedings shall be had thereon the same as in other civil cases; and no property shall be exempt from seizure and sale upon any execution issued upon any judgment rendered for such poll tax."

It will be observed that the above statute authorizes towns and villages, (and we assume Baring comes within this class) to provide, by ordinance for the levy and collection of poll taxes.

You are further advised that no ordinance so passed by the board of trustees, must be any broader than the statute, authorizing such ordinance, for instance only able-bodied male persons, between the age of twenty-one and fifty years, who have resided within the town or village thirty days next before the levy of such poll tax for any given year, and such levy shall not exceed three days work, or not to exceed \$3.00 when paid in lieu of work.

## II.

Towns and villages have no authority to pass ordinances, disfranchising those subject to payment of poll tax, who become delinquent.

Section 7 article IX of the Constitution provides as follows:

"The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

-3- September 14th, 1934

It will be observed from the foregoing Constitutional provision, no ordinance may be declared valid that cannot find support in its charter provisions.

In *Kansas City v. Hallett*, 59 Mo. App. 1.c. 163, the court said:

"It is not necessary to invoke the terms of the constitution to announce that the by-laws of a municipal corporation in order to be of any validity, must be consistent with its charter and the general statutes of the commonwealth creating it. This is a well understood principle of the common law. Such ordinances or by-laws must not be repugnant to the legislative policy of the state, as manifested by its general enactments."

It must be understood, that all ordinances passed by the board of trustees of a village or town must be measured by the State Statute on the same subject in order to determine whether or not there are inconsistencies or conflicts.

This department therefore holds that the statute, section 7110 (Supa) authorizes the town board to pass ordinances levying a poll tax, and prescribes the manner of the collection in event of failure on the part of the taxpayer to pay. That such a town or village have no charter authority to pass an ordinance, disfranchising poll tax subjects for failure to pay such tax.

Respectfully submitted,

W. W. Barnes

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Asst. Attorney-General

APPROVED:

W. H.  
(Acting)  
Attorney General



COUNTY BUDGET LAW: It is not in conflict therewith for the County Court to contract and make an appropriation for three years for extension work in the county.

3-2  
March 1, 1934.



Mr. Arlie Lake,  
New London, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of February 6, which is as follows:

"Ralls County is under the budget plan for financing the county, and the County Court has agreed to furnish funds satisfactory for the support of Extension work in the county by the year.

Under the Smith-Lever Act, which provides for the national part in the financial program in Extension Service in the county, courts are required to sign a three-year contract. Is there a conflict in requirements of these two laws? Please advise me if it is possible, under the budget plan, for the county court to contract for three years."

You, no doubt, refer to Sec. 12623, which provides as follows:

"County courts appropriating funds under this article shall make such appropriation for a period of not less than three years nor more than four. Any county court may, on petition or on its own initiative, appropriate funds in support of a county farm bureau prior to the final completion of the bureau organization, but no money shall be paid out until the county farm bureau shall have met the conditions set forth in section 12619 of this article."

March 1, 1934.

Sec. 12623, R.S. Mo. 1929 appears to make it mandatory on the county court to appropriate funds for not less than three years. We interpret this section to mean that the county court makes the appropriation for three years but only pays one-third of the amount so appropriated annually.

In applying this to the new budget law, Laws of Mo. 1933, p. 346, the first nine sections inclusive deal with the budget in counties within which Ralls County, according to its population is classified. Bearing in mind that the appropriation is made for three years and one-third paid annually, it is then possible that the annual appropriation could be paid under Class 5, page 342, Laws of Mo. 1933, County Budget Law, which provides as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

#### CONCLUSION

In view of the above, it is the opinion of this department that the county court can contract and make the appropriation for three years and the same would not be in conflict with the County Budget Law.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

LICENSE: DELIVERY TRUCKS - CITY CANNOT PASS ORDINANCE IMPOSING LICENSE TAX ON DELIVERY TRUCKS OF NON-RESIDENTS USING STREETS AND AT THE SAME TIME EXCEPT DELIVERY TRUCKS OF RESIDENTS WHO HAVE PLACE OF BUSINESS IN SAID CITY.

420  
April 17, 1934.



Honorable Philip A. Land  
City Clerk  
Marshall, Missouri

Dear Sir:

This department is in receipt of your enclosure and letter dated March 23, 1934, requesting an official opinion. Your letter of the 23rd reads as follows:

"Enclosed please find copy of Ordinance Number 1786 of the City of Marshall, Missouri.

"Kindly note Section 2, of this Ordinance and please advise me your opinion as to the legality of the same.

"We have in this city been enforcing this ordinance from its passage and approval June 2, 1930, and it has never been tried out in our courts. Under this Ordinance we have been collecting a license from foreign Bakery Trucks who come into our city deliver, sell, and collect for their bread.

"We have one concern in Kansas City who have protested the Ordinance, while there are other baking firms coming into Marshall from Kansas City paying this license tax."

Your enclosure - copy of Ordinance Number 1786 - reads in part as follows:

"ORDINANCE NUMBER 1786

"AN ORDINANCE PROVIDING FOR THE LEVY

OF A LICENSE TAX UPON \*\*\*AND CARRIERS  
AND DISTRIBUTORS OF MERCHANDISE IN  
THE CITY OF MARSHALL, MISSOURI.

"SECTION 1. \* \* \* \* \*

"SECTION 2. Every person, firm or corporation operating a truck or other vehicle on the streets of the City of Marshall for the delivery and sale of goods, wares, and merchandise within said city shall be required to obtain a license from the City Clerk for each such truck or vehicle so used, and shall pay for such license the sum of \$20.00 for each year. Provided, however, no such license shall be required on a delivery truck or other vehicle of any merchant having a place of business in the City of Marshall and who pays a regular merchants license tax thereon; and Provided further that no license tax shall be required of any person or firm delivering or selling agricultural or horticultural products raised or grown by such person in his usual course of business.

"SECTION 3. Any person violating any of the provisions of this Ordinance shall on conviction thereof be fined not less than \$10.00 or more than \$100.00 for such offense.

"SECTION 4. This Ordinance shall be in full force and effect from and after its passage and approval.

C. G. Glass  
President of City Council.

Approved this 2nd day of June 1930

C. G. Glass  
Mayor.

"Filed this 2nd day of June 1930  
C. D. Alexander  
City Clerk.

(I hereby certify the above to be a true and correct copy of Ordinance #1786.

(signed) Philip A. Land. )"

Section 2. of Article IV. of the Constitution of the United States reads as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Section 1. at pages 577 and 581, of the Fourteenth Amendment to the Federal Constitution provides in part as follows:

\*\*\*\*\*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 6092, R. S. Mo. 1929, classifies cities of the third class and states as follows:

"All cities and towns in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class."

United States Department of Commerce, Bureau of the Census of the United States for the year 1930, in tabulating the population of incorporated places of Missouri states that Marshall had 8,103 people. We shall therefore assume throughout our opinion that the City of Marshall is a City of the Third Class, as set out in Section 6092, R. S. Mo. 1929, supra.

Section 6840, Laws of 1931, provides that a license tax may be levied by the council in cities of the third class and provides in part as follows:

"The council shall have power to levy and collect license tax on wholesale houses, auctioneers, architects, druggists, grocers, banks, brokers, wholesale merchants, merchants of all kinds,

confectioners, delivery trucks, ice trucks, transfer trucks, laundry wagons, milk wagons, merchant delivery companies, \*\*\*\*, baker and bakeries, bakery delivery wagons, and deliver autos, \*\*\*\*."

37 Corpus Juris, page 205, deals with discrimination against non-residents and states as follows:

"As a general rule, an act or ordinance is unconstitutional as a denial of the equal protection of the laws, and particularly is a violation of the constitutional provision that 'citizens of each state shall be entitled to all privileges and immunities of citizens of the several states' where it confines the right to a license to citizens of the state, or taxes the business or occupation of a non-resident in a different manner or at a different rate from that of a resident; and this applies even where the discrimination operates only within the limits of a municipality."

17 Ruling Case Law, Section 34, page 513, in discussing discriminatory licenses, says:

"It is a basic rule of law relating to licenses that a state or municipality should not arbitrarily discriminate against persons or classes of persons. A statute or ordinance which, in imposing license taxes, discriminates in favor of residents of the city or state as against nonresidents in the same class is unconstitutional. \*\*\*\*\*"

In the case of City of Fort Smith v. Scruggs, 69 S.W. 679, 1.c. 682, the Court had under consideration an act authorizing a tax on the privilege of using the streets of a city for driving. The Court said:

"It is true that nonresidents of the city also use the streets with their wagons and other vehicles, and it may be true that certain of them use the streets as much or more than certain of the residents of the city, but as



a class, they do not use the streets as much as residents of the city, and this furnishes a reasonable basis for the distinction made in the act between the two classes. The requirement of the statute that the tax must be imposed on residents of the city only is but an adoption by the Legislature of the common policy of making each community keep up its own highways. This does not discriminate unjustly in favor of those who live beyond the city limits, for they have to keep other highways, which the people of the city may in turn use free of charge. \*\*\*\*"

We quote from the Court's syllabus (3) in the case of In Re. Jarvis, 66 Kansas 329, which reads as follows:

"\*\*\*\*So far as it exacts the payment of a license-tax by non-residents, from which certain residents of the state are exempted by the fact of their residence, is repugnant to the provision of the federal constitution that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The Court, on page 332 of the above case, said:

"The petitioner claims that the statute is unconstitutional upon several grounds, only one of which it will be necessary to consider. It provides that it shall be a misdemeanor for any one to deal as a pedler without procuring and paying for a license from the county clerk, but expressly exempts from its operation the owner of goods peddling them in the county in which he is a resident taxpayer, or in any county immediately adjoining thereto. The statute, therefore, attempts to impose a tax on non-residents of the State from which certain residents of the State are exempted by the fact of such residents. This is an obvious discrimination in favor of the resident and against the non-resident and is repugnant to Section 2. of Article 4.,



of the federal constitution, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. \*\*\*\*\*

Again, in the case of Fecheimer v. City of Louisville, 2 S. W. 65, 1.c. 67, the Court said:

"If the city of Louisville, through its council, can impose taxes or exact a license, so as to discriminate against all those who live out of the city, and are engaged in like business, and all other cities and towns within the State, by way of retaliation, or for their own protection, should impose like restrictions, it would be a practical destruction of all trade and commerce between this and any other state, and in fact between towns and cities in our own State. \*\*\*\*  
That the resident merchant pays taxes for the improvement of the streets, the support of the public schools, and for the maintenance of the poor in the city is no reason why this discrimination should be made. He is supposed to, and in fact does, receive benefits from the duties thus imposed that do not pertain to the non-resident; and, whether so or not, that there is a palpable discrimination in this case is evident, and therefore the ordinance is in violation of the federal constitution.\*\*\*\*\*"

We further see in the case of Shell Co., v. Industrial Accident Commission, 172 Pac. 610, 1.c. 611; 88 Cal. App. 744, the Court said:

"The petitioner contends that the ordinance unjustly discriminates against him in that it requires from him a license fee of \$60. per year, while it exacts but \$12. per year from others

similarly situated, except that his place of business is without, while theirs are within, the city of Venice. He points to Section 21. of Article I. of the Constitution of California, providing that no 'citizen, or class of citizens' shall 'be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens,' and to the Fourteenth Amendment to the Constitution of the United States, Section I, to the same effect that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \* \* \*

"The petitioner relies upon the Matter of Hines, 33 Cal. App. 45, 164 P. 339. In that case, one who operated and maintained a laundry wagon was under imprisonment for a failure to take out a license under an ordinance of the City of Venice. He delivered laundry work in Venice from an establishment outside of the corporate limits of the city in the same manner that laundry work was delivered to the people of the city from laundries within its limits. A greater license fee was sought to be required from him for operating and maintaining his wagon than from those conducting laundry businesses within the city for the conduct of such businesses. In the opinion in the case, we said:

"We are of the opinion that the provisions of the ordinances under which petitioner has been convicted attempt to create and enforce a discrimination not based upon the differences in the nature of the business being transacted or differences in the manner of conducting the same business, or any other difference other than the mere fact of difference in destination of the goods collected, and delivered by wagons collect-

ing for laundries located outside the city and the destination of goods collected for delivery to laundries within the city. The license provisions in question are plainly devised as a protective tariff for the benefit of laundries located in the city of Venice, or laundry wagons doing business with laundries located in the City of Venice and apparently they have no other purpose.

"We then declared the assailed provisions of the ordinance to be void. We are convinced that the provisions which are attacked of the ordinance now before us are also 'devised as a protective tariff for the benefit' of businesses located in the city of Venice, and that 'apparently they have no other purpose. \*\*\*\*'"

In the case of Ward Baking Co., v. City of Fernandina, 29 F. (3d) 789, the Court had under consideration whether an ordinance fixing a higher license to be paid by non-resident bakeries delivering within the city than for resident bakeries, was constitutional. The Court said:

"Complainants complain that that part of the ordinance above quoted is unconstitutional, in that it discriminates between residents and nonresidents of the City of Fernandina, Fla., by fixing a higher license tax to be paid by non-residents for engaging in the identical business that residents may engage in upon the payment of a smaller license tax. \*\*\*\*.

"The ordinance plainly discriminates between nonresidents and residents engaged in the same occupation. The classification upon which the difference in tax is based is not according to occupation, but according to residence. Upon well-settled principles the ordinance is void as violating Article 4., Section 2, of the Federal Constitution. \*\*\*\*."

In the case of Nafziger Baking Company, et al., v. City of Salisbury, et al., 48 S. W. (2d) 563, 1.c. 563-564, the Court had before it an ordinance exacting a higher annual license on non-resident seller of goods as against residents. The Court said:

"The effect of the ordinance is very apparent. It is intended to and does operate as an advantage to the local merchants, who have an established place of business within the City of Salisbury, over those who have not. It destroys the competition encountered by local merchants with the merchants, as plaintiffs, that deliver the merchandise in trucks to their customers within the city. \*\*\*\*\*

"Such ordinances, being discriminatory and unjust, have often been condemned as being violative of the provisions of the Constitution. \*\*\*\*\*".

#### CONCLUSION.

We are of the opinion that Ordinance No. 1786, Section 2., supra, discriminates between residents and non-residents of the city of Marshall, Missouri, by compelling "every person, firm or corporation operating a truck or other vehicle on the streets of the City of Marshall to obtain a license therefor, \*\*\*\* provided, however, no such license shall be required on a delivery truck or other vehicle of any merchant having a place of business in the city of Marshall \*\*\*\*\*". The classification upon which the difference in tax is based is not according to occupation, but according to residence. Upon well-settled principles the ordinance is void as violating article IV. Section 2, of the Federal Constitution, which guarantees to citizens of each State the privileges and immunities of citizens in the several states, and in that it violates the provisions of the Fourteenth Amendment to the Federal Constitution, which prohibits any State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States, and which prohibits the States from depriving any person of liberty, or property without due process of law, and from denying any person the equal protection of the laws.

An examination of the ordinance in question shows that it is an attempt to enforce its provisions in a discriminatory manner; that it is invalid, illegal, and void, in that the City of Marshall has extended its powers granted to it by Section 6840, Laws of Mo. 1931, supra, defining the power of the City Council in levying license tax in cities of the third class. We are of the opinion that it is not the purpose of the ordinance to regulate the affairs of the City of Marshall under the police powers. Its primary purpose operates to grant an apparent and real advantage to the resident merchant of the city of Marshall who has an established place of business within the corporate limits of said city, exempting such merchant from a revenue tax which it seeks to impose on the outside business by reason of the fact that such business does not maintain a place of business within the city. It is discriminatory in its application and in reality attempts to build a barrier wall around the corporate limits of said city, and attempts to eliminate and prohibit all competitors who have no fixed or established place of business within the corporate limits of said city. It is a classification studiously, artfully, and comprehensively drawn, but nevertheless discriminatory and violative of the Federal Constitution.

It is true that Section 6840, Laws of Mo. 1931, supra, provides that a license tax may be levied by the Council on various kinds of trucks but it does not give the council power to distinguish between trucks of residents and non-residents. The "foreign bakery trucks" are using the streets as much as or more than certain of the residents of the city and whatever may be the justice of the complaint that the transient merchant does not pay his share of the taxes, the remedy is not to be found in outlawing or destroying his business or by creating a monopoly for the resident merchant. Assuming that both lines of business are honestly conducted, one is as legitimate as the other and entitled to like protection, and the laws should not be converted into a weapon by which either competitor may annihilate the business of the other.

It is quite common in these latter days for certain classes of citizens - those engaged in this or that business - to appeal to the government national, state or municipal, to aid them by legislation against another class of citizens engaged in the same business. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is

4/17/34

directed but also at the expense and to the detriment of the many, for whose benefit all legislation should be framed and devised.

We are, therefore, of the opinion that Ordinance No. 1786, Section 3, supra, of the City of Marshall, Missouri, approved and filed the 2nd day of June, 1930, is illegal and void.

Respectfully submitted,

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WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

MW/afj



SCHOOLS: School director voting for first cousin would forfeit  
NEPOTISM: office; the fact that husband dies does not terminate  
the relationship by affinity where there are children  
living who were born of the marriage.

May 28, 1934

Mr. Charles F. Lamkin, Jr.  
Assistant Prosecuting Attorney  
Keytesville, Missouri



Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"A young woman is applying for a position  
as teacher in a district school in this  
county. Her husband, now deceased, was a  
first cousin of one member of the board.  
She has two children born of this union.  
If she obtains the position it will be  
necessary for the board member related  
to her to vote for her.

I will appreciate it very much if your  
office will give me an opinion as to  
the legality of such employment, and  
the effect on the tenure of office of  
the director voting for her, in view of  
the nepotism amendment, and in view of  
the fact that the relationship by affi-  
nity may have terminated by the death  
of her husband.

It is my opinion that the death of the  
husband does not terminate the relation-  
ship, but there is some room for argu-  
ment, and these people would be better  
satisfied if we had an opinion from  
your office."

Section 13 of Article XIV of the Constitution of  
Missouri provides as follows:

"Any public officer or employee of this  
State or of any political subdivision  
thereof who shall, by virtue of said  
office or employment have the right to  
name or appoint any person to render  
service to the State or to any politi-  
cal subdivision thereof, and who shall  
name or appoint to such service any



relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The Supreme Court of Missouri, in construing the above constitutional provision, in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, held that a school district was a political subdivision of the State within the above amendment and that a school director who votes for a first cousin by affinity for the position of teacher thereby forfeits his office. The court says at page 101:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

The teacher is related by affinity to the director as first cousin. Persons related as first cousins are related within the fourth degree, as prohibited by the Constitution. If the director in question, therefore, should vote to elect this teacher the director would make himself liable to forfeiture of office, and the contract existing between the teacher and the board would be illegal. The fact that the husband is now dead does not, in our opinion, terminate the relationship. It is said in 2 C. J. 379 that:

"Death of the spouse terminates the relationship by affinity; if, however, the marriage has resulted in issue who are still living, the relationship by affinity continues."

We are therefore of the opinion that the relationship has not been terminated in this instance because there were children who are still living which were born of this marriage. Since the relationship of first cousin still obtains, it would be illegal and in violation of the

Mr. Charles F. Lamkin, Jr.

- 3 -

May 28, 1934

Constitution for the related director to vote for her election. If he does so vote he would make himself liable to forfeit his office and the contract resulting from his illegal act would not be binding upon the district.

Very truly yours,

FRANK W. HAYES  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
Attorney General

FWH:S

NEPOTISM: Appointment of collateral relative due to marriage along the line of descent or ascent does not violate the Missouri Constitution on Nepotism.

October 15, 1934.



Honorable Charles F. Lamkin, Jr.  
Prosecuting Attorney  
Chariton County  
Keytesville, Missouri

Dear Sir:

Your request for an opinion dated August 31, 1934, is as follows:

"In a certain school district in this county, a member of the Board of Directors and the teacher who was employed for the coming year are related in the following manner: The mother of the director is a sister-in-law of a sister of the grandmother of the teacher.

"I will appreciate an opinion from your office stating whether or not the director and the teacher in this case are related within the degree of relationship forbidden by the Constitution."

Article XIV, Section 13, Missouri Constitution provides as follows:

"Any public officer or employe of this State or any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

October 15, 1934.

The matter presented by the facts set out in your letter do not state any blood relationship between the school director and the school teacher, hence there is no question of consanguinity in your query.

The only problem presented by your query is a problem of affinity as prohibited by the Missouri Constitution on nepotism.

If a school director who appoints a school teacher, and said school teacher's grandmother's sister is a sister-in-law to the director's mother, and if this relationship, when calculated, is within the fourth degree by affinity between the director and the school teacher, then the director is guilty of nepotism. If there is no affinity in such a relationship, or if there be affinity but it be beyond the fourth degree, then there is no violation of the Missouri Constitution on nepotism.

Let us first figure the degrees of relationship through the common ancestor. From the school teacher up to her mother, within the first degree. From the mother up to the grandmother, within the second degree. From grandmother up to great grandmother, within third degree. From great grandmother down to grandmother's sister, who is a sister-in-law of the school director's mother, within the fourth degree. From school director's mother down to director, within fifth degree. Thus we see that if there be any relationship by affinity at all, it is at best only within the fifth degree.

On the other hand we do not believe that the school director is related to the teacher at all, even by affinity, for Encyclopedia Britannica, 11th Ed. Vol. 1, page 301, has the following to say about affinity:

"The marriage having made them one person, (husband and wife); the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relationship is only with the married parties themselves, and does not bring those in affinity with them in affinity with each other; so a wife's sister has no affinity to her husband's brother."

Hon. Charles F. Lamkin, Jr. -3- October 15, 1934.

In the case at bar we do not believe that the school director has any affinity with the school teacher upon a showing that his mother is a sister-in-law with the great aunt of the school teacher. The affinity relationship is only with the married parties, that is, to say, it is only with the school director's mother and her husband, or is only with the teacher's great aunt and her husband, and this affinity does not bring those in affinity with them in affinity with each other.

In the case of North Arkansas and Western Railway Company v. Cole, 70 S. W. 312, 1. c. 313, the Court said:

"Affinity is the tie which arises from marriage between the husband and the blood relations of the wife and between the wife and the blood relations of the husband. There is no affinity between the blood relatives of the husband and the blood relations of the wife."

There is no Mo. authority directly in point, but all the authority from foreign jurisdictions is in line with the reasoning of the Arkansas case, supra.

#### CONCLUSION.

It is the opinion of this office that there is no nepotism presented by your query, for the director is, in our opinion not related either by affinity or consanguinity to the school teacher. The appointment of the teacher is not unconstitutional and in violation of the Missouri Constitution on Nepotism.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.

WOS:H

COU.

- Salary of official court reporter should be in Class 4.

3-2  
March 1, 1934.

Mr. J.E. Leggett, Jr.,  
Official Court Reporter,  
22nd Judicial Circuit,  
Bloomfield, Missouri.



Dear Sir:

This department acknowledges receipt of your letter of January 23 relative to the class in which you, as an official court reporter, should be classified under the new Budget Law. Your letter reads as follows:

"There is a controversy in this county concerning the classification, under the new budget law, of the salary of my office, which is that of Official Court Reporter of this judicial circuit, composing the counties of Stoddard and Dunklin.

It is my contention that my salary and expenses should be in Class 2 which includes 'Expenses of holding Circuit Court' and this view is also shared by Mr. Phillips, our Prosecuting Attorney, the members of the County Court, and Mr. Briney, whom I have employed to bring a mandamus suit in case I am put in class 4, which includes salaries of county officers.

I am in no sense a county officer but am a circuit officer the same as the Circuit Judge, and I am appointed by the Circuit Judge and all of my duties are connected with the Circuit Court and nothing else, and I can't see how my salary could be classed as anything but 'Expenses of holding Circuit Court'.

Mr. Phillips has or will write you asking for an opinion on this question, and Mr. Jackson, the County Clerk, has written you, and I wish you would send



me a copy of your opinion when you have prepared it."

The question arises as to whether or not your salary should be paid in Class 2 of the County Budget Law, Laws of Missouri, 1933, page 341, which is as follows:

"Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1, "

or Class 4 of said law, which is as follows:

"The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

As above set out, in class 4 the phrase "to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county" is used, which presents the question of whether or not you are a county officer. In the case of State ex rel. Rucker v. Hoffman, 294 S.W. 429, the Court, in passing upon this question, said (l.c. 430-431):

"If such reporter is a county officer section 11016 provides as a basis of ascertaining his salary that the highest number of votes cast at the last previous general election be multiplied by 5, which would give Pettis county a population of 75,000. No provision is made in section 12670 for ascertaining population. Section 7057, R.S. of Mo. 1919,



does not apply because of section 11016."

Otto, J., speaking for the Supreme Court recently in the case of *Hastings v. Jasper County*, 282 S.W. 700, held that a probation officer appointed by the circuit court sitting as a juvenile court in Jasper County was a county officer. Such county comprises a judicial circuit as does Pettis county, and under the authority of this case we must hold that the official reporter of the Thirtieth judicial circuit comprising Pettis County alone is a county officer and his salary is governed by section 11016."

In this case you will note the court uses the language "circuit comprising Pettis County alone is a county officer". In your case the circuit is made up of two counties, and although we are impressed with the logic contained in your letter, and the fact that the court did not clarify the situation when more than one county is in a circuit, yet if they did not intend the rule to be the same, the result would be as was stated by Judge Bland in a dissenting opinion in the Hoffman Case, *supra*, (l.c. 432):

"An official court reporter in this state is in no sense an officer 'by whom the county performs its usual political functions, its function of government.' He has absolutely nothing to do with the government of a county, he is not appointed for a county, is not required to reside in any particular county, does not perform his functions in any certain county, and his duties are not limited by law to any particular county. It seems to me that he does not meet the test of a county officer in any respect. He is not a county officer, but has been often held an officer of the court which he serves. *State ex rel. v. Hitchcock*, 171 Mo. App. 109, 153 S.W. 546. When we remember that most of the circuits of this state are composed of more than one county, it will readily be seen that a court reporter in such a circuit cannot be a county officer, and it would be absurd to say that in some circuits the reporter is not a county officer while in others,

where the circuit is composed of one county, he is such an officer."

CONCLUSION

We are mindful of the fact that it would be possible to determine that your salary should be included in the "expenses of holding Circuit Court" and therefore come under Class 2, yet in view of the decision above quoted, which is the law of this State at the present time, we are of the opinion that your salary should be placed in Class 4 of the County Budget Law.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

**SCHOOLS:**

**Duties of school treasurer in six-director school district under Section 9515-9516.**

4-30  
April 28, 1934.



Hon. Chas. A. Lee  
State Superintendent  
Department of Public Schools  
Jefferson City, Missouri

Dear Mr. Lee:

This is to acknowledge your letter dated April 27th, 1934, as follows:

"Will you please give me an opinion on the following question:

What are the duties of the treasurer in a six-director school district with reference to the keeping of financial records and reports?

I shall greatly appreciate the favor if you can give me this opinion no later than Monday morning, April 30, since I am leaving town at that time to attend a meeting in St. Louis and wish to take this opinion with me."

Section 9194, R. S. Mo. 1929, in part provides as follows:

"The public schools of this state are hereby classified as follows: \* \* \* \* \* second, all districts outside of incorporated cities, towns and villages, which are governed by

six directors, shall be known as consolidated school districts; third, all districts governed by six directors and in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts."

Section 9515, R. S. Mo. 1929, in part provides as follows:

"All cities in this state now or hereafter having a population of more than seventy-five thousand and less than five hundred thousand inhabitants, \* \* \* \* \* may be organized into a single school district \* \* \* \* \*."

Section 9516, R. S. Mo. 1929, provides in part as follows:

"The government and control of such city school district shall be vested in a board of six directors, \* \* \* \* \*."

Your letter inquires of the duties of the treasurer in a six-director school district and above we have shown that there are three separate and distinct school districts that are governed by six directors. However, you state that you are going to attend a meeting in St. Louis and we assume that you wish our opinion on the duties of the treasurer in the six-director school district organized under Section 9515, supra, and we direct our opinion to such.

Section 9521, R. S. Mo. 1929, provides:

"From and after the approval of his bond as such, the treasurer shall receive all moneys belonging to the district, from whatever source derived, and deposit and pay out the same upon warrants drawn upon him as hereinafter provided. He shall also be custodian of all bonds and other securities belonging to the school district."

We call to your attention that the treasurer is the custodian of all moneys and pays same out upon warrants.

Section 9556, R. S. Mo. 1929, provides:

"No moneys or funds of the school district shall be paid out except on account of indebtedness of the district and in pursuance of warrants ordered by the board and drawn upon the treasurer of the district, signed by the president and secretary of the board."

Section 9564, R. S. Mo. 1929, provides:

"It shall be the duty of the treasurer of the school district, upon presentation of any warrant or warrants drawn upon him in the manner hereinbefore provided, if there shall be funds and moneys sufficient to pay the same to the credit of the school district in any of the depositories, to draw his check or checks, as such treasurer, upon one or more of such depositories in favor of the legal holder of said warrant or warrants for the amount thereof, and to take up the same; and no money belonging to said school district shall be paid by any depository except upon the check of the treasurer of the school district. In case any bonds, coupons or other indebtedness of the district are payable, by the terms of the bonds, coupons or other evidences of indebtedness, at any particular place outside the said district, nothing herein contained shall prevent the board from causing the treasurer to place a sufficient sum of money to meet the same at the place where said debts shall be payable at the time of their maturity."

Section 9555, R. S. Mo. 1929, provides:

"The treasurer of the district shall open an account for each fund specified in this section, and all moneys derived from

the state, county and township funds, all tuition fees and all back taxes, and such portion of the moneys derived from the levy of the tax for school purposes as shall be set apart to that fund by the board, shall be placed to the credit of the 'teachers fund;' the moneys derived from taxation under the provisions of section 9533, from the sale of real estate, schoolhouses, library buildings or other buildings of any kind and school furniture, from insurance, and from sale of bonds other than funding and refunding bonds, shall be placed to the credit of the 'building fund;' all moneys derived from the levy of the tax for sinking fund and from interest on the sinking fund shall be placed to the credit of the 'sinking fund;' all moneys derived from the levy of the tax for annual interest on outstanding bonds shall be placed to the credit of the 'interest fund;' and all other moneys and funds of the school district, from whatever sources derived, shall be placed to the credit of the 'incidental fund.' The treasurer shall not honor any warrant unless it be drawn upon the appropriate fund, and each and every warrant shall be paid from its appropriate fund. No interest shall be paid on any warrant. The board of directors shall have power, in its discretion, from time to time, to transfer from the 'incidental fund' to any other of said funds such amounts as it may deem proper."

From the above it will be seen that the treasurer receives the money; keeps it in separate accounts; and pays it out upon warrants drawn by the president and secretary. True, Section 9520, R. S. No. 1929, provides in part as follows:

"The secretary of the board shall keep a record of the proceedings of the board; he shall also keep a record of all warrants drawn upon the treasurer, showing the date and amount of each \* \* \* \*;

he shall also perform such other duties as may be required of him by the board, and shall safely keep all bonds and other papers intrusted to his care \* \* \* \* \*."

However, the duties of the secretary relative to keeping records, are separate and distinct from those of the treasurer. The treasurer must give a bond before entering upon his office, conditioned 'that he will render a faithful and just account of all moneys that come into his hands as such treasurer."

Section 9523, R. S. Mo. 1929, provides for the settlement of the treasurer to be had "between the first and fifteenth of July, settle with the board and account to said board for all school moneys or funds received \* \* \* \* \*; and at the expiration of his term of office the treasurer shall deliver over to his successor in office all books and papers, with all moneys or other property in his hands, and also all warrants, bonds and coupons he may have paid or redeemed since his last annual settlement."

Thus, the statutes entail upon the treasurer to keep a true and just account of all moneys, and in order to do so he will have to have some records to show in what manner he kept and disbursed the moneys in order for him to make proper settlement.

Therefore, it is our opinion that it is the duty of the treasurer in a six-director school district (Secs. 9515-9516) to keep complete, true and correct records of all moneys that come into his possession; into what fund he has placed same; and the disbursement of same. The secretary, among other things, keeps a report of all warrants drawn, but this fact does not relieve the treasurer from keeping records.

If we have not touched upon the duties of the treasurer of the six-director school district that you had in mind, please let us know and we will be pleased to supplement this opinion.

Respectfully submitted,

APPROVED:

James L. HornBostel  
Assistant Attorney-General.

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ROY McKITTRICK  
Attorney-General



ELECTIONS:

No part of filing fee goes to the State Committee;  
Candidate can be a delinquent taxpayer.

July 3rd, 1934



Mr. William O. Leek,  
Warrenton, Missouri.

Dear Sir:

This Department acknowledges receipt of your letter of June 20th containing several questions and requesting our opinion thereon.

"I would like to know if persons filing their declaration for nomination in the Primary are eligible when the declaration is accompanied with a receipt for five dollars (\$5.00) if it can be shown that no money has been paid and that the receipt was filled out by the committee.

I would also like to know if any part of the filing fee is due the party State Central Committee, and if persons delinquent in their taxes are eligible to file for an office. The particular offices in question are county collector and county representative to the General Assembly."

In answer to your first question, we are of the opinion that the answer is contained in Section 10258, Revised Statutes of Missouri 1929, pertinent part being as follows:

"\* \* \*To the treasurer of the county central committee--five dollars, if he be a candidate for state representative or any county office; take a receipt therefor, and file such receipt with and at the time he files his declaration papers. The said sums of money, so paid by the several candidates, shall be evidence of their good faith in filing said declaration papers, and shall be used as an expense fund by the several political parties upon whose tickets the various candidates propose as candidates and seek nomination; and such sums of money, so paid, shall be excepted from the terms and provisions of article 14 of this chapter."

We interpret this Section to mean that if the receipt for \$5.00 in question, accompanies the candidate's declaration then said candidate has complied with the conditions required for filing and is entitled to have his name printed on the ballot. The fact said candidate paid no money and the receipt was filled out by the committee would not disqualify. The same is a question of fact and if the candidate was trusted or credited by the Committee, then the committee will lose the same or be individually responsible.

In answer to your next question, namely as to whether or not any part of the filing fee is due the State Committee, we are of the opinion that no part of the filing fee is due the State Committee, for the reason that Section 10258 quoted supra, reads,

"\* \* \*The said sums of money, so paid by the several candidates, shall be evidence of their good faith in filing said declaration papers, and shall be used as an expense fund by the several political parties upon whose tickets the various candidates propose as candidates and seek nomination; \* \* \*"

We interpret the above sentence to mean that the County Central Committee can retain all of the money for party purposes if it so desires.

In answer to your next question, namely is a delinquent taxpayer eligible to file for office, we refer you to Section 10257 which contains the form of declaration to be signed by the candidate:

"I, the undersigned, a resident and qualified elector of the (\_\_\_\_\_) precinct of the town of \_\_\_\_\_) \* \* \* county of \_\_\_\_\_ and State of Missouri \* \* \*."

The word "elector" defined by Section 6923 is as follows:

"(4) The word electors shall be construed to mean persons qualified to vote for elective offices \* \* \*".

The qualifications of a voter are set forth in Section 10178, Revised Statutes of Missouri 1929, which is as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

The above statute in no wise compels the voter to be a taxpayer and having held anyone, <sup>who</sup> is a qualified elector or voter can be a candidate or hold office, we are of the opinion that the fact that the candidate is delinquent in the payment of his

Mr. William O. Leek

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July 3rd, 1934

taxes does not disqualify him to become a candidate for office.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney- General

APPROVED:

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ROY McKITTRICK  
Attorney-General

OWN/mh

MOTOR VEHICLE - Trailer or semi-trailers registered according to the maximum weight carrying capacity of such - live load capacity.

7-30  
July 24th, 1934



Captain Thomas L. Leigh,  
State Highway Patrol,  
Commanding Troop "C"  
Kirkwood, Missouri.

Dear Captain Leigh:

This is to acknowledge your letter as follows:

"We would like to have the opinion of your department on certain questions that have come up in connection with the interpretation of Section 7762.

The above section provides among other things, 'For each trailer that shall be paid a fee equal to one-half of that provided for commercial vehicles, for each semi-trailer that shall be paid a fee equal to one-fourth of that provided for commercial vehicles, according to the live load capacity of such trailer or semi-trailer.' We have discovered a situation as follows:

Certain commercial operators are operating trailers upon which they are paying a nominal license fee for two or three tons capacity, yet when these operators ask for a Public Service Commission permit they buy and pay for permits ranging all the way from four to ten tons and they haul this weight. Obviously, a trailer which will carry ten tons of weight has more than two or three tons capacity and it has occurred to us that the size of the Public Service Commission permit and the weight actually carried is the proper standard by which to judge live load capacity and that these trucks and trailer which are hauling ten tons ought to pay a ten ton license fee.

Could, in the opinion of your department, these operators be compelled to purchase

license plates of a size equal to the load they are actually carrying. I am quite sure that if they could the revenues from this source would be greatly increased."

Section 7761, Laws of Missouri 1933-1934, Extra Session, page 100, in part reads as follows:

"For each trailer there shall be paid a fee equal to one-half (1/2) of that provided for commercial motor vehicles and for each semi-trailer there shall be paid a fee equal to one-quarter (1/4) of that provided for commercial motor vehicles, according to the live load capacity of such trailer or semi-trailer."

Thus the Legislature has determined by statute what the fee shall be on all trailers or semi-trailers such being determined according to the live load capacity of same.

Section 7759, Revised Statutes of Missouri 1929, defines 'live load' as follows:

"'Live load'. The weight of the cargo or passengers of a commercial motor vehicle in addition to that of the chassis and body of the vehicle."

Section 7761, supra, further provides:

"(a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: \* \* \* (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity."

Thus, when a semi-trailer or trailer is registered and plates procured therefor, it is necessary for the owner thereof in making his application to state the maximum weight carrying capacity of the trailer or semi-trailer and if such is falsified then in our opinion, the trailer or semi-trailer is improperly registered and would subject the person so operating the trailer or semi-trailer to prosecution.

Captain Thomas L. Leigh

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July 24th, 1934

We direct your attention to Section 7783, Revised Statutes of Missouri 1929, para. (h), which reads:

"(h) False statements: No person shall wilfully or knowingly make a false statement in any application for the registration of a motor vehicle or trailer, \* \* \*. All blanks or forms issued by the commissioner for the purpose of making application for registration of certificate of ownership shall conspicuously bear on the face thereof the following words: 'Any false statement in this application is a violation of the law and may be punished by fine or imprisonment or both.' "

Section 7770, Revised Statutes of Missouri 1929, pertains to license plates.

From the above and foregoing, it is our opinion that any commercial operator operating a trailer or semi-trailer on license plates procured through fraud and misrepresentation is subject to prosecution, and further, that these operators could be compelled to register the trailer or semi-trailer according to the live load capacity of such.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General

APPROVED:

ROY McKITTRICK  
Attorney-General

JLH/mh



- SCHOOLS: (1) Does a high school have to return fees exacted from pupil?  
(2) What action may be brought to compel sending district to pay tuition of non-resident students if such refuses to do so?

September 14, 1934.



Hon. Chas. A. Lee  
State Superintendent  
Department of Public Schools  
Jefferson City, Missouri

Attention: Mr. Geo. B. John

Dear Mr. John:

This is to acknowledge your letter as follows:

"Many inquiries have reached this office concerning the validity of the additional fee high school districts collected from non-resident pupils last year.

1. Were high school districts acting within the law in accepting such fees last year? Would the decision in the case of School District Barnard v. Matherly 90 Mo. App. 403, apply in this case?

Several high school districts have made complaint that some rural school boards have refused to pay the district's part of the high school tuition cost.

2. What would be the proper action to pursue in requiring sending school districts to comply with the law for the payment of the high school tuition when the school boards in these districts neglect or refuse to meet this obligation?

I shall appreciate your opinions relative to the foregoing questions."

September 14, 1934.

We shall answer your questions in the order asked.

I.

Were high school districts acting within the law in accepting such fees last year?

In answer to the above question, it has been the opinion of this Department from the first time we wrote on the subject of charging non-resident high school students tuition fees, and it is still the opinion of this Department, and confirmed by the Supreme Court in the recent case of State ex rel. Mildred Burnett vs. School District of Jefferson City (not yet reported), that the high school cannot charge such pupils a tuition fee. See our opinion rendered to Mr. G. C. Jones on August 28th, 1934, and former opinions. Our answer, then, to the right of the high school district to charge non-resident pupils tuition fees, will be in the negative. However, your inquiry relates to the right of the high school, after having exacted or accepted fees or promises to pay fees from pupils to attend the high school, to now keep said fees, or does the pupil have the right to recover fees paid by them to the high school from such school? The answer to these questions depends upon the facts in each individual case.

At the outset, we say that, if the state or sending district refunds to or pays the high school these fees in part or all that the student or parent has paid, then the high school should refund the amount so remunerated by the state or sending district. So our discussion of the above question will be predicated on the assumption that the deficit paid by the pupil will never be paid by the state or sending district. As recently ruled by the Supreme Court in the Burnett case, supra, the high school does not have to accept non-resident pupils, and if such pupils paid tuition fees to the high school district, then the question arises - What consideration supports the payment or promise to pay? Or, was such payment a compromise of a doubtful claim?

In School District of Barnard v. Matherly, 90 Mo. App. 403, 1. c. 407, the Kansas City Court of Appeals said:

"It is very well settled in this state that the compromise of a doubtful claim, asserted in good faith, furnishes a valuable consideration to support a promise."

Prior to the Supreme Court's ruling in the Burnett case, supra, quite a difference of opinion prevailed as to the right of the high school to charge non-resident pupils tuition fees. And if the high school and the pupil were of opposite opinion and compromised such doubt by permitting the pupil to attend high school, and in return exacted from the pupil a tuition fee, then, we hold, and it is our opinion, that the pupil cannot recover the fees thus paid; and the high school having received them was within the law.

Referring to the compromising of a doubtful claim, it is well to keep in mind the language of the Kansas City Court of Appeals in the case of McCrary v. Thompson, 123 Mo. App. 596, 1. c. 601, as follows:

"It is held that the assertion of a doubtful claim in good faith is a sufficient consideration for a promise. (Cases cited.) But plaintiff's claim was not doubtful. It had no foundation whatever. There was no consideration for the promise."

With the premises here under consideration, and in the light of the Burnett case, supra, there is no doubt but that the high school did not have to accept non-resident pupils and the pupils are presumed to have known that fact; and the high schools are likewise presumed to have known that they could not charge the pupils to attend the high school. However, the consideration that would support the retention of these fees by the high school against demand by the pupils, would be that the high school

permitted the pupil to attend, which the high school did not have to allow, and the pupils paid a fee, which the pupils did not have to pay, but paid same in consideration of the high school allowing the pupil to attend school. Thus, in our opinion, the consideration would be sufficient and the high school would be within its rights in retaining these fees.

See also, School District v. Matherly, 84 Mo. App. 140; Hanson v. Yearly, 159 Mo. App. 151; Stierman v. Weissner, 253 S. W. 383.

## II.

What would be the proper action to pursue in requiring sending school districts to comply with the law for the payment of the high school tuition when the school boards in these districts neglect or refuse to meet this obligation?

Section 16, Laws of Missouri, 1931, page 343, amended Laws of 1933, page 393, provides in part as follows:

"The board of directors of each and every school district in the state \* \* \* \* \* shall pay the tuition of each and every pupil \* \* \* \* \*." (that attends a high school in an adjoining district.)

The above section is mandatory upon the board of directors and if such do not pay the tuition of a pupil resident in their district who attends a high school located in an adjoining district, then, in our opinion, a debtor and creditor relationship exists between the sending district and the receiving high school, and such receiving high school could maintain an action at law for debt against the sending school district.

Hon. Chas. A. Lee  
(Mr. Geo. B. John)

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September 14, 1934.

Hereinbefore we have called attention to the fact that the receiving high school does not have to admit non-resident pupils, and if such high school refused to admit the pupils because the sending district will not pay the tuition of such resident students, then, in our opinion, the pupil would have a right to bring a mandamus action to compel its district to comply with Section 16, supra.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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(Acting)  
Attorney-General.

JLH:EG

SCHOOLS: Filling vacancies in the director school district --  
What constitutes a quorum?

September 27, 1934.



Hon. Chas. A. Lee  
State Superintendent  
Department of Public Schools  
Jefferson City, Missouri

Attention: Mr. Geo. B. John

Dear Mr. John:

This is to acknowledge your letter of September 14th, 1934, as follows:

"This Department has received inquiry from W. F. Frame, President of the Consolidated School District No. 1 (Bagnell), Miller County, concerning the validity of the recent acts of the school board in filling vacancies and transacting other business.

Will you please advise this Department concerning the legality of the board's acts, particularly as to the question of what really constitutes a legal quorum for the transacting of business. The facts in this case as presented to this Department are as follows:

On August 29, a meeting of the board was called by Mr. Robertson, Vice-President of the Board, and at that meeting four members of the Board were present; that immediately upon the meeting having been called to order Dr. Parrish, one of the Board members, submitted his written resignation and it was immediately accepted by a vote. I am not advised whether Dr. Parrish voted as a board member to accept his own resignation or

whether the vote was simply of the three remaining directors. I understand further that upon this purported action the remaining three board members appointed Mr. Moore as director and that thereupon Mr. Diederich submitted his resignation; that this purported to be accepted and the three remaining board members appointed Mr. Jordan to fill that vacancy; that thereafter the purported Board proceeded to transact further business.

The action of the board has created a dispute between the four members who were present at the meeting and the two remaining members who were absent. The one contends their acts were legal because Section 9329 provides a majority of their board shall constitute a quorum for the transaction of business and that Section 9290 provides that the remaining directors shall appoint some qualified person to fill the vacancy. The other contends that four members constitute a quorum and in no event could three members appoint to fill a vacancy and that the law does not say the majority of the remaining members shall constitute a quorum.

It appears that Section 9329 is a little indefinite concerning what really constitutes a quorum by the statement 'A majority of the board shall constitute a quorum for the transacting of business'. If this statement had said 'A majority of the whole board or a majority of the remaining members of the board shall constitute a quorum', then there could have been no dispute. However, in Section 9329 the phrase 'A majority of the board shall constitute a quorum .....' is used in the same sentence with the phrase 'A majority of the whole board shall vote therefor'. It appears that a quorum shall consist of a majority of the total number constituting the membership as provided by law, namely six members.



"Please advise as follows:

1. (a) Does three school board members constitute a quorum for the purpose of filling a vacancy when there are only five members remaining on the board?

(b) Or, on the other had, does the quorum constitute a majority of the total membership of the board as provided by law?

2. Were the acts of the three board members in appointing persons to fill vacancies, legal?"

As we view the situation here involved, the determination of such depends upon the interpretation to be given Section 9329, Laws of Missouri, 1931, page 333, in particular this part thereof:

"A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor."

Consolidated School District No. 1 (Bagnell), Miller County, is a six-director school district. The facts presented in your inquiry show that four of the directors (who constituted a majority of said board) regularly met and the first order of business was the presenting of a resignation by one of said four members, and presumably in pursuance to Section 9290, R. S. Mo. 1929, the three members present proceeded to fill the vacancy. Said section, in part, reads as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; \* \* \* \* \*"

It is to be borne in mind that Section 9290, supra, primarily pertains to a three-director school board and by reference applies to a six-director school board. Section 9327, R. S. 1929. In a three-director school board, two is a majority and if one resigns the remaining members, namely, two, would fill the vacancy. However, in a six-director school board, four constitutes a quorum or a majority for the transaction of business, and if the remaining members, as provided by Section 9290, supra, fill the vacancy, then does it take all five remaining directors to be present when they vote, or does it take a majority of the entire membership of six members or a majority of the remaining members? We are of the opinion that Section 9329, supra, governs, namely: That whenever a vacancy is filled, it takes at least a majority of the six members, to-wit, four, to be present. That is to say, that if five of the members met and one resigned, that the remaining four could fill the vacancy, or if six members were present and one resigned, then the five members could fill the vacancy; and a majority vote of those present, in either case, would constitute an election. In any event, we are of the opinion that four members must, at all times, be present in order to fill vacancies or transact other business. We are mindful, however, of the persuasiveness of the case of Bauer v. School District, 78 Mo. App. 442, wherein the Kansas City Court of Appeals used the following language (l. c. 445):

"In our opinion a failure on the part of the directors to fill the vacancy as they are required to do by this statute, does not invalidate any official action taken by the board. The command of the statute is addressed to the remaining members of the board and no intention seems to be disclosed to make void any act done while the vacancy exists. If such had been the intention of the lawmakers on a matter so important, they would undoubtedly have expressed the intention in direct terms. The directors should obey the statute before performing any other official act. It may be that they could, by proper proceedings, taken in time, be compelled to do so. But if the board engages in its duties while the vacancy exists, the business transacted, if otherwise regularly done, will not be void."

In the above case the court was dealing with a three-board-director district, one of the members having resigned and the remaining two transacted business prior to filling the vacancy.

We are also mindful of the case of La-Monte Cowles, Appellant, v. Independent School District of Rome, Appellee, 204 Iowa (Sup.) 689, which is practically an analogous case, but we, for reasons hereinafter shown, are unable to agree with the opinion in that case so far as our statute is concerned. In the Iowa case the following occurred (l. c. 691):

"At a meeting held August 27, 1914, the minutes show: Present, John Sammons, J. J. O'Laughlin, J. M. Baston. Absent, William Wehrle, F. D. Swailes."

And further,

"The president called for nominations to fill the vacancy of John Sammons. Motion to prepare ballots "to fill vacancy of John Sammons" was carried. C. O'Grady was nominated, and according to the minutes, "received two votes," or a majority of the quorum, and was elected to fill vacancy of John Sammons, and was duly qualified by the president. Moved by O'Laughlin and seconded by O'Grady that the resignation of F. D. Swailes be accepted."

R. W. Swailes was nominated 'to fill vacancy of F. D. Swailes. R. W. Swailes received the majority of the votes of the quorum, electing him to fill the vacancy occasioned by the resignation of F. D. Swailes, and duly qualified by the president."

Thus, we have the facts that five members constituted the board, and at a meeting when three were present and two absent, one of present members resigned and his resignation accepted at said meeting and at the same time a new member was elected to fill the vacancy. The court, in discussing such a

procedure, said this (l. c. 696):

"Section 1268, Code of 1897, provides how resignations of sundry civil officers--not including, however, school directors--may be made. The resignation involves the intent on the part of the resigning official whether to make a present immediate resignation or to make one to take effect when accepted, or on some other event. His intent to resign with immediate effect involves the question of public interests,--whether the necessary performance of the duties of the office which he holds and the interests of the public will permit an immediately effective resignation. The resignation involves also the understanding and intent of the officer or board to whom it is made, whether they are advised of it, whether they accept it, and upon what condition as to time of taking effect. ing effect."

And further (page 698):

"It seems to be clear, on this record, that neither Sammons nor his colleagues on the board understood or intended that his resignation took effect prior to O'Grady's election and qualification. The record of the meeting of August 27, 1914, is that the 'house' was called to order by the president, J. M. Baston. On the roll call, Sammons, O'Laughlin, and Baston were noted as present; Wehrle and F. D. Swalles, absent. The minutes of the last meeting were read and approved. On the election by the board to fill vacancy, it is recorded, O'Grady 'received two votes, or a majority of the quorum.' The members of the board, therefore, including Sammons, counted a quorum as present. John Sammons's presence was necessary to the quorum. The intent of Sammons, as well as of the two other members present, plainly was that Sammons's resignation had not taken effect,

and he was still a member. The board, therefore, was legally constituted, and had the power to elect a successor to Sammons. When O'Grady qualified, the board was competent to accept the resignation of F. D. Swailes and to elect R. W. Swailes in his place. On this record, the new members were such de jure. But if, as defendant argues, they were not members de jure, they were such de facto, with authority as to third parties, including plaintiff and Miss Talbot, to transact the business of the district. In the first place, we are cited to no statute which requires, to fill a vacancy, a majority of all the members elected. In the absence of such a provision, the action of the body is determined by a majority of the quorum."

The statute in Missouri on filling vacancies, Section 9290, *supra*, says, "the remaining directors shall, before transacting any official business," and read in conjunction with the 1931 Law -- "A majority of the board shall constitute a quorum for the transaction of business," means, in our opinion, the remaining (5) directors, or a majority of the whole board, to-wit, four members, be present when a vacancy is to be filled. Consequently, if four members meet and one resigns, then there is not a majority of the board of six present to fill the vacancy. So, when Dr. Parrish's resignation was accepted, he being one of the four, a majority of the board was destroyed and the meeting should have been adjourned until at least one of the two remaining members not present would have an opportunity to be there. Seemingly, it would follow that all acts done by the three members of the board were void. However, we are not passing on that question at this time. We are only passing on the question of the filling of the vacancy, that is to say, that if a quo warranto suit were brought against the director elected to fill the vacancy, would the court oust him from office? We are of the opinion that he would be subject to ouster. Thus, we are holding in this opinion that he is not legally elected to the directorship he now holds.



Hon. Chas. A. Lee  
(Mr. Geo. B. John)

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September 27, 1934.

We take the liberty at this time to quote from a brief prepared on this subject, which accompanied your letter, and which, in our opinion, clearly declares the law under our statutes:

"In 56 Corpus Juris, page 326, paragraph 196, the law is stated as follows:

'When a statute gives a board the right to fill all vacancies in the board this is not a power conferred upon the remaining members but it presupposes the presence of a quorum as a condition to valid action. Hence such a power can be exercised only when the vacancies are not sufficient in number to destroy the required quorum and if a majority of the board is necessary to constitute a quorum this means a majority of the whole board authorized, so that when half or more of the offices of the board become vacant the power cannot be exercised by the remaining members, or if more than half of the original board remains the power can be exercised only when there is present a number which would have constituted a majority of the original board.'

"There is no case in Missouri deciding this question. I find however that in the case of Glass et al vs. City of Hopkinsville, (Ky.) 9. S. W. (2d) 117, the principles asserted above are fully considered and sanctioned. In that case the school board consisted of nine members and the statute provided that 'A majority elect of said board constitutes a quorum for the transaction of business.' It appears from the report that the terms of five members of the board were expiring. The four remaining members of the board together with the five whose terms were expiring elected five additional directors. The governor under

an enabling statute appointed five others, and the contest was between these two groups. The court said, in part:

'It is insisted on behalf of the appellees that the case is controlled by Section 3463 Kentucky Statutes, which empowers the board of education "to fill until the next general election all vacancies in said board." It will be noted that the power is conferred upon the board of education and not upon its remaining members. Ky. Stat. Sec. 4465, as amended by Act March 7, 1922, p. 35 c. 8. When a power is delegated to a board or body consisting of several members is presupposes the presence of a quorum as a condition to valid action and the power may not be asserted effectively by a less number. 43 Corpus Juris page 503; Hopkins vs. Dickens, 188 Ky. 368, 222 S. W. 101; Short vs. Langston, 125 Ky. 816, 102 S. W. 236; Scott vs. Pendley, 114 Ky. 606, 71 S. W. 647; Pierce vs. Sullivan, 189 Ky. 193, 224 S. W. 872.

'In cities of the third class, to which Hopkinsville belongs, the board of education consists of nine members and a majority elect of said board constitutes a quorum for the transaction of business Ky. Stat. paragraph 3462. It is apparent therefore that five vacancies left the board without a legal quorum and disabled it from the transaction of any business.'

"The court in a further discussion of the case said:

'Appellees present a theory that the authority to appoint members to fill vacancies is vested in the board of education, a corporation which was then in being and would continue in being when the vacancies occurred and when the appointments were to be made, which consideration is supposed to bring this case within the reasoning and strict letter of the authorities last cited. The theory is confounded by the fact that the board of education as a corporate entity



cannot function with less than a quorum of its members, and five of those whose terms were expiring were disqualified to vote on their own successors. The corporation can act only by its members, and when a majority of them are disqualified on a given subject the board itself is powerless to act thereon, but the appellees further argue that the four members remaining in office constituted all of the board of education legally in office and as such had a right to carry on the business and fill the vacancies. This contention is predicated upon a definition of "majority elect of said board" as used in Section 3462 Ky. Stats. as meaning a majority of those constituting the actual as distinguished from the authorized membership thereof. State vs. Orr 61 Ohio St. 384, 56 N. E. 14; State ex rel Wilson vs. Willis, 47 Mont. 548, 133 Pac. 962. The contention is unsound and utterly untenable. In our state the legislature has sometimes provided that the remaining members of a board were empowered to fill vacancies and in many other instances has bestowed the power upon a board or body in which only a quorum could act, requiring a quorum to consist of a majority of all the members elect. The plain import of such provision is that a majority of all members that could in any event be elected to the board must be considered in office and counted to comprise a quorum. 43 Corpus Juris 503.'

"In the case of In Re Wells Township School District Directors, (Pa.) 146 Atl. 601, the statute provided for a five member board. Two directors resigned and thereafter two of the remaining three qualified directors after notifying the third, who refused to attend, met and elected a successor to one of the members. The three members at a later date then met and elected Ayres as the fifth member, the fourth member still declining to attend. Section 308 of the Pennsylvania Code provided 'A

majority of the members of a board of school directors shall be a quorum. If less than a majority is present at any meeting no business shall be transacted at such meeting but the members present may adjourn to some stated time.' Section 214 of their law provided: 'In case any vacancy shall occur in any board of school directors in any school district of this commonwealth by reason of death, resignation, removal from the district or otherwise \* \* \* in a school district of the second, third and fourth classes the remaining members of the board of school directors shall by a majority vote thereof fill such vacancy within thirty days thereafter.' The court in holding that the two members elected as above were not properly elected said:

'Three is the smallest number which may form a quorum in school districts of the fourth class, and three must be present to transact business. This quorum or majority is not reduced merely because one member happens to be absent from a meeting for the transaction of business. Under the school code a quorum must always consist of a majority of the total number constituting the membership. A statutory quorum cannot be changed by a reduction of the number by vacancies. Craig vs. First Presbyterian Church, 88 Pa. 42, 32 Am. Rep. 417; United States vs. Ballin, 144 U. S. 1, 12 S. Ct. 507, 36 L. Ed. 321; 2 Dillon Municipal Corporations (5th Ed.) paragraphs 521 and 530. Section 214 provides that where there is a vacancy the remaining members of the board shall by a majority vote thereof fill such vacancy. "Remaining members" means all members in office when the vacancies occur and action by less than that number is not the action of the remaining members. "Majority vote" of the remaining members contemplates concerted action of those members. At least they

must be present in an official capacity attending a meeting at which a given action was taken. Any other construction would make this pointed language of very little weight, especially when the section immediately following is considered.'

"Our Section 9327 provides that when any vacancy occurs in our board the same 'shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled.'

Section 9290 provides that 'If a vacancy occur in the office of director by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall before transacting any official business appoint some suitable person to fill such vacancy, but should they be unable to agree or should there be more than one vacancy at any one time the county superintendent of public schools shall upon notice of such vacancy or vacancies being filed with him in writing immediately fill the same by appointment and notify said person or persons in writing of such appointment.'

It might be argued from this statute that even where we have a six member board if one of the members resigns all five of the remaining members must be present at the meeting where such vacancy is filled. I do not think a court would so interpret it. I am inclined to say that under such circumstances the court would hold that a quorum could fill the existing vacancy. This would mean however four members of the board present at the meeting and would likewise mean a majority of those present must vote for the director to fill the unexpired term. If five of the directors were present then three would constitute a majority of the quorum and that would be sufficient for the transaction of any official business other than that which the statute provides must be

transacted only when all six of the members are present. I cite you further in support of the principles here set out 46 Corpus Juris, page 1378, paragraph 8:

'It is a well established parliamentary rule that a quorum of the body must be present in order to validate its action or to transact any business. In order to constitute a quorum it is not necessary that the entire membership of the assembly be present. In reckoning the quorum the general rule is that in the absence of a contrary provision affecting the rule the total number of all the membership of the body be taken as the basis; and ordinarily a majority of the authorized membership of a body constituting a definite number of members constitutes a quorum for the purpose of transacting business, but it is competent for the statute or constitution creating the body to prescribe the number of members necessary to constitute a quorum or to delegate to the created body the authority so to prescribe.'

"In State ex rel Attorney General vs. Kansas City,  
310 Mo. 542, 586, the court quotes from 29 Cyc  
1688 as follows:

'Where a quorum is not fixed by the constitution or statute creating a deliberative body consisting of a definite number the general rule is that a quorum is a majority of all the members of the body.'

"This same rule is quoted by our court in State ex rel Riechmann, 239 Mo. 81, l. c. 102. In this latter case too the court said:

'The rule seems to be that unless there be some specific law to the contrary a majority of a given body has the right to transact all business which the entire body is authorized to do, and not only so but that a majority vote of those present and voting (there being a majority participating) can do all the

things which could be done by the entire body. This was the common law rule and is only changed by some express provision. The theory is that the majority is the body itself for the transaction of business.'

"In the light of these authorities I have concluded that when this board meeting was called on August 22, there being four members present there was a quorum for the transaction of business. That upon the receipt of Director Parrish's resignation there was still a quorum until such time as it should be accepted. There being a quorum present the question of his resignation could be put to a vote and legally carried, and I am of the opinion that his resignation was accepted at that meeting and that he is no longer a director. I am of the further opinion that immediately upon the acceptance of his resignation, leaving only three members the only action they could take thereafter was to adjourn."

#### CONCLUSION.

In conclusion, it is our opinion that the remaining directors, five, or a majority of the full board, four, should now meet and fill the vacancy caused by Dr. Parrish's resignation, and when such is done other business of the board be conducted just as long as a quorum, namely, four members, are present.

It is to be noted that the other member who has submitted his resignation would be a competent member of the board until his resignation was acted upon.

In answer to your specific questions:

"1. (a) Does three school board members constitute a quorum for the purpose of filling a vacancy when there are only five members remaining on the board?" -- Our answer is 'No!'

" (b) Or, on the other hand, does the quorum

Hon. Chas. A. Lee  
(Mr. Geo. B. John)

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September 27, 1934.

constitute a majority of the total membership of the board as provided by law?" -- Our answer is "Yes".

"2. Were the acts of the three board members in appointing persons to fill vacancies, legal?" -- Our answer is "No".

Yours very truly,

James L. HornBostel  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

CONTRACTS: Agreement entered into by the County Court of Morgan County and physician appointed to act as Deputy State Health Commissioner is not a valid contract under Sec. 2962, R.S. Mo. 1929.

1-15  
January 9, 1934.



Hon. Minor C. Livesay,  
Prosecuting Attorney,  
Versailles, Missouri.

Dear Sir:

This department is in receipt of your letter of December 11, 1933 in which you request an opinion as to the following state of facts:

"I have been requested by the County Court of Morgan County to obtain the opinion of your office on the following question:

The facts are that pursuant to the provisions of Section 9025, Article 1, Chapter 52 of the Revised Statutes of Missouri for the year 1929, the County Court appointed a physician to act as Deputy State Health Commissioner for this county. A contract was entered into between the county and the physician (a copy of said contract enclosed providing also that the physician should be the county physician for county patients for a term of three years.

Has the act of the Legislature, as appears at page 271 of the session acts of the year 1933 repealing above mentioned section, made this contract now null and void, or may they allow him to continue under the terms of the contract?"



## I.

The agreement entered into by the County Court is not a valid contract under Section 2962, R.S. Mo. 1929.

Section 9025, R.S. Mo. 1929 provides as follows:

"At the first regular February term of the county court in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years. In case of a vacancy in the office of the deputy state commissioner of health of a county, the county court shall at its next regular term of court appoint a reputable physician for the unexpired term. If the county court fails to appoint a deputy state commissioner of health as above provided at the February term of said court or at the next term following a vacancy, the state board of health shall appoint a reputable physician as deputy state commissioner of health for that county who shall serve until the county court of such county makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the state board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

This section was amended by Section 9025, Laws of Mo. 1933, page 271, as follows:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court

every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services, which amount shall be paid out of the county treasury of the county."

The Act of 1933 changed the term of the Deputy State Commissioner of Health from three years to one year. The question here before us is whether or not the Act of 1933 renders invalid the "contract" entered into between the County Court and the Deputy State Health Commissioner on the 10th day of March, 1932, for a term of three years.

Article II, Sec. 15 of the Constitution of the State of Missouri provides:

"That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

In view of this section of the Constitution, if the agreement entered into between the County Court and the Deputy State Health Commissioner is, in law, a contract, then the Act of 1933 can not affect the validity of said contract.

Section 2962, R.S. Mo. 1929 provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration,

shall be in writing and dated when made, and shall be subscribed by the parties hereto, or their agents authorized by law and duly appointed and authorized in writing."

In view of this section of the statutes of Missouri, the agreement here entered into between the parties cannot be said to be a valid contract. The provision that the contract "shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing" is totally ignored by the agreement--in fact, there are no signatures to the agreement at all.

#### CONCLUSION

From a consideration of the foregoing, it is the opinion of this department that the agreement here submitted does not comply with the provisions of Sec. 2962, R.S. Mo. 1929 and is not, in law, a binding contract. It amounts to no more than an appointment made by the County Court for a period of three years. Under the Act of 1933, the County Court may appoint a Deputy Health Commissioner for one year only. This Act is binding upon the County Court and the agreement entered into in 1932 is therefore now of no force and effect whatsoever.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

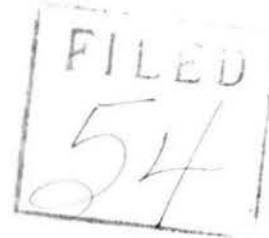
JWH:AH

BANKRUPTCY: Action in nature of a suit should not be taken by a collector to collect taxes from a bankrupt railroad;

Claim for taxes should include interest, penalties and interest.

April 5, 1934.

4-9



Hon. Minor C. Livesay,  
Prosecuting Attorney,  
Versailles, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of March 9, 1934 wherein you request an opinion relating to delinquent railroad taxes due and owing to the County of Morgan by the Chicago, Rock Island and Pacific Railway Company. You have very kindly attached the correspondence relating to the matter, which has been of assistance to us in rendering an opinion. Your letter is as follows:

"I am enclosing herewith copies of the correspondence and of law cited between the Collector of Morgan County and the Chicago, Rock Island and Pacific Railway Company.

The Collector has asked me to secure an opinion from your office as to what action, if any, he should take towards collection of railway taxes at this time.

The Statute of Missouri, Section 10038, R.S. Missouri require him to proceed by suit to collect these taxes.

I talked to one of the lawyers in your office some time ago and he suggested that suit be filed. However, I would appreciate a written opinion."

An action in the nature of a suit  
should not be taken by a collector  
to collect taxes from a railroad  
company in bankruptcy.

Sec. 10038, R.S. Mo. 1929, mentioned in your letter, provides as follows:

"If, on the first day of January of any year, any taxes levied under the provisions of this article, in any county, remain delinquent and unpaid, it shall be the duty of the collector of such county, notwithstanding the right of seizure and sale of personal property, to proceed at once to enforce the lien of the state against the property of said company, and to compel the payment of such taxes by suit in the circuit court of said county; and in all such suits the general laws of the state as to practice and proceedings in civil cases shall apply, as far as applicable, and not inconsistent with this article."

We agree with you that under this section the ordinary procedure to collect delinquent taxes from a railroad or street car company would be by the method outlined, but in the instant case the railroad company appears to be insolvent; we must therefore determine whether or not an action can be brought when a railroad company is in bankruptcy. In the first instance the order, which is restraining in its nature would, as pointed out by Mr. Angell, in all probability place the one suing in contempt. In other words, we believe under this order your collector would be restrained from bringing any such suit.

In a decision in our own state, *Bank of Rothville v. Zaleuke*, 221 Mo. App. 1051, l.c. 1052, the Court said:

"Appellant presents eleven assignments of error but the solution of the first, to-wit, that the court erred in overruling defendant's motion to dismiss the action and his plea to the jurisdiction will determine them all. There is no dispute as to the material facts in the case, but as to the application of the law to the facts there is much controversy. It is urged by defendant, and is the law, that when a Federal court in a bankruptcy proceeding has acquired jurisdiction, a State court cannot render a judgment, jurisdiction of the cause being lodged in the Federal and not the State court. (Black on Bankruptcy (1926 Ed.), p. 135, sec. 90, and p. 475, sec. 364; *Putnam v. Coleman*, 277 S.W. 213)."



We are of the opinion that it would be necessary, before any suit could be maintained, that special leave of court should be given, as was held in the case of *Dayton v. Stanard*, 241 Sup. Ct. Rep. 1190, 1.c. 1192:

"This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in custodia legis and was sold without leave of court. Because of this the court held the sales invalid, and entered a decree canceling the certificates of purchase, and enjoining the county treasurer from issuing tax deeds thereon. Thus far there is no room to complain."

Also, in the case of *People of State of New York v. Irving Trust Co.*, 288 U.S. 329, it was held:

"The Federal government possesses supreme power in respect of bankruptcies. *International Shoe Company v. Pinkus*, 278 U.S. 261, 265, 49 S. Ct. 108, 73 L. Ed. 318. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

We are of the further opinion that your collector could not bring any action for the collection of the delinquent taxes. Having so held, then what should be the procedure? The pertinent part of the National Bankruptcy Act, provides as follows (U.S.C.A. Title 11, p. 71):

"(a) The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

Sec. 103 of the same Act deals with debts provable against the bankrupt and is in part as follows:

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of a petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments."

#### Conclusion

In view of the foregoing, it is the opinion of this department that the proper procedure would be, as stated by Mr. Angell, for you to file a claim for the unpaid taxes.

#### II.

The claim for taxes should include interest, penalties and commission

We are not in accord with Mr. Angell in his statement that Sec. 93 of the National Bankruptcy Act as enumerated would exempt the payment of penalties and commissions. Sec. 93, U.S.C.A. Title 11, p. 287 states as follows:



"Debts owing to the United States, a State, a county, a district, or a municipality, as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Corpus Juris, Vol. 7, P. 307, Sec. 501 provides as follows:

"Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture cannot be allowed except for the amount of the pecuniary loss sustained by reason of the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs sustained thereby, and such interest as may have accrued thereon according to law. But where a penalty for nonpayment of a delinquent tax takes the place of interest, such penalty can be allowed as a claim against the bankrupt estate of the taxpayer along with the tax. Where a lease to a bankrupt of a store service system for a term of ten years provided that, on a breach by the lessee or its bankruptcy, the lessor might enter and take possession of the property, which it did after the bankruptcy, a further provision that in such case the rent for the entire term should immediately become due and payable was one for a penalty, and a claim therefor against the bankrupt estate could not be allowed."

A case also bearing on the question is that of *In Re Scheidt Bros.*, 177 F. 599, in which the Court said:

"Section 2855, Rev. St. Ohio 1908, provides that immediately after the semiannual settlement for taxes in August of each year the county auditor shall add a penalty of 10 per cent. to all taxes on personal property remaining unpaid, as shown by the County treasurer's books. If the taxes be not then paid within the time named in section 1094, Rev. St. 1908, and the county treasurer thereafter proceeds to collect them

by distress, or action, or rule of court, or special effort in person or through his agent (Hunter v. Borck, 51 Ohio St. 320, 37 N.E. 714), a further penalty of 5 per cent. is added to them, for his use as compensation. Taxes on personalty, unlike those on realty, are not made a lien on any of the owner's property. The referee held that under Section 57j of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 (U.S. Comp. St. 1901, p. 3444) the penalty is not allowable as a claim against the estate.

No question as to taxes accruing and penalties imposed subsequent to the institution of the bankruptcy proceedings is involved. Whatever may be the rule elsewhere, in Ohio the penalty takes the place of interest. Bridge Co. v. Mayer, 31 Ohio St. 317, 328. Its allowance is intended to cover interest until the delinquent taxes are put into judgment (Wheeling & Lake Erie Ry. Co. v. Wolfe, 13 Ohio Cir. Ct. R. 374) or are paid voluntarily, or are collected by special effort of the treasurer, in person or by his agent--in some manner other than by a part of the tax itself. 27 Am. & Eng. Ency. Law, 777, 778, 779. Under section 64 of the bankruptcy act, the referee should have directed payment of both taxes and penalty. Re Kallak (D.C.) 147 Fed. 276. Referee reversed."

We also refer you to the case of In Re S. Alex Smith & Co., 289 F. 524, wherein the court said (l.c. 525):

"In this matter the town of Madison made a claim for taxes for the years 1921 and 1922 due from the bankrupt. Upon a hearing before the referee an order was made on the 28th day of April, 1923, denying the petition of the town to have the taxes due for 1921 paid by the trustee as a priority. It is this order that is brought here for review.

The decision of the question here involved must be governed by the terms of the Bankruptcy Act (Comp. St. Secs. 9585-9656). Section 64 provides for the priority of payment out of the bankruptcy estate and specifically says:

April 5, 1934.

'The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to \*\*\*\*\* municipality in advance of the payment of dividends to creditors.'

Are these taxes legally due? The amount and due assessment are not questioned. The payment is objected to because the tax collector might have collected same by levy and sale prior to the bankruptcy proceedings. But the fact that he did not do so in no wise discharges the obligation of the taxpayer, nor releases his estate should he subsequently go into bankruptcy. Nor does the payment of such taxes by the trustee depend upon any question of lien. The referee seems to have been led astray in the order made by the assumption that the lien for taxes attached only to the particular personal property upon which such tax was assessed. As I understand the law, the lien for taxes attaches to all the property possessed by the taxpayer, whether possessed at the time of the levy of the tax or subsequently acquired. But, be this as it may, the payment of taxes properly assessed against and owing by the bankrupt at the time of bankruptcy must be paid from the estate before any dividends are distributed to the creditors, as provided by the bankruptcy act.

The petition to review is granted, and the matter remanded to the referee, with instructions to order the trustee to pay the town of Madison the amount due for taxes for the year 1931."

#### Conclusion

In view of the above authorities, it is the opinion of this department that you may rightfully and legally file a demand or claim for the full amount of the taxes, penalties, etc. now due and owing by the railroad company.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK,  
Attorney General

OWN:AM

NEPOTISM:-

Under Section 13 of Article XIV, election of  
SCHOOL DISTRICTS:-teacher is legal where related director does  
not participate in teacher's election and does  
not, by collusion or fraud, bring about her  
election.

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July 19, 1934.



Mr. Minor C. Livesay,  
Prosecuting Attorney,  
Versailles, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"I have been requested to secure an  
opinion from your office on the fol-  
lowing question.

"One member of the School Board is  
related to an applicant for the  
position of teacher. May the other  
two directors employ this applicant  
to teach the school?"

Section 13 of Article XIV of the Constitution  
of Missouri provides as follows:

"Any public officer or employe of this  
State or of any political subdivision  
thereof who shall, by virtue of said  
office or employment, have the right  
to name or appoint any person to ren-  
der service to the State or to any  
political subdivision thereof, and  
who shall name or appoint to such  
service any relative within the  
fourth degree, either by consanguin-  
ity or affinity, shall thereby forfeit  
his or her office or employment."

Under the foregoing Constitutional provision  
any officer or employe of the State or any political sub-  
division thereof, who exercises his right to name or  
appoint in favor of a person related within the fourth  
degree makes himself liable to forfeiture of office.  
A school district is a political subdivision of the State  
and the school board would be officers of such political  
subdivision. The Supreme Court of this State in the case  
of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100,  
in construing the above constitutional provision as appli-

cable to school districts, says as follows:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name of appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

As we interpret the constitutional provision and the foregoing decision the director must participate in the election of the related teacher. If he does not participate in her election and her election is brought about by the remaining members of the board, we do not believe that her election would be illegal, unless the related director, by fraud or collusion, circumvented the provision of the Constitution.

We are therefore of the opinion that if the related director did not participate in the election of the teacher and did not, by fraud or collusion, bring about her election, her election would be legal.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,  
Attorney General.

NEPOTISM:-Under Section 13 of Article 14 of the Constitution members of school board may supervise relief projects for improvement of school property, but have no right to withdraw money from incidental fund for such services.

November 2, 1934.



Mr. Minor C. Livesay,  
Prosecuting Attorney,  
Versailles, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would like your opinion on the following matter:

"The school district here receives a federal fund for relief projects for improvement of school district property. School board members supervise this work and do work for the school district, for which they receive pay from the school district incidental fund.

"I would like to know whether or not this employment of school board members by the school board is legal, and whether or not it is a violation of the nepotism law."

You ask whether the above employment is in violation of the nepotism law. Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

We do not believe that the matter set out



in your inquiry violates the nepotism provision of the Constitution. That provision prohibits any public officer of this State or any political subdivision thereof from appointing any person to render service to the State or any political subdivision thereof who is related, either by consanguinity or affinity, within the fourth degree. We do not believe that the constitutional provision could be construed so as to include a situation where members of the school board act as supervisors in administering federal funds. However, we are of the opinion that even though that provision of the Constitution does not apply, they have no right to pay themselves out of the school funds.

We find no statute which authorizes the withdrawal of money from the incidental fund for the purpose of paying for services of this character. Such being true, the members of the school board would not be entitled to any compensation. The general rule is that any public officer must be able to point out the statute whereby he claims compensation. The rule is aptly stated in *State ex rel. v. Adams*, 172 Mo. 1. c. 7, where it is said:

"In order to maintain this proposition some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. (Citations omitted)."

We are, therefore, of the opinion that even though the employment may not be said to be in violation of Section 13 of Article XIV of the Constitution, yet we are of the opinion that the members of the school board have no right to withdraw money from the school district incidental fund for rendering the services involved, unless the statute expressly so provides. Not finding any statute authorizing such expenditure, we believe that to do so would be illegal.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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ROY McKITTRICK,  
Attorney General.



ELECTIONS: - Cities or counties that have registration of voters may not take advantage of Sec. 10389, i.e., has to appoint two judges and two clerks--such cities or counties are governed by the General Election Law.

April 27, 1934

Mr. Thomas J. Lysaght  
413 Francis Street  
St. Joseph, Missouri



Dear Sir:

This is to acknowledge your letter to Governor Park which was referred to this department for answer. Your letter in part reads as follows:

"I desire to call your attention to Sec. 10389--in reference to number of judges and clerks necessary to serve at special elections. The question is, where registration is held--is it necessary to have full quota of Judges and Clerks. (6 Judges and 4 Clerks) I am so anxious to have these bonds carry and if successful--want no cloud on their legality. I am suggesting, that you have the Attorney General--give an opinion at once, in reference to the interpretation of this section."

I.

Section 10389 R. S. 1929 pertains to special elections when same are called for the purpose of amending the constitution or to vote on the proposition to revise or amend the constitution. The section is quite lengthy and we will only quote those parts pertinent:

"Whenever a proposed amendment to the Constitution\* \* \*shall be submitted to the voters at a special election, said election shall be conducted in the manner provided by law for general elections and said propositions shall be sub-

mitted, voted on, and returns certified and the results proclaimed in the manner provided by law in case such propositions are submitted at a general election: Provided that it shall not be necessary to hold said election with booths for the voters and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and next to the highest number of votes for governor at the last general election; except that in cities and counties where registration of voters is now provided for by law that said special elections shall be held in accordance with the provisions of law now in effect applicable to the holding of elections in said cities and counties: \* \* \*

The above section was enacted July 8, 1921 by the General Assembly in extra session, laws of Missouri, 1921 extra session, p. 182. It contained an emergency clause which provided among other things the following:

"And whereas the Governor has called a special election for the same date for the purpose of submitting certain proposed constitutional amendments, and whereas there is no law governing the manner of holding such special election, there is an emergency within the meaning of the constitution."

At a special election held August 2, 1921 the constitution was amended, Article IV, Section 44b, referred to and known as the "Bonus to soldiers' and sailors' amendment", said election was held in accordance with Section 10389 supra,--so much then for the history of said statute.

## II.

The city of St. Joseph is a city of the first class. Laws 1931, p. 209 provides for registration of voters in the cities of first class, thus the city of St. Joseph is a city

where registration of voters is provided by by law.

III.

Laws of Missouri 1933-34 extra session, p. 174, provides the following:

"At the general election to be held on the Tuesday next following the first Monday in November, 1934, or at a special election to be called by the Governor, in his discretion, prior to such general election, there shall be submitted to the electors of ~~this~~ State, for their approval or rejection, an amendment to the Constitution of the State of Missouri, adding to Article IV thereof, between Section 44c and Section 45, a new section to be known as Section 44d, to read as follows:"

On April 10, 1934 an opinion was written by this department to W. M. Morris, Clerk of the County Court of Grundy County, wherein it was held that the election to be held on May 15 was a special election at which a question of public policy would be submitted to the people, namely, that of bonding the state.

On April 12, 1934 this department rendered an opinion to Hon. Gordon Weir, Prosecuting Attorney at Greenfield, Missouri, in which we held that in counties where there was no special law providing for registered voters, that section 10389 supra, applied, namely, it being necessary in such counties to appoint only two judges and two clerks at each polling place for the bond election to be held on May 15.

IV.

Section 10223 R. S. Mo. 1929 provides as follows:

"Such special election, except as provided in the preceding section, shall, as near as possible, be conducted in the same manner, and be governed by the same laws, as a general election."

Section 10206 R. S. Mo. 1929 in part provides as follows:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties;"

Laws of Missouri 1933 p. 238, section 10208 provides in part as follows:

"In all precincts in this state that at the last preceding general election cast three hundred or more votes, at the same time and in the same manner as judges of election are appointed or elected, two additional judges of election for each such election district in the state shall be appointed or elected;\* \* \*"

Laws of Missouri 1933, p. 239, Section 10211 provides in part as follows:

"In all precincts casting less than three hundred votes in the last general election, the judges shall appoint two clerks, and in all precincts casting three hundred or more votes in the last preceding general election, the judges shall appoint four clerks.\* \* \*"

#### CONCLUSION

From the foregoing it is our opinion (1) that four and/or six judges and two and/or four clerks as the case may be should be appointed as judges and clerks in the city of St. Joseph for the special election to be held on May 15; (2) that in the county of Buchanan if registration is not necessary then only two judges and two clerks; (3) wherever a registration of voters is provided then the general election laws apply so far as judges and clerks of elections are concerned, and the reverse is that if no registration is provided then only two judges and two clerks, same to be selected in accordance with Section 10389 supra.

## V.

In this opinion we do not comment on the equities or attempt to express an opinion as to why the legislature made a distinction between counties (cities) having registration and those not having same. We have based our conclusion solely upon the statute. Assume, however, that some cities that provide registration of voters do not in all particulars follow the general election laws, then does such invalidate the entire election. We do not express an opinion concerning same, however, we do quote hereinafter from cases for whatever deductions and conclusions the reader or readers of this opinion may draw therefrom.

In *Fahey v. Hackmann*, State Auditor, 237 S. W. 752, the Supreme Court of Missouri en Banc in passing upon the Soldier's Bonus Bonds said the following (l. c. 757).

"Counsel for plaintiff next contends that the amendment to article 15 of the Constitution of Missouri in the year 1920 was not constitutionally submitted to nor ratified by the voters of the state at the general election held November 2, 1920, because the proposed amendment was not published in a newspaper in Pettis county for four consecutive weeks preceding November 2, 1920, but was published in said county for three weeks only preceding said day."

l. c. 760:

"This precise question was decided in the case of *State ex rel. v. Winnett*, supra, where the Supreme Court of Nebraska held that such an omission did not render the amendment invalid, and in my opinion that opinion properly declared the law, and, if followed, would necessarily lead to the conclusion that the publication in the case at bar was in substantial compliance with the constitutional mandate, and that the amendment is valid, and is in full force and effect. But there is another reason

why the amendment in question should be upheld, and that is that if the entire vote of Pettis county should be eliminated from the entire vote of the state or counted against the proposed amendment, still the amendment would have something like 75,000 majority in its favor, so under no circumstances can it be said that the failure to give the full required publication in that county could have or did affect the final vote as cast throughout the state."

In State ex rel City of Marshall v. Hackmann, State Auditor, 203 S. W. 960, l. c. 963 the Supreme Court of Missouri en banc said:

"The effect of the doctrine announced in that case is that, absent fraud or a mandatory statute, an election like the one under review will not be set aside for mere irregularities in the method of voting, such as relate to furnishing booths, the duties of the judges of election, and the certification of the result of the election."

Also in State ex rel city of Memphis v. Hackmann, State Auditor, 202 S. W. 7, l. c. 14, the Supreme Court en banc said:

"It is urged that the opening of the polls at 7 instead of 6 o'clock a.m., as required by the statute, constituted such an error as to invalidate the election. The force of this contention depends upon whether the statute is mandatory or directory. Ordinarily it is held to be directory, especially where the omission is unsubstantial and there was no evidence of resultant injury. For example, it has been held that a delay of an hour or an hour and a half in opening the polls will not affect the validity of an election, especially where there is no evidence that any one was deprived of the right of voting. People v. Prewett,

124 Cal.7, 56 Pac. 619; Packwood v. Brownell, 121 Cal. 478, 53 Pac. 1079; Pickett v. Russell, 42 Fla. 116, 634, 28 South. 764; Graham v. Graham (Ky.) 68 S. W. 1093; Marks v. Park, 7 Leg. Gaz. 70; Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273. In the absence, therefore, of any injury resulting from a failure to open the polls at the time designated in the statute, we hold the same, as applied to the facts in this case, to be directory, and overrule respondent's contention."

In Breuninger et al v. Hill et al, 210 S. W. 67, 1. c. 71, the Supreme Court of Missouri en banc said:

"Aside from this, the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with. Sanders v. Lacks, 142 Mo. 255, 43 S. W. 653."

Yours very truly

JAMES L. HORNBOSTEL  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General



1/2  
CIRCUIT CLERKS - Duty to include all costs in criminal costs bills.

4-9

March 27, 1934.



Honorable Bert Maple  
Clerk of the Circuit Court  
Holt County  
Oregon, Missouri

Dear Sir:

We have your request of March 1st, 1934, for an opinion as follows:

"Would like to know the proper and legal duties and actions of a Circuit Clerk under the following conditions, a defendant plead guilty to a misdemeanor and was fined by the court. Defendant appears before the Clerk in open court with money in hand to pay to Clerk said fine and costs. The Court will not let Clerk receive said fine and costs but directs clerk to make out fee bill and give to Sheriff and said Sheriff to collect same after adding ten per cent. It seems that the Court read his authority from the latter part of Section 11791 R. S. 1929. Does that part of said Section apply to a case of this kind or to the costs as before set out in Section in regard to the transportation etc., of prisoners?

In case of Civil suits or criminal, where the Sheriff or other officer has made an error in his charges by charging too much for some service, that is more than the Statutes provides, is it the right or duty of the clerk to correct or try to correct said errors rather than make the party who pays the costs, pay more than they should? Or in Criminal cases perhaps the Prosecuting Attorney or Judge

#2 - Honorable Bert Maple

does not know whether the mileage charged is proper or an overcharge, and would not be able to justly audit same, does the clerk have the right or is it any of his concern to attempt to correct same?

We will subdivide this opinion into two divisions:

1st. Fees due the sheriff.

2nd. Duties of the circuit clerk in making out costs bills.

I.

FEES DUE THE SHERIFF.

The Legislature has created a complete system for the collection of criminal costs, keeping a record thereof, the payment of such costs to the county treasurer at stated intervals, and the disbursement of such costs to the owners thereof with certain limitations by the county treasurer. The pertinent part of statutes setting out this scheme are as follows:

Section 11791 R. S. Mo. 1929:

"\*The clerk shall tax all the costs in the case against such defendant and deliver a certified copy of the same to the sheriff, who shall immediately proceed to collect such costs from the defendant, together with ten per cent. on the amount of costs, so collected, as a commission for collecting the same,\*"

**#3 - Honorable Bert Maple**

**Section 11822 R.S. Mo. 1929:**

"Every sheriff, \* shall, at the expense of their respective counties, procure a book in which a correct account of all fees collected by such officer, giving the date when collected, and in what case, giving the name of the person entitled thereto, shall be entered."

**Section 11824 R. S. Mo. 1929:**

"It shall be the duty of each sheriff, \* on the first day of January and the first day of July in each year, to pay over all fees in their hands belonging to others to the treasurer of the county, with the name and amount belonging to each person, date when collected and in what case, \*"

**Section 3854 R. S. Mo. 1929:**

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for: PROVIDED, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, \* "

It is, therefore, the opinion of this office that the circuit clerk has no authority to receive either the costs or fine in criminal cases. The collection of such is placed specifically in the hands of the sheriff, and immediately upon the entering of a judgment in a criminal case against the defendant the fees allowed the sheriff, including his portion of the ten per cent fee allowed in Section 11791 R. S. Mo. 1929, are attached to the costs bill and become part of the costs bill. The right of the sheriff to these fees cannot be defeated by the defendant tendering the fine and costs to the circuit clerk.

II.

DUTIES OF THE CIRCUIT CLERK IN MAKING OUT COSTS BILLS.

In this connection, we call your attention to Section 3841 R. S. Mo. 1929, which makes it the specific duty of the circuit clerk, immediately after the adjournment of the Court, and before the next succeeding term, to tax all costs which have accrued in every case. The circuit clerk is not required to be the judge of the law and the facts in making out criminal costs bills. This duty is specifically placed upon the circuit judge and the prosecuting attorney under the provisions of Section 3842 R. S. Mo. 1929. As to the duty of obtaining correct information as to mileage and witness fees, in either civil or criminal cases, the duty of the circuit clerk is set out in Section 11799, as follows:

"The clerk of each court of record, on the application of any witness to have his fees allowed, enter on his book, under the title of the cause in which the witness was summoned or recognized, \* and shall swear the witness to the truth of the facts contained in said entry, \* "

The responsibility for making a false affidavit and misleading the clerk, is placed clearly upon the affiant. As to the correctness of the fees charged by an officer, the responsibility is again by law placed directly upon the shoulders of the party collecting such fees by Section 3948 R. S. Mo. 1929, which provides:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

#5 - Honorable Bert Maple

It is, therefore, the opinion of this office that it is the duty of the circuit clerk, in making out either civil or criminal costs bills, to include in such the fees sworn to by the witness, and the fees included by the sheriff in his return.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTERICK  
Attorney General

FER:FE

LIQUOR CONTROL ACT: City of fourth class has authority to pass an ordinance prohibiting the possession of intoxicating liquor upon which state and federal tax has not been paid, provided same does not conflict with Sec. 8 of the Act.

May 7, 1934

FILED

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Hon. Howard R. Maness  
Prosecuting Attorney  
Doniphan, Missouri

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"It happens that I am prosecuting attorney of Ripley County and also city attorney of Doniphan, and I find that I can get better satisfaction in the city court for misdemeanor cases than in justice court. We have a city ordinance covering all liquor violations. I wish to ask your opinion upon the following proposition:

Does a city of the 4th class have authority to pass an ordinance prohibiting the mere possession of intoxicating liquor which has not had the state or federal tax paid on it. If so, where does it derive this authority?"

I

A city of the fourth class has authority to pass an ordinance prohibiting the possession of intoxicating liquor upon which the State and Federal tax has not been paid.

Section 25 of the Liquor Control Act of Missouri provides:

"The Board of Aldermen, City Council or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers,

wholesalers, and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

It will be noticed by a reading of this section that the cities are given the power to make and enforce ordinances for the regulation and control of the sale of all intoxicating liquors within their limits.

Section 8 of the Liquor Control Act provides:

"No person shall possess intoxicating liquor within the State of Missouri unless the same has been acquired from some person holding a duly authorized license to sell the same under this act, or unless the said intoxicating liquor is had or kept with the written or printed permission of the Supervisor of Liquor Control, and the package in which intoxicating liquor is contained and from which it is taken for consumption has, while containing such intoxicating liquor, been labeled and sealed with the official seal prescribed under this act and the regulations made hereunder; provided further, that nothing in this act shall be so construed as to prevent the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests."

By this section it is unlawful for any person to have in his or her possession intoxicating liquor upon which the state tax has not been paid, with the exception that the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests is allowed.

Since a city does not have the power to make an ordinance inconsistent with the provisions of the Liquor Control Act, it is the opinion of this department that if the ordinance does not



Hon. Howard R. Maness

-3-

May 7, 1934

conflict with Section 8 of the Act, the city may, by reason of Section 25, make and enforce an ordinance prohibiting the possession of intoxicating liquor upon which the State and Federal tax has not been paid.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

Roy McKittrick  
Attorney General

SECTION 12167, R.S.MO.1929: Transfer surplus \$1,000 remaining in the pauper fund may be transferred to any other fund which in the judgment of the county court be in need of the balance.

830  
August 28th, 1934



Hon. Howard R. Maness  
Prosecuting Attorney,  
Ripley County,  
Doniphan, Missouri

Dear Sir:

This Department is in receipt of your letter of sometime ago wherein you request our opinion or passing on the following facts:

" We have in the treasury of our county \$1000.00 credited to the pauper fund for the year 1932. All accounts on the pauper fund for that year have been paid in full, however, there is a deficiency in the salary fund for that year and there is also a deficiency in the pauper fund for the year 1933.

The question is; is it lawful to transfer the surplus in the pauper fund for the year 1932 to another year without first paying off all debts accruing under other funds for the year 1932.

Section 12167 R. S. Mo. 1929 provides, 'Whenever there is a balance in any county treasury in this State to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may by order of record decide that set balance be transferred to the credit of the general revenue fund of the county or to such other fund as may in their judgment be in need of such balance'.

It is my understanding that each years revenue must take care of all debts for that year and that this must be done before the surplus in any special fund may be transferred to another year, however, I would appreciate your opinion in regard to this matter."

August 28th, 1934

Section 12167 R. S. of Mo. 1929 as quoted in your letter gives the County Court the right to transfer any balance remaining in the pauper fund to the credit of the General Revenue Fund "or to such other fund as may in their judgment be in need of such balance".

It was said in the case of K.C. Ft. S. & M. R'y. Co. v. Thornton, 152 Mo. 1.c. 575:

" If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year. The intended effect of all which is to abolish the credit system and to establish a cash system in public business."

By the above decision in our opinion, the \$1,000.00 in question could be used to take care of the deficiency in the pauper fund for the year 1933.

We shall next determine whether or not it is possible to transfer this fund to take care of the deficiency in the salary fund. In the case of Holloway v. Howell County, 240 Mo. 1.c. 614, the Court said:

" The bill alleges that the share of the district is still in the county treasury, but the proof shows nothing of the sort. Whatever mere theory be indulged by way of inference, one way or the other, the actual fact is, as shown by the proof, the money levied for county purposes was used for county purposes, presumably for paupers, insane persons, the salaries of officials, the expenses of running the courts, jury fees, expenses of elections, criminal costs and roads and bridges elsewhere. (Vide, R. S. 1909, sec. 11423) It was not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes

for ensuing years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied."

In the case of Decker v. Diemer, 229 Mo. l.c. 336, the Court in passing upon the question of transfer of funds said:

" The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer the question in the affirmative. We are of the opinion that the force of the Cottey act is spent in another direction as the history of the times of its enactment well shows, and that it ought not to be construed as prohibiting such transfer of funds. We are further of the opinion that the various statutes providing for the transfer of funds, when practically construed, lend substance and countenance to the view we have expressed. We are further of the opinion that sections 6723 to 6729 inclusive, supra, now a part of article 2 of chapter 97, entitled 'counties', is a live law though old."

One of the early decisions on the question is found in the case of State ex rel. Appleby, 136 Mo. l.c. 412, wherein the Court said:

" We do not think section 7363 can be given such a construction. We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenues and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should go unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which it was appropriated, from which it can be paid. When it is found that there is a surplus in one fund, and a deficiency in another, there is nothing in the law, or other reason, why the court may not transfer the surplus in order to make up the deficiency.

August 28th, 1934

Indeed sections 3189 and 3190 expressly provide for such transfer."

CONCLUSION

We are of the opinion in view of the decision quoted herein and by the latitude given the county court under Section 12167, the \$1,000.00 in question could be transferred to any fund which in the judgment of the county court be in need of such balance; and it would therefore be lawful to transfer the surplus in the pauper fund for the year 1932 to another year without first paying off all debts accruing under other funds for the year 1932 or to transfer to the salary fund or to any other fund which is in need of the balance.

Yours very truly,

OLLIVER W. NOLEN  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

OWN/mh

COUNTY BUDGET LAW: County Court cannot pay cost of rights-of-way in Special Road Districts out of expenditures in Class 3, but must pay same out of expenditures in Class 5.

June 21, 1934.

6-28



Hon. C. Roy Marsden,  
Clerk of County Court,  
Jefferson County,  
Hillsboro, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of May 10 - also the supplemental letter of Honorable Sam M. McKay, Prosecuting Attorney - relating to the following question:

"Last week I requested the Prosecuting Attorney, Mr. McKay to ask you for an opinion in regard to expenditures under Classification No. 3 of the County Budget Law. I am enclosing a copy of Classification No. 3 as sent out by the State Auditor. Can the County Clerk issue warrants for any work performed or pay for any right-of-way in the Special Road Districts?

Classification No. 3, page 341 or Classification No. 2, page 344 does not include the word 'roads', but says 'amount required, if any, for the up-keep, repair or replacement of bridges on other than State Highways (and not in any Special Road District). Section 8131, R.S. Mo. 1929 provides that any civil or sub-division shall have power and authority to purchase right-of-way out of funds available and for road purposes. Section 8132 defines the term 'civil subdivision', 'wherever the word civil subdivision is used shall be deemed and taken to mean a county, township, road district, or other political subdivision of the state, etc.'

The State Auditor's interpretation (or night mare) of classification No. 3, if he is correct, would not permit the county clerk to issue a warrant out of county funds for any work or construction on roads or bridges, purchase of right-of-way, or any



expenditures incurred in the limits of a special road. Section 8 of the Budget Law holds the county clerk, treasurer or other officer participating in the issuance or payment of any warrant contrary to the provision of the act shall be liable therefor on his official bond. We have considerable amount of right-of-way to purchase in special road districts on Route #21 supplemental system S.V. and I am refusing to issue warrants for same until your office gives me a favorable opinion."

The classification of expenditures under the new Budget Law as set forth in Section 2, page 341, Laws of Mo. 1933 contains in Class 3 the matter to which you refer, and is as follows:

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

Under the caption "Classes of expenditures" on page 344, Laws of Mo. 1933, it is provided that "repair and upkeep or replacement of bridges on other than state highways and not in any special road district" shall be shown by the county court for the year in Class 2.

We construe Class 3 to exclude completely from consideration by the county court in the classification of expenditures, any upkeep, repair or replacement of bridges and also, the cost of obtaining rights-of-ways in special road districts. It was evidently the manifest intention of the Legislature to exclude special road districts.

Under Section 8024, R.S. Mo. 1929, dealing with the organization of special road districts, the Commissioners, as defined in Section 8026, R.S. Mo. 1929, have exclusive control over the funds and the roads within the district. This was the gist of the opinion in the case of Harris v. Bond Co., 244 Mo. 644; hence, the Legislature treated special road districts as separate and distinct political sub-divisions, excluding them when classifying the expenditures.

We shall next consider the right of the county court to pay for the rights-of-way mentioned in your letter in the special road districts out of any other class. Section 8039, R.S. Mo. 1929 is as follows:



"Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired or maintained, all bridges and culverts needed within said district: Provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

This section is broad enough in its scope to give the county court power to pay for rights-of-way in special road districts, but having held above that such expenditures could not come within Class 3, we must next consider other classes out of which such funds might be paid. Class 5 deals with the contingent emergency expense of the county, and it is the opinion of this department that the expenses of obtaining rights-of-way in special road districts could be classified as incidental expenses.

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the county court cannot pay the cost of rights-of-way in special road districts out of expenditures in Class 3, but it may pay same out of the expenditures in Class 5.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

COUNTY BUDGET LAW: CLASSIFICATION OF SALARIES - OFFICE EXPENSE -  
TRAVELING EXPENSES.

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1-24  
January 23, 1934.



Honorable Wade W. Maupin  
Prosecuting Attorney  
Carroll County  
Carrollton, Missouri

Dear Sir:

We have your request of January 15, 1934, requesting this office for an opinion as to classification of the salaries, office expense, and traveling expenses of county officials. For convenience, we will divide this opinion into the following headings:

1. Salaries.
2. Office expense.
3. Traveling expense.

- \* -

I.

SALARIES.

Section 2. of the County Budget Act - Laws of Missouri, 1933, pages 340-341 provides:

"Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, \* \* \*"

We construe the meaning of Section 2, supra, to include both elective and appointive county officers. Briefly, this classification includes Prosecuting Attorney, Highway Engineer, County Court, Circuit Clerk, County Treasurer and Superintendent of Schools. The salaries of each of the above named county officers are paid out of the county revenue.

The Prosecuting Attorney is paid under Section 11314, R. S. Mo. 1929; the Highway Engineer - under Section 8008; the County Court judges - Laws of Missouri, 1933, page 204; Circuit Clerks - Laws of Missouri, 1933, page 369; County Treasurer, under Laws of 1933, page 339; and Superintendent of Schools is paid under Section 9463, R. S. Mo. 1929.

In the above county offices, such deputies as are appointed perform the same duties as the elected officials. The salaries of such deputies, as are payable out of the county revenue, are to be placed in Class Four of the Budget Act.

- \* -

## II.

### OFFICE EXPENSE.

Class Four also includes office expense when the same is payable out of county revenue. Office expense generally means expenses incurred in performing duties in the office, such as stationery, stamps, ink, pens, pencils, rubber bands, paper clips, filing cabinet folders, loose leaf ledgers, and supplies of a temporary nature, the use of which calls for replacement. Fixtures, or supplies of a permanent nature such as tables, desks, chairs, typewriters, adding machines, dictaphones, etc., are not to be classified under the Budget law as "office expense" but are specifically placed in Class Six by the following provisions of Section 2. of the Budget Act:

\* \* \* \* \* Furniture, office machines

and equipment of whatever kind shall be listed under Class Six."

A janitor cannot be classified either as a county officer or an officer provided by law to perform the duties of a county officer. However, the expense of janitor service has heretofore been authorized as a necessary "office expense," - Ewing v. Vernon County, 316 Mo. 681, and therefore it is an expense necessarily incurred in the maintenance of an office.

Heretofore it has been held that the county was required to furnish an office - Boone v. Todd, 3 Mo. 140 (1832), and fuel for that office - St. Louis County v. Ruland, 5 Mo. 159 (1838). It therefore appears that the salaries or wages paid to janitors ought to be placed in Class Four. This is true under the above cases of the Supreme Court holding that necessary janitor service was an office expense, and also by the budget act itself. There are only two classes in the budget act wherein janitor service could be paid, and these classes are Four and Five. However, Class Five, under Section 2. of the Budget Act provides:

"\* \* \* No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

It will therefore appear that the only provision in the Budget Act wherein janitors could be paid would be in Class Four. Class Four, under Section 2. of the Budget Act provides that "office expense" shall be placed therein.

Some officers are paid by fees, and insofar as the compensation is concerned, these officers do not come within the County Budget Act. However, most of these county officers who are paid fees receive office supplies from the county. They must therefore submit an estimate for such supplies to the county court. Section 3. of the Budget Act provides:

"Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary

revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished."

Such county officers include Recorder of Deeds, County Clerks, Probate Judge, Sheriff, Surveyor, and perhaps others.

- \* -

### III.

#### TRAVELING EXPENSES.

This item includes any general expense allowed by law to officers for the purpose of reimbursing such officers for expenses incurred by them in the discharge of their official duties. Specific statutory authority for the allowance of such expense, when incurred in the discharge of official duties, is not required to authorize the payment of such - Boone v. Todd, 3 Mo. 140 (1832); Harkreader v. Vernon Co., 216 Mo. 696 (1909); Buchanan v. Ralls, 283 Mo. 10; 232 S. W. 1002 (1920).

It was said in Harkreader v. Vernon County, 216 Mo. 696, (1909), 1.c. 698:

"All legal debts made by any officer of the county in the discharge of his duties as such officer are county debts."

Therefore, any payment out of the county treasury to an officer for the purpose of reimbursing that officer for traveling

expenses necessarily incurred, allowed by law, in the discharge of his official duties, is to be classified as "contingent and emergency expense" and paid from Class Five of the Budget Act. Class Five provides:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue."

Necessary expenses outside of the office, such as traveling expense are always contingent. Into this category falls the expenses allowed the Prosecuting Attorney, Superintendent of Schools and the mileage allowed county court judges and expenses of the County Highway Engineer. The mileage allowed the county court judges is an expense item, and is not compensation for services since that compensation is fixed at a specific sum per day or per year depending upon the size of the county - Laws of 1933, page 204. The mileage is allowed once for each term of court and is for the purpose of reimbursing the County Judge for expense incurred going to attend that court, but at all times it is contingent upon the judge's actual attendance at court and the number of miles traveled by him. To construe this item of mileage as compensation or fees for services, and not as an item of expense would be to place a construction upon it so as to violate Section 12. Article IX. of the Constitution of Missouri which provides:

"The General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and for this purpose may classify the counties by population."

When three county judges travel different distances to attend court, the amount of mileage they receive is likewise different, and if this mileage allowance were construed as compensation, then it would not be uniform within the meaning of the above constitutional provision.

CONCLUSION.

It is therefore the opinion of this office that the salaries of all county officers including the deputies and janitor, together with the necessary inside office expense must be placed in Class Four, while the necessary outside office expense, herein classified as traveling expense, is to be placed in Class Five.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK  
Attorney-General.

FER/J



COUNTY CLERK:

Deputy County Clerk may be put on the new salary schedule as set out in Section 11811, Laws of 1933, page 371, at any time after said law becomes effective.

February 20th, 1934.



Mr. W. S. Matthews,  
County Clerk,  
Troy, Missouri.

Dear Mr. Mathews:-

We have your letter of January 15, 1934, in which was contained a request for an opinion as follows:

"In regard to salary of Deputy County Clerk and Deputy Circuit Clerk: Does the new law in regard to the regulation of their salary go into effect on July 27th. or is it the same as the Clerks to remain the same for the remainder of the present term?

"I am attempting to put my deputy on the new salary schedule. Is it your opinion that I can do this? I am presenting my annual settlement next month and would like to know if I am right."

We are of the opinion that you may put your deputy on the new salary schedule at any time from now on. This has, in our opinion, been possible ever since the law in question (Section 11811, Laws of 1933, page 370) became effective, or ninety days after April 25, 1933, the date of adjournment of the legislative session, the proviso clause at the end of the section notwithstanding.

Section 11811, Revised Statutes of Missouri, 1929, provides in part as follows:

"Section 11811. \* \* \* \* Provided, that the person now holding the offices, the salaries of which are determined by this section, shall, to the ends of the terms for which they are chosen, draw the same salary that was paid to the persons holding such offices at the time of the general election of November 2nd, 1920." \* \* \* "

Section 11811 as reenacted, Laws of 1933, page 370, provides in part as follows:

"Section 11811. \* \* \* Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now by law provided. \* \* \* "

Mr. W. S. Mathews

-2-

February 20, 1934.

It might be contended that the proviso clause in the 1929 section included deputy county clerks within its terms, but we need not pass on that question. It is noteworthy, nevertheless, that the 1929 section refers to "the person now holding the offices the salaries of which are determined by this section". When, however, we come to the 1933 section the legislature refers in specific wording to "the person holding the office of County Clerk". In other words, the legislature has confined itself in the 1933 section to saying that a specific officer shall be paid under the old law until the end of his term, while in the 1929 section it referred to a group of people, thereby opening the field for conjecture as to what people were included. If this change of wording means anything at all, and we must assume that it does, it means that the legislature intended the proviso clause to apply to County Clerks as such and to no one else, not even to deputies.

With regard to deputy circuit clerks, the new law (Section 11812, Laws of 1933, page 371) sets no definite limitation on salaries except in counties having a population of 12,500 or less, and since Lincoln County has a population of 13,929 this does not apply. In addition, there is no provision in said section for the holding of office under the old law until the end of the present term.

In view of the above, therefore, we feel you can proceed under the new law as to both county and circuit deputy clerks' salaries.

Very truly yours,

CMHJR:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General.

Approved:

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Attorney General.

LIQUOR CONTROL ACT: St. Francois Recreation Club cannot sell on premises  
intoxicating liquor other than malt liquor  
containing alcohol not in excess of 5% by weight

3-16  
March 13, 1934.



Hon. Thomas A. Mathews,  
Prosecuting Attorney,  
St. Francois County,  
Farmington, Missouri.

Dear Sir:

This department is in receipt of your letter of  
February 20 requesting an opinion as to the following state  
of facts:

"We are herewith sending you a copy of agree-  
ments of the St. Francois County Recreation  
Club and also the petition for a Pro Forma  
Decree of Incorporation, and Pro Forma Decree  
No. 8211 granted by Honorable I.N. Threlkeld,  
Judge of the 27th Judicial District, at that  
time, and Ex-officio Judge of the St. Francois  
County Circuit Court, rendered on Saturday,  
June 22, 1929.

"This Recreation Club, as you will see, was  
organized under and by virtue of Article 11,  
Chapter 90, R.S. Missouri, 1919 for benevolent,  
religious, scientific, fraternal and beneficial  
and educational purposes; anyone may become a  
member of said Club by the payment of One Dollar  
(\$1.00), and he is thereupon issued a membership  
card to said club.

"It is our understanding that someone connected  
with this Club, and as we are informed, one A.G.  
Murphy, has been licensed by the Supervisor of  
Liquor Control of this State, under and by virtue  
of an act of the Special Session of the Legisla-  
ture of Missouri, said act being a committee  
substitute for Senate Bills Nos. 621-22-23-24-25,  
of the 57th General Assembly.

"You will observe by reading the document herewith  
sent, that there is no mention in any of these  
documents for authority conferred by said club, for  
the sale of intoxicating liquor mentioned and pro-  
vided for in said Committee Substitute.

March 13, 1934.

"We are further informed that said Club, by its officers and agents, are seeking to get proper license to sell intoxicating liquor, from the County Court of this county.

"It is our opinion that if license have been issued by the Supervisor of Liquor Control, that the issuance of said license is contrary to said Committee Substitute; and further that if and when such application to sell intoxicating liquor, under said Committee Substitute was made to the County Court of this County, that said County Court will have no legal right or authority to issue said license.

"We, as Prosecuting Attorney and Assistant Prosecuting Attorney of St. Francois County, Missouri, are asking you to give your written opinion as to the legal right of said Club or any agent thereof, to receive from the State Supervisor of Liquor Control, a license to sell liquor of any kind or nature mentioned in said law. We are further of the opinion that the County Court of St. Francois County, has no right to issue license to said club or any agent thereof, for the sale, in St. Francois County, of intoxicating liquor, provided by the said Committee Substitute."

Article II of the Articles of Agreement of the Club states that the location of the club "shall be in the County of St. Francois, State of Missouri". We may assume, therefore, that the club is not located in a city having a population of 20,000 inhabitants.

Section 13-a of the Liquor Control Act of Missouri provides:

"Provided, that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, in any incorporated city having a population of less than twenty thousand (20,000) inhabitants. \*\*\*\*\* Provided further, that no license shall be issued for the sale of intoxicating liquor other than malt liquor containing alcohol not in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold, outside the limits of such incorporated cities."

March 13, 1934.

Section 22 of the Liquor Control Act provides:

\*\*\*\*\*Provided, however, that no license shall be issued for the sale of intoxicating liquor in the original package, not to be consumed upon the premises where sold, except to a person engaged in, and to be used in connection with the operation of one or more of the following businesses: a drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionery and/or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least fifteen hundred (\$1500.00) dollars, exclusive of fixtures and intoxicating liquors. \*\*\*\*\*

CONCLUSION

In view of the foregoing, it is the opinion of this department, based upon the facts as set out in your letter, that since the St. Francois County Recreation Club cannot qualify under the above section of the Liquor Control Act, intoxicating liquor other than malt liquor containing alcohol not in excess of 5% by weight may not be sold on the premises.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

COLLECTORS - Voluntary overpayment to County.  
ATTORNEY GENERAL - Cannot decide questions of fact in opinions.

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4-20  
April 12th, 1934.



Honorable Thomas A. Mathews  
Prosecuting Attorney  
St. Francois County  
Farmington, Missouri

Dear Sir:

We have carefully gone over your request of March 1st, 1934, together with the brief statement of facts submitted therewith relating to the overpayment by the Collector of St. Francois County, Mr. Brewer, to the State of Missouri in the sum of \$1319.23 during the years 1925, 1926 and 1927, and the subsequent deduction of that amount by the Collector of St. Francois County from amounts remitted to the State.

It appears from your request that the succeeding County Collector, Mr. Coffield, distributed this money to the County Road and School Fund, whereas it should have been paid to Mr. Brewer as the former collector.

The voluntary overpayment of money by a county to the County Collector, in the absence of fraud, collusion or mistake of fact, is binding on the county and cannot be recovered. State ex rel. Lawrence County v. Shipman, 125 Mo. 436. It is also equally true that a voluntary overpayment by a collector to the county in the absence of fraud, duress or misrepresentation is binding upon a collector, and such money cannot be recovered from the county. Hethcock v. Crawford County, 200 Mo. 170. However, your request presents the additional facts of whether or not the letters from the State Auditor, dated April 6, 1925, March 24, 1926 and March 29, 1927, demanding payment of such taxes to the State, constitute duress within the exception of the two above mentioned cases. We think this is a question of fact to be determined by a fact



#2 - Honorable Thomas A. Mathews

finding body. Whether the County Collector, in making this payment, was acting under duress, is a question of fact and not one of law, and under such circumstances the Attorney General's office is without the necessary authority to enter into controversial matters and decide questions of fact. 6 C. J., Section 16, p. 811.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

PER:FE



TAXATION - Owner of grain stored in warehouse liable for taxes thereon.

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May 21st, 1934.

5-23



Honorable W. H. Massingill  
Assessor of Atchison County  
Rock Port, Missouri

Dear Sir:

We have your request as to who is responsible for taxes on corn or other grain stored in a warehouse, upon which the Federal Government has made a loan to the farmer, the loan being made on warehouse certificates issued in accordance with the Laws of Missouri, 1933, Special Session, p. 168.

The reference to the warehouse laws, Laws of Missouri, 1933, Special Session, p.p. 168-173, was created for the purpose of enabling farmers to borrow money from the Federal Government - Section 17 of the Act. The form of the warehouse certificate to be issued is set out specifically in Section 8 of the Act, and shows upon its face that the money obtained from the Federal Government by the farmer is a loan on the warehouse certificate.

Under the provisions of Section 9756, Revised Statutes of Missouri, 1929, it is made the duty of the Assessor to assess all taxable property against the owner of such property, and the owner is liable for the taxes.

Even though a loan has been obtained from the Federal Government upon warehouse certificates, the farmer obtaining the loan is still the owner of the grain stored in the warehouse, and is, therefore, in the opinion of this

#2 - Honorable W. H. Massingill

office, liable for the taxes which may be assessed  
against that grain in storage.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

TAXATION AND REVENUE:

Liability of administrator for taxes  
against an estate.

June 18, 1934. 6-28



Hon. Thomas A. Mathews  
Prosecuting Attorney  
St. Francois County  
Farmington, Missouri

Dear Mr. Mathews:

This Department acknowledges receipt of your letter of recent date with request for an opinion; your letter being as follows:

"J. O. Swink, Judge of Probate Court of our County and I are anxious to know from your department, as to what to do under the following circumstances.

There are quite a number of estates in the course of administration in this County, and which sums of money are deposited in closed banks. It is quite evident that in two or three instances they will only pay from 15¢ to 25¢ on the dollar. The taxes resulting from assessments made on the return of the respective administrators, show certain balances and on which assessments the taxes are levied. In some instances there will not be sufficient money to pay the taxes.

Under the circumstances, what would you suggest in the premises?"

Your letter calls more for an expression from us as to what course of action should be taken by you in regard to the collection of taxes mentioned in your letter, rather than the methods of legal procedure to be taken of the collection of same.

Section 9756, R. S. Mo. 1929, provides in part as follows:

"The assessor or his deputy or deputies shall between the first days of June and January, \* \* \* \* \* proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person etc. \* \* \* \* \*"

Section 9763, R. S. Mo. 1929, provides that:

"It shall be the duty of every judge of the probate court in each county in this state to certify to the county assessor, on the first Monday of June in every year, a written list of every administrator, executor and guardian, and every other person legally in charge and control of any estate in the probate court; and thereafter, and upon such certification, it shall be the duty of the county assessor to take from each administrator, executor, guardian, and every other person legally in charge and control of any estate in such probate court, or from the papers and records of the court

relating to such estates, a list of personal property, and to assess the same according to law--such property hereby being declared to be subject to taxation in said county for all lawful purposes whatsoever, so long as the probate court thereof retains jurisdiction of such estate; \* \* \* \* \*

In the case of *Kansas City v. Simpson*, 90 Mo. App. 50, it was held by the Kansas City Court of Appeals that if the property was in the hands of the curator the day that the property should be returned for assessment, and that final assessment in the probate court was made the curator became personally liable for payment of the tax.

Also, in the case of *State ex rel. Ziegenhein v. Burr*, 143 Mo. 209, 1. c. 215, the Supreme Court had this to say:

"The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right but that over which he has 'the care, charge, or management.' There can be no reason why a minor's estate should not bear its equal portion of taxation. Who so appropriate then to list it and see that it is not exorbitantly assessed, and who so proper to pay the tax when assessed, as his curator! When it is conceded that a minor's estate is liable to taxation, it is apparent that either directly or indirectly the curator must furnish the funds to pay it, as he has charge of all the estate of the minor. This question arose in *Payson v. Tufts*, 13 Mass. 493, in 1816, and it was held that a guardian of minors was liable to

be taxed personally for the property of his wards in his possession and the same remedies existed against him on his default for their taxes as upon his own estate. Baldwin v. Fitchburg, 8 Pick. 494."

And further, in the case of State ex rel. Rice, Collector, v. Packard, 250 Mo. 686, it was held by the Supreme Court that where an executor had given in for taxation an assessment list of the personal property of an estate in his hands, and afterwards made final settlement of the estate without reserving funds with which to pay such taxes as may thereafter be levied upon such assessment list, he is personally liable to the state for the taxes so levied.

So it would seem from the statutes above quoted and the above cited cases that when an assessment has been legally made, the administrator is personally liable for the payment of the taxes if he distributes the money under the order of the probate court upon final settlement and the taxes have not been paid by him that he thereby becomes personally liable for the same. And further, it makes no difference what has happened to the property after the assessment was made if it was in existence and it was returned at its true value on June 1st, the administrator is liable therefor and should retain funds to pay same before making final settlement.

The Supreme Court of New Hampshire in Whitfield v. Dalton, 80 N. H. 93, 112 Atl. 907, said:

"The right to tax is determined by facts as they existed when the taxes laid."

It is therefore our opinion that if the assessment was legally and properly made that the administrator should pay the taxes out of any funds coming into his hands. However, we

June 18, 1934.

have only given you our views of the law on the subject,  
and have left to the tax collecting officials of your County  
the time and methods to be used in enforcing collection.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG



CIRCUIT CLERKS AND DEPUTY CIRCUIT CLERKS: Amount, method and source of compensation.

126  
November 21, 1934.

Hon. Thomas A. Mathews,  
Prosecuting Attorney St. Francois County,  
Farmington, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of November 15th, 1934, such request being in the following terms:

"At the last general election, our old Circuit Clerk, J. C. Reifner, was defeated by F. P. Graves.

F. P. Graves, Circuit Clerk-elect, by his Attorney, Harry O. Smith, of Farmington, Missouri, has been advised that under the Laws of 1933, pages 69 to 72 inclusive, that he will be, under that law, permitted to employ two (2) Deputy Circuit Clerks; this County, by the last Federal Census, has a population of 36,000 and less than 70,000; by Section 11736, Laws of 1933, pages 369 and 370, it is provided that the Circuit Clerk of this County receive a salary of \$2500.00; by Section 11814, Laws of Missouri, 1933, at page 372, you will see that it is the duty of the Clerks' of all Courts of record, to charge and collect certain fees, and it becomes the Circuit Clerk's duty to quarterly pay into the County Treasury, the amount of any fees collected, in excess of the sums permitted to be retained for services and pay of Deputies and Assistants.

I, as Prosecuting Attorney of this County, request you to give me a written opinion as to whether or not the Circuit Clerk shall receive, in this County, it having a population of 30,000 and less than 70,000, \$2500.00 salary, and in addition thereto, the County Court shall pay the salaries of the two (2) Deputy Clerks. As I understand it, both the salary for the Circuit Clerk of this County, and the salary for the Deputies, must be paid out of the fees collected, and if the aggregate fees collected exceed the \$2500.00 salary, he is permitted only to pay, out of the excess of the total fees collected, the salary of the one or more Deputy Circuit Clerks. However, as I stated above, Harry O. Smith, ex-Prosecuting Attorney, who is now

2. Hon. Thomas A. Mathews.

November 21, 1934.

attorney for Mr. Graves, has advised and directed him to demand not only the \$2500.00, but that the County Court, regardless of whether or not the fees collected is to pay the salary of his two (2) Deputy Clerks.

Advise me as soon as you can, by your written opinion, the construction of the Laws of 1933, with reference to the Circuit Clerk's salary and how paid, and the Deputy Circuit Clerk's salary, and how and from what funds they are paid."

The questions raised in your letter have, we believe, been answered by a ruling of this Department directed to Hon. Birt F. Bryant, Clerk of the Circuit Court of Dunklin County, dated March 7, 1934, and signed by Roy McKittrick, Attorney-General, and Franklin E. Reagan, Assistant Attorney-General, copy of which is enclosed. In such ruling you will observe that it is the opinion of this Department that the number of Deputy Circuit Clerks is left to the judgment of the County Court, that the County Court fixes their compensation and is liable to pay the sum out of the general revenue fund of the County, but that the \$2500 allowed as the compensation of a Circuit Clerk in a County having between 30,000 and 70,000 inhabitants is not to be paid by the County Court, the statute providing that such Circuit Clerk shall retain such amount out of the fees collected by him in his official capacity.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK  
Attorney-General

CIRCUIT CLERKS in counties having population between 70,000 and 80,000 to receive \$3000.00 annually.

December 27, 1934.



Mr. Geo. E. Masters  
Clerk, Circuit Court  
Jasper County  
Carthage, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"Page 369 of the 1933 Laws of Missouri repeals Section 11786 of the Revised Statutes of Missouri for 1929. I, as Circuit Clerk of Jasper County, have been drawing the salary of \$3000.00 per year under that Statute Section on the following basis, to-wit: 'in which circuit court is held in two or more places in said County;' (Carthage and Joplin in Jasper County). The population of Jasper County, according to the decennial census is 73,810, and never has reached the 75,000 mark. Section 1, 1933 Missouri Laws allows the Circuit Clerk of Counties of 75,000 and less than 90,000 population a salary of \$4000.00. Greene County falls in this class and has court in only one place. Jasper County falls below the 75,000.00 but has court in two places, necessitating the keeping of two offices. Section 1, page 375 says nothing about Court in two places. I am at a loss as to what class Jasper County is in. Jasper County with Court in two places, surely would not fall in the class under Section 11786 on page 369 of Missouri Laws for 1933."

The population of Jasper County, according to the United States Census of 1930 is 73,810 inhabitants.--Official Manual of the State of Missouri, 1933-34, page 546.

Laws of Missouri, 1933, page 369, Section 1, in part provides as follows:

"That sections 11786 -- 11811 -- are hereby repealed and five new sections pertaining and relating to the same subject to be known as Sections 11786 -- 11811 -- be and are hereby enacted in lieu thereof, to read as follows: "

Section 11786, R. S. Mo. 1929 (repealed) had this provision:

"The clerks of the circuit courts of this state shall receive for their services, annually, the following sums: \* \* \* \* \* Provided further, the provisions of this section shall not apply to \* \* \*, or to any county which now contains or may hereafter contain 80,000 inhabitants and less than 150,000 inhabitants, in which circuit court is held in two or more places in said county; for the purpose of this section the population of any county shall be determined by multiplying by five the total number of votes cast in such county at the last presidential election prior to the time of such determination;"

Section 11811, R. S. Mo. 1929 (repealed) provided in part as follows:

"The aggregate amount of fees that any clerk under articles 2 and 3 of this chapter shall be allowed to retain for any one year's services shall not in any case exceed the amount hereinafter set out. \* \* \* Provided, however, that in all such counties having a population of 75,000 persons and less than 125,000 persons, and where circuit courts are held in more than one place, the clerk of the circuit court \* \* \* be and are hereby permitted to retain annually the sum of  
\* \* \*."

Section 11866, R. S. Mo. 1929, provides in part as follows:

"From and after the expiration of the term of office of the present incumbents, the following salaries per annum shall be paid the hereinafter named officers of all counties in this state, which now contain or may hereafter contain eighty thousand inhabitants and less than one hundred and fifty thousand inhabitants, and in which circuit court is held in two or more places in said county, viz.: Clerk of circuit court, two thousand dollars; \* \* \* "

The above section was repealed by implication by Laws of Missouri, 1933, page 375, Section 6. Thus, any former statute or statutes under which you receive compensation as Circuit Clerk (Davis v. Jasper County, 300 S. W. 493) were repealed in 1933 by the Legislature. Prior to repeal of the above 1929 statutes in 1933 by the Legislature, the population of Jasper County was determined by the multiplication method and when that fact was ascertained the other statutes determined the amount of compensation. However, in 1933, the Legislature enacted new and entirely different laws pertaining (1) to the method of computing the population, and (2) a classification as to salaries to be received by circuit clerks after the population was determined. The population after the present terms of the circuit clerks expire will be determined by the decennial census of the United States.

Section 11808, Laws of Missouri, 1933, page 370, reads as follows:

"The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

Dec. 27, 1934.

Section 11786, Laws of Missouri, 1933, page 369, provides in part as follows:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. \* \* \*; in counties having a population of 70,000 and less than 80,000 persons, the sum of \$3000.00; \* \* \*; provided, further, that clerks of the Circuit Court shall be allowed to retain, in addition to the fees allowed under this section, all fees earned by them in cases of change of venue from other counties; provided, further, that, until the expiration of their present terms of office, the persons holding the offices of Circuit Clerks shall be paid in the same manner and to the same extent as now provided by law."

Thus, when the present term of the circuit clerk has expired, new section 11786, Laws of Missouri, 1933, page 369, will be effective. Your county has a population, according to the decennial census, between 70,000 and 80,000 persons, to-wit, 73,810 inhabitants. Hence, the annual fees that may be retained by the circuit clerk taking office in 1935 will be \$3000.00, and such is our opinion.

We base this opinion on the assumption that the act is constitutional. If you are dissatisfied with the present law, then you should address your complaint to the Legislature as it has the sole power to remedy same.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

JLH:EG

BUILDING AND LOAN COMPANIES:

Proceedings for merger examined.

2-9  
February 6, 1934



Honorable Ira A. McBride  
Supervisor Building and Loan Companies  
Jefferson City, Missouri

Dear Mr. McBride:

We are acknowledging receipt of your letter  
in which you inquire as follows:

"I submit to you herewith all papers  
in connection with the proposed mer-  
ger of the Home Building and Loan  
Association and the Bonne Terre Build-  
ing and Loan Association of Bonne  
Terre, Missouri. Before giving our  
formal approval, however, to the afore-  
said merger, this is to ask your  
opinion as to whether or not they have  
correctly complied with all of the  
requirements of Section 5611, laws of  
Missouri, 1931, providing for such a  
merger.

For your information and guidance, I  
am inclosing the notices of their  
stockholder's meeting, certification  
of the results of that meeting and  
other papers in connection with this  
matter. As soon as you have looked  
them over, I would be pleased to have  
you return them to us for our files  
together with your opinion. "

Section 5611, Laws Missouri 1931, at page 157  
deals with the merging of two or more building and loan corpora-  
tions and provides as follows:



February 6, 1934

"Any two or more corporations, with the approval of the supervisor of building and loan associations previously had in writing, may unite and become incorporated in one body, with or without any dissolution or division of the funds of such corporations, or any or either of them, or any such corporation may transfer its engagements, funds and property to any other such corporation upon such terms as may be agreed upon by three-fourths of the members of each of such bodies present at the meeting of the members convened for that purpose, by notice stating the object of the meeting, sent through the postoffice to every member, and by a general notice, appearing daily at least one week, or weekly at least two weeks, in some newspaper published at the place of the principal business of the corporation; but no such transfer shall prejudice any right of any creditor of any such corporation to have payment of his debt out of the assets and property thereof, nor shall any creditor be thereby deprived of or prejudiced in any right of action then existing against the officers or directors of said corporation for any neglect or misconduct."

Under the provisions of the above section a notice is required to be mailed to every member of the two building and loan companies and a general notice, appearing daily at least one week or weekly at least two weeks, shall be published in some newspaper published at the place of the principal business of the corporation. After the giving of that notice the corporations may merge provided that the terms are agreed upon by three-fourths of the members of each corporation present voting for the merger.

On January 15, 1934, the Bonne Terre Building and Loan Association voted to merge with the Home Building and Loan Association of Bonne Terre, by a vote of 365 in favor of the merger, as against none opposed. On the same date the Home

February 6, 1934

Building and Loan Association of Bonne Terre voted to merge with the Bonne Terre Building and Loan Association, by a vote of 59 in favor of the merger, as against none opposed. It appears that the notice of the stockholders' meeting of the Bonne Terre Building and Loan Association, at which the vote was taken, was published in the Star News Register, a weekly newspaper published in the City of Bonne Terre on January 5 and January 12, 1934; it also appears that the notice of the stockholders' meeting of the Home Building and Loan Association of Bonne Terre, at which the vote to merge was taken, was published in the Star News Register, a weekly newspaper published in the City of Bonne Terre on January 5 and January 12, 1934.

We assume from the letterheads that the principal office of both of these companies is in Bonne Terre, Missouri, and since the newspaper in which the notices were published is published in Bonne Terre, Missouri, that portion of the requirement has been complied with.

However, in addition to the notices published in the newspaper the statute expressly requires that a notice stating the object of the meeting be sent through the post-office to every member. The file which you inclosed does not disclose that any notice was ever mailed to the members of these building and loan companies. If the notices were not in fact mailed to each member as required by the statute, then the merger is not legal. However, if the notices were mailed then you should require proof of that fact from each company before approving the merger.

Very truly yours,



FRANK W. HAYES  
Assistant Attorney General ,

APPROVED:

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ROY MCKITTRICK  
Attorney General.

FWR:LC

**BUILDING AND LOAN  
ASSOCIATION:**

May become Federal Savings and Loan Associations only by ceasing to do business and voluntarily transferring its assets by two-thirds of stockholders' vote.

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3-21  
March 17, 1934.



Hon. Ira A. McBride, Supervisor  
Building and Loan Supervision  
of Missouri  
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter  
as follows:

"Inclosed is a letter from Mr. E. S. Tesdell, General Counsel of the Federal Home Loan Bank of Des Moines, Des Moines, Iowa, raising the question as to whether or not the laws of Missouri authorizes a Missouri building and loan association chartered under the laws of this state to change from a state charter to a federal charter.

"Furthermore, Mr. Tesdell raises the question that if the Missouri statutes make provision for such a change, what are the necessary steps for one of our Missouri associations to take in order to become a federal building and loan association under the Federal Home Loan Bank Act copy of which I am inclosing. Your opinion on the points raised in Mr. Tesdell's letter relative to this matter will be appreciated by this department."

I.

A building and loan association "is purely a creation

of the statutes, having only such powers as the statutes give and such as are necessarily implied," Appeal of Powell and Doyle, 93 Mo. A. 296, l.c. 300.

Section 5593, Laws of Mo. 1933, page 182 provides:

"Any corporation heretofore organized or now existing under the laws of this state relating to 'mutual saving fund, building and loan associations' and any corporation organized in pursuance of the provisions of this article shall have all the powers provided for in this article, and the object of such corporation shall be the accumulation of a capital in money, to be derived from payments by its members in periodical installments or otherwise, at such time and in such manner as shall be provided in the by-laws, and from the profits and accumulation arising from the investment of such payments.\*"

Section 5585, Laws of Mo. 1931, page 144, provides in part the following:

"Any number of persons, not less than twenty-five, who are residents of this state, and who shall have associated themselves together by an agreement in writing, such as is hereinafter described, \* \* \* shall become a corporation on complying with the provisions of this article, and shall remain a corporation, with all powers and privileges, and subject to all the duties, limitations and restrictions, conferred by general

laws upon corporations, except as hereinafter otherwise provided.

Section 5623, Laws of Mo. 1931, page 160, provides:

"It shall be the duty of the supervisor of building and loan associations of the state of Missouri to administer and enforce the provisions of this article."

Section 5579, Laws of Mo. 1931, page 142, provides:

"The state bureau of building and loan supervision and the supervisor of building and loan associations shall have charge of the execution of the laws relating to mutual savings fund, building and loan associations  
\* \* \* \*".

From the above, it is to be observed that the regulation of building and loan associations is clearly defined by the Legislature, such being the exercise of a police power. The supervisor is called upon to execute the laws relating to building and loan associations. Among other powers conferred upon him is that of examining into the affairs of associations under his custody to the end that he may "correct any illegal practices," (Section 5626, Laws of Mo. 1931, page 162). And failure of an association to desist "illegal practices" (after notice) gives the supervisor the right to seize, reorganize or liquidate it. A statutory receivership and/or liquidation is provided. Foreign corporations are likewise subjected to his supervision but in a limited degree (Laws of Mo. 1931, pages 158, 160). Thus the object of regulating building and loan associations is to promote the general welfare of the people, such associations being quasi-public.

Section 5611, Laws of Mo. 1931, page 157 provides as follows:

"Any two or more corporations, with the approval of the supervisor of building and loan associations previously had in writing, may unite and become incorporated in one body, with or without any dissolution or division of the funds of such corporations, or any or either of them, or any such corporation may transfer its engagements, funds and property to any other such corporation upon such terms as may be agreed upon by three-fourths of the members of each of such bodies present at the meeting of the members convened for that purpose, by notice stating the object of the meeting, sent through the postoffice to every member, and by a general notice, appearing daily at least one week, or weekly at least two weeks, in some newspaper published at the place of the principal business of the corporation; but no such transfer shall prejudice any right of any creditor of any such corporation to have payment of his debt out of the assets and property thereof, nor shall any creditor be thereby deprived of or prejudiced in any right of action then existing against the officers or directors of said corporation for any neglect or misconduct."

From the above and foregoing, it is our opinion that only "mutual saving fund, building and loan associations and any corporation organized in pursuance of the provisions of this article" are intended by the Legislature to be the only such corporations that might merge and take advantage of Section 5611, supra. Thus it becomes necessary to determine if a "Federal Savings and Loan Association" is a "mutual saving fund, building and loan associations" and a corporation organized in pursuance of the provisions of this article", contemplated by Section 5611, supra, to be merged with a State (domestic) building and loan



association, so that the State charter is abrogated.

## II.

Section 5 of the Home Owners' Loan Act of 1933, in part provides as follows:

- "(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
- "(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation.
- "(f) Each such association, upon its incorporation, shall become automatically a member of the Federal Home Loan Bank of the district in which it is located



or if convenience shall require and the Board approve, shall become a member of a Federal Home Loan Bank of an adjoining district. Such associations shall qualify for such membership in the manner provided in the Federal Home Loan Bank Act with respect to other members. "

Without deciding the question as to whether a "Federal Savings and Loan Association" is a foreign or domestic corporation (or neither of each) it suffices to say that such associations are not supervised or within the jurisdiction of the supervisor, to-wit:

"\* \* the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as \* \* \* , and to issue charters therefor \* \* \* ."

It is our opinion that a building and loan association may not merge with a Federal Savings and Loan Association under and by virtue of Section 5611, Laws of Mo. 1931.

### III.

Section 5626, Laws of Mo. 1931, page 162, provides in part the following:

"No association shall cease to do business or attempt to make a voluntary assignment of its assets or in any other manner to liquidate its affairs prior to the maturity of all of its stock, except with the consent of two-thirds of its stockholders and the approval of the supervision of building and loan association. \* \* \* "

3/17/34

If an association, now supervised and deriving its right and enjoyment to do business by the laws of this State, attempts to change its character to the end that it would cease to be under the jurisdiction of the State Bureau of Building and Loan Supervision, and/or laws of Missouri, then it would amount to "ceasing to do business". If such domestic building and loan association desires to quit business or make a voluntary assignment of its assets, it may do so upon consent of two-thirds of its stockholders, and approval of the supervisor.

It is our opinion that a building and loan association may make a voluntary assignment of its assets to a Federal Savings and Loan Association prior to the maturity of all of its stock when it obtains the consent of two-thirds of its stockholders and the approval of the Supervisor of Building and Loan Associations.

In this connection we quote from Vol. 9, Corpus Juris, page 997, Article 149:

"\* \* \*, or an agreement whereby one purchases the assets or assumes the business of another, is not unlawful, and may be attacked only by the stockholders of the association which is being absorbed, the courts will not allow the rights of stockholders, either individually or collectively, to be prejudiced thereby; and where the purchasing association acts in such an arbitrary and unauthorized manner that the absorbed association becomes insolvent, equity will set aside the transaction and appoint a receiver on behalf of the minority stockholders of the association so absorbed."

Yours very truly,

APPROVED:

\_\_\_\_\_  
ROY MCKITTRICK  
Attorney-General.

\_\_\_\_\_  
JAMES L. HORNBOSTEL  
Assistant Attorney-General.

JLH/AFJ

CC - Hon. E.S. Tesdell, General Counsel.

SCHOOLS: Under Section 9331, Laws of Missouri, page 350,  
SCHOOL DISTRICTS: which amended same section of the Revised Statutes  
of Missouri 1929, the school district may be dis-  
solved by a vote of two-thirds of the resident  
voters and taxpayers who are present and voting  
for dissolution.

3-26  
March 23, 1934.

Mr. Sam M. McKay,  
Attorney at Law,  
De Soto, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"I have another legal tangle, on which it  
has been requested that we secure your  
opinion. It is a school fight.

Consolidated District No. 1, of Jefferson  
County, was organized several years ago.  
These people have been to the Supreme  
Court on two or three occasions on diff-  
erent phases of the situation. There has  
been a sharp division between those in  
favor of the Consolidated District and a  
High School, and those who were opposed  
to it. Last week, there was an election  
held pursuant to proper notices on the  
question of disorganizing the Consolidated  
District. Those favoring this dissolution  
received more than two-thirds of the votes  
cast at the election.

Section 9331, Article 4, Chapter 57, R. S.  
1929, was repealed by the Legislature of  
1931, and the Legislature re-enacted a new  
section known as 9331, which is identical  
with the old section, except the words  
'present and voting.'

The State Superintendent of Schools issued  
a Revised School Law in 1931, in which there  
appears, under the new section, certain  
citations. These cases, of course, were  
prior to 1931.

The Directors who favor the continuation of  
the Consolidated District have taken the  
position that that is the interpretation  
of the present law, which required a two-  
third majority of all the resident voters  
of the District. However, I do not take



that view, and they have asked me to secure an opinion from you as to what effect the words 'present and voting' will have on the interpretation of this question by the Courts.

I have advised the Directors that the vote dissolved the Consolidated District, but they prefer to have an opinion from you, and I will appreciate it if you will get us this information as soon as possible, as the Directors of the Consolidated District are posting notices for election of Directors, and there are notices being posted in the old school districts from which the consolidated was taken and organized, to vote for directors in the common school district."

In order that we may clear up this controversy and avoid further difficulty to the district, we shall attempt to discuss the law as it was before the amendment of 1931, as well as after the amendment. Section 9331, R. S. Mo. 1929, provides as follows:

"Any town, city or consolidated school district heretofore organized under the laws of this state, or which may be hereafter organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district, and at said meeting, if two-thirds of the resident voters and taxpayers of such school district shall vote to dissolve any such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under article 3 of this chapter."

In the foregoing section it is specifically provided that "if two-thirds of the resident voters and taxpayers of such school district shall vote to dissolve <sup>any</sup> town, city or consolidated school district," then the district shall be dissolved. In

State v. Sheridan Consolidated School District No. 1, 274 S. W. 1073, the Supreme Court held that, under Section 11242, R. S. Mo. 1919, which was Section 9331, R. S. Mo. 1929, a vote of two-thirds of the resident voters and taxpayers of the district was necessary to dissolve it. The Court says at page 1075:

"The foregoing analysis of section 9772, R. S. 1899, applies directly and authoritatively to section 11242, R. S. 1919. The last named section, after reciting the conditions precedent to the holding of the meeting, continues, saying: 'And at said meeting if two-thirds of the resident voters and taxpayers of such school district shall vote to dissolve,' etc. The phrase, 'at such meeting,' refers to the 'time and place, when and where, the fact whether or not' two-thirds of the resident voters and taxpayers of such school district shall vote to dissolve. If the phrase 'at said meeting' were transposed, so that the reading would have been 'if two-thirds of the resident voters and taxpayers of such school district at said meeting shall vote to dissolve,' then, it would be plain that a majority of two-thirds of only those voting at the meeting was required; but, as the sentence is framed, it plainly means that at said meeting it is necessary that two-thirds of the resident voters and taxpayers--that is, two-thirds of the total number of resident voters and taxpayers of the district--must vote to dissolve in order that the disorganization of the district may be effected.

The cases cited under this point, we think, have no persuasive effect, because, first, section 11242 is not ambiguous; and again, being clear in its requirement, the question of whether it leads to oppressive or inconvenient results is one to be considered by the Legislature and not by the courts."

It will be noticed that the Supreme Court construed the statute as it was written and declared it unambiguous. The Court also stated that whether or not such a construction of the plain terms of the statute would be oppressive and inconvenient was a question for the Legislature to determine. It is apparent that the Legislature thought that the statute, as then written and construed by the Supreme Court, was not a



good law, for in 1931 the Legislature, in Laws of 1931, page 350, amended Section 9331, R. S. Mo. 1929. An examination of the amended section discloses that the only change made was to insert the words "present and voting." Such was the only purpose of the Legislature as is indicated by the enacting clause and section, which reads as follows:

"That section 9331 of article 4, chapter 57, Revised Statutes of Missouri, 1929, relating to consolidated school districts--how disorganized, be and the same is hereby amended by inserting the words 'present and voting,' between the words 'district' and 'shall' in line 23, so that said section when so amended shall read as follows:

Any town, city or consolidated school district heretofore organized under the laws of this state, or which may hereafter be organized, shall be privileged to disorganize or abolish such organization by a vote of the resident voters and taxpayers of such school district, first giving fifteen days' notice, which notice shall be signed by at least ten qualified resident voters and taxpayers of such town, city or consolidated school district; and there shall be five notices put up in five public places in said school district. Such notices shall recite therein that there will be a public meeting of the resident voters and taxpayers of said school district at the schoolhouse in said school district and at said meeting, if two-thirds of the resident voters and taxpayers of such school district present and voting, shall vote to dissolve such town, city or consolidated school district, then from and after that date the said town, city or consolidated school district shall be dissolved, and the same territory included in said school district may be organized into a common school district under article 3 of this chapter."

There can be no doubt that after the Laws of 1931 went into effect that it is no longer necessary, to dissolve a consolidated district, to have a two-thirds vote of the resident voters and taxpayers, but it is only necessary to have the votes of two-thirds of the resident voters and taxpayers present and voting. As the statute now stands a person must be a resident voter and taxpayer in the district in order to be qualified to vote, but a vote of two-thirds of such qualified voters present and voting is now sufficient to dissolve the district.

March 23, 1934.

You state in your inquiry that<sup>at</sup> an election duly held more than two-thirds of the votes cast at the election were in favor of the dissolution of the district. Under the statute now in force, the district was legally dissolved as of the date of the election, although two-thirds of the resident voters and taxpayers might not have cast their ballots at the election. Since the district has been legally dissolved, the consolidated district would have no standing and have no right to elect directors.

It is therefore the opinion of this Department that while prior to the amendment of 1931, both by statute and judicial construction, it was necessary, in the dissolution of a school district, that two-thirds of the resident voters and taxpayers should vote in favor of such proposition, yet the amendment of 1931 was made for the very purpose of changing this requirement, and since the effective date of that amendment the district may be dissolved by a vote of two-thirds of the resident voters and taxpayers of such district who are present and voting in favor of the dissolution. In other words, it is no longer necessary, to dissolve a district, that a vote of two-thirds of the resident voters and taxpayers be in favor of the dissolution.

We, therefore, conclude, upon the facts stated in your inquiry, that consolidated district No. 1 has been legally dissolved under the law as it now is, and that such district is no longer a legal entity.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S



GOLD: Mineral rights under private property belong to the owner of the land.

4-20  
April 11, 1934.



Honorable A. L. McCawley  
Member, House Representatives  
Cathhage, Missouri

Dear Sir:

We hereby acknowledge a request for an opinion dated March 6, 1934, which is as follows:

"In asking you for an opinion as to whether the State or the individual has title to gold that may be found on an individual's land, that is, gold in its virgin state under ground as other minerals, I am fearful that the question is not one on which an humble member of the legislature would have the right to ask for the opinion of your department. In fact, I am not certain whether an individual member of the General Assembly has the right to request your opinion on any subject. I think perhaps it would be more regular if the request should come in the form of a resolution from the house of which the legislator is a member.

"However, I am pressed for an answer to the above question.

"I am standing on the proposition that the owner in fee simple of land in Missouri is the owner of all mineral including gold, silver, platinum, etc. that is found on his land.

"In opposition to this view it is contended that gold found on a farmer's land in Missouri belongs to the State. My antagonist is standing on the proposition laid down in Cooley's Blackstone, page 295, Volume 1.

"If not improper for you to do so, I will appreciate an opinion from your department as to

April 11, 1934.

whether the land owner, or the State, owns virgin gold which may be found on his land in Missouri.

"It is contended that Missouri being under the common law except otherwise provided by statute, and Gold at common law being classified as Royal metal, and one of the King's prerogatives, therefore belongs to the State.

"It has also been suggested that in those states where gold mining has been commercially profitable, the legislators have by appropriate enactment, provided that the ownership of gold found on ones land belongs to the land owner, and not to the State.

"In Missouri of course we have not as yet engaged commercially in the mining of gold though gold in small quantities have been found here and there, and it might be that the New Deal will reveal deposits of gold in Missouri hitherto undreamed of."

Cooley's Blackstone, Vol. 1, 4th Edition, Section 12, page 294, provides as follows:

"A twelfth branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials; and therefore those mines which are properly royal, and to which the king is entitled when found, are only those of silver and gold. (t) By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some, the whole was a royal mine, and belonged to the king; though others held that it only did so, if the quantity of gold or silver was of greater value than the quantity of base metal. (u) But now by the statutes 1 W. and M. st. 1, c. 30, and 5 W. and M., c. 6, this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities;

but the king, (or \*persons claiming royal mines under his authority,) may have the ore, other than tin-ore in the counties of Devon and Cornwall, paying for the same a price stated in the act. This was an extremely reasonable law; for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones; neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land-owner is by reason and law entitled." (\*295)

On the otherhand the text writers of recent date are not in accord with Blackstone, and in Walsh, The Law of Property, second edition, page 26, Section 24, I find the law stated thus:

"Under the common law of England, all mines of gold and silver belonged to the King, not as an incident of sovereignty, but by virtue of the royal prerogative. The right to these mines was part of the crown's 'regalian rights' and was based upon the supposed necessity of owning and controlling them in order to provide and issue currency for purposes of trade, and to supply means for the defense of the kingdom. The crown could grant the mines with the land, in which case the grantee became sole owner of the mines with the land, exactly as in the case of mines of any other kind. As a matter of fact, the crown did grant 'all mines' and therefore mines of gold and silver in the lands included in the charters under which the American colonies were settled. It follows, therefore, that where such mines are now the property of any state, or of the United States, they are held by the state or nation as proprietary owner, exactly as where they are the property of a private individual. Therefore, where title to property has been acquired by private individuals through grant or patent from the state or nation under laws regulating the settling of land or otherwise, if the grant or

patent be without reservation, they take mines of gold or silver with the land as part of it; and it may be taken as generally true that in the different states as well as under patents from the United States, private ownership of land carries with it ownership of the gold and silver mines therein, except where such mines have been expressly reserved. After the crown had granted away the gold and silver mines in the lands covered by the Colonial Charters it no longer had any right to such mines, to which the state or nation could succeed on their separation from England. Certainly the ownership of these mines is not an incident of sovereignty, since they could be transferred by the crown at pleasure, and therefore the states and the nation did not succeed to them by virtue of sovereignty. In New York, gold and silver mines have been reserved in all grants by the state, and by statute it is expressly asserted that the state by virtue of its sovereignty is owner of all such mines. In other states, and in public territory of the United States, it is generally held that private ownership of the land carries with it title to gold and silver mines therein unless they are expressly reserved to the state."

Corpus Juris, Vol. 40, page 756, Section 114, provides as follows:

"According to the common law of England, mines of gold and silver, although on private property, were the exclusive property of the crown, by virtue of the royal prerogative, and did not pass in a grant by the king under a general designation of lands or mines; and if metalliferous ores contained gold or silver to such an extent as to be worth extracting, but the ores could not be obtained without interfering with the gold or silver, the whole of such ores belonged to the crown, and, except as limited by statute the crown had the right to work not

April 11, 1934.

only gold and silver mines, but also all mines containing gold or silver worth extracting. The crown's ownership also extends to other mines and minerals in public reserves, other public lands, and the beds of rivers. But where minerals in which there is no gold or silver are in private lands, they belong to the owner of the land, unless they were reserved in a grant of the land by the crown."

Corpus Juris, Vol 40, page 358, Section 115, provides as follows:

"In the United States title to, and right of control and disposition of, minerals in public lands is generally in the federal government, except to the extent that it is in the local state government by virtue of original settlement, as in case of the original thirteen states, or by cession or grant from the federal government; and it has been the policy of the government to preserve and protect its interest in the mineral wealth of the public domain. As to private lands the owner of the surface is prima facie entitled to the minerals under it; and neither the state nor the federal government has title, as an incident of sovereignty, to mines or minerals found within their boundaries upon the lands which belong to individuals. And when the title to public land passes by patent or grant to another, the right to the minerals generally passes with it, unless such right is reserved."

#### CONCLUSION.

It is the opinion of this office that in Missouri, one who owns private land in fee, owns not only the surface but also the minerals under the land, including gold within the surface boundaries, and that neither the State of Missouri nor the Federal Government has any title to the gold under the land as an incident to sovereignty or prerogative. If either the State or Federal Government have any interest in gold located under private<sup>ly</sup> owned land in Missouri, it is because they reserved this title to the mineral when they granted the land patent, or because they

Honorable A. L. McCawley

-6-

April 11, 1934.

subsequently purchased or were granted the mineral rights under privately owned land as any other purchaser or grantee would acquire these rights. Those "regalian rights" which were once a part of the king's prerogative have never prevailed in this county, and in New York gold and silver mines belong to the state, not because of the state's prerogative or sovereignty, but because these rights were expressly given to colonial New York in the king's charter and have since been expressly reserved by the state in all of her land grants to private ownership.

Respectfully submitted.

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK

WOS:H



8 "2" ✓  
CONSULS:---VICE-CONSULS:---CONSULAR AGENTS: Immunity from auto license  
tax by reason of their  
office.

✓ 28  
April 26, 1934.

Hon. John J. McCarthy  
Captain and Acting Chief of Police  
Department of Police  
1200 Clark Avenue  
Saint Louis, Missouri.



Dear Sir:

Your request for an opinion, dated March 26,  
reads as follows:

"Every now and then the perplexing question arises as to just what privileges foreign consuls assigned to St. Louis are entitled. Several consuls recently have applied to the Police Department for letters granting them immunity from arrest for not equipping their motor vehicles with Missouri State automobile tags and St. Louis City stickers.

"Under an opinion given in 1929 by the then City Counselor, Hon. Julius T. Muench, consuls have been furnished with personal courtesy letters. Mr. Muench was inclined to believe that they should take out city licenses for their cars, but pointed out that they would have to be prosecuted in the federal courts if they declined to take out city licenses. Mr. Muench at that time communicated with the then Attorney General Stratton Shartel, and Mr. Shartel answered that the State of Missouri, through the Secretary of State, was granting automobile licenses to foreign consuls free of cost. He approved this course, he wrote, but thought the matter of St. Louis granting city licenses to foreign consuls



was a matter for the city to decide. Upon receiving this letter Mr. Muench ruled the Police Department ought not to insist upon foreign consuls taking out city licenses for their cars, and this has been our policy since.

"I should appreciate receiving the suggestions of you gentlemen with respect to foreign consuls and automobile licenses, especially since the accredited chancellors to the foreign consulates located in St. Louis also are applying for immunity for their cars in a license way.

"What complicates the situation further is that there are two kinds of consuls in St. Louis. One kind is the consul de carriere, who is assigned here to represent his native country, and the other is the resident consul who represents some foreign country while maintaining a voting and legal residence in the city.

"Thanking you in advance for the prompt answer I confidently expect, I am, \*\*\*"

2 Corpus Juris, Section 29, page 1305, provides:

"Although some expressions of Vattel appear to countenance a different opinion, it is well settled that a consul is not entitled, by virtue of his office merely, to the immunities of a foreign minister, but is subject, civilly and criminally like other residents, to the tribunals of the country in which he resides. He is, however, upon principle and according to international usage, entitled to the liberty and safety necessary to the proper discharge of his functions. Thus a consul is generally exempt from personal taxes; \*\*\*\*\*."

We find the law stated thus in Phillimore's "International Law, Vol. II., Section CCLII., page 278:

"Some nations permit, and others forbid

their Consuls to trade (y); a trading Consul is, in all that concerns his trade, liable to the local authorities in the same way as any native merchant. In fact, sometimes natives of the place itself, in which consular services are required, are appointed Consuls; and thus are, at one and the same time, the subjects of the country in which they dwell and agents of a foreign State. Such an appointment is perhaps rightly pronounced, by a considerable authority, to be objectionable in principle (z). The prerogatives of such Consuls are very limited; the only exemptions which they appear to enjoy are from lodging soldiers and from personal service in the civic guards or militia (a).

And in the same work under Section 88, at page 320:

"When the Consul is not a citizen of the country in which the Consulate is situated, and does not own real estate therein, and is not engaged in business therein, he is secured against the liability to taxation by treaties or conventions with Austria-Hungary, Belgium, Bolivia, Denmark, Ecuador, France, Germany, Hayti, Italy, the Netherlands (and colonies), Peru, Salvador, Colombia, and Mexico, and in Germany the official income of a Consul is not taxable; but in the Dominican Republic, the Orange Free State, Persia, Portugal, the Hawaiian Islands, Russia, and Switzerland, if they engage in business they are subject to the laws of the country. And in general, if a Consular officer engages in business, or owns property in the country of his official residence, he cannot claim other exemptions in respect of such business or property than are accorded to citizens or subjects of the country."

In Wheaton's "International Law", pages 352 and 353, the law is stated thus:

"Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties and whatever special privileges may be conferred upon them by local laws and usages, or by international compact, they are not entitled, by the general laws of nations, to the peculiar immunities of ambassadors. \*\*\*\*\* The general result of the English, American and French cases establishes that consuls have certain privileges, but that they are not diplomatic officers, and that they cannot claim any of the immunities accorded specially to members of the diplomatic service."

The law, as stated in Flores' "International Law" Codified by Boschard, Section 526, page 257, reads in part as follows:

"Consuls have the right to be exempted from municipal or state burdens or charges imposed on citizens and resident foreigners. \*\*\*\*\*"

"They are also exempt from the obligation to pay military taxes and direct personal or sumptuary taxes imposed by the State, province or town, unless they own real property or engage in business."

Later, on page 258, Section 528 of the same work, the author states:

"Consular agents, whether they are citizens of the state which appointed them, or of the state where they exercise their functions, do not enjoy the same rights as consuls of the first class. Nevertheless, for acts performed in the exercise of their functions, by virtue

of their commission and within the scope of their special authority, they are not personally responsible."

In the case of The Lonsdale Shop v. Bibily, 126 Misc. 445, 213 N. Y. S. 170, 1.c. 173, the court said, when they excluded chancellors to foreign consuls and their secretaries from the immunities granted consuls:

"An examination of the contents of the certificate shows that the ambassador of France merely said that Mr. Bibily is the only person in the consulate general of France at New York who has charge of the duties appertaining to his office of chancellor. This does not in any way enable the defendant to come within the provisions of the Consular Convention of 1853 with France that he was at the time of service discharging the duties of a vice consul in the absence of the latter. I therefore reach the conclusion that the defendant, by virtue of his position is chancellor at the French consulate general in New York, is not entitled to immunity from the service of process.

#### CONCLUSION.

From your letter it seems that foreign consuls residing in St. Louis, Mo., object to take out city and state licenses on their personal automobiles, claiming that the state and city car license tax amounts to a tax on their persons, and that personal taxes are not chargeable against foreign consuls. Of course, if these consuls are liable for this tax and liable to prosecution for the failure to pay this tax, your department is ready to start making arrests, but if these consuls are not liable for this automobile license tax, but are immune from same, by reason of their office, then your department stands ready to grant them immunity from arrest for the failure to equip their

cars with State automobile tags and St. Louis city stickers.

These consular officers, we take it, admit their liability for automobile licenses except for their office and the privileges and immunities going with their particular office.

In the light of the Bibily case, supra, it follows as our opinion that since accredited Chancellors to the foreign consulates are not entitled as an international right to immunity from service of process, by reason of their office they likewise are not entitled to any immunity for the failure to procure State automobile license tags or St. Louis City stickers. They have no legal claim to immunity extended to foreign consuls.

As for these native resident consuls, who claim immunity for their failure to procure State automobile license tags or St. Louis City stickers, we can find no foundation for their claim in international law, and it is our opinion that they are not immune, for as was said in Phillimore's "International Law", "The prerogatives of such consuls are very limited; the only exceptions which they appear to enjoy are from lodging soldiers and from personal service in the civil guard or militia."

Consuls coming from foreign countries have a legal right to maintain their privileges and exemptions which by treaty or by custom they may be fully entitled to demand, and they have no legal right to aim at or expect more. They are generally and almost universally, by treaty and custom, immune from personal taxes on themselves or their belongings. So universal is this immunity provision that we believe your department is making no mistake in granting courtesy on this automobile license tax, when the owner of the car has fully satisfied your department that he is a foreign consul, by his credentials, and that the car is used for diplomatic matters.

Whenever a foreign consul or vice-consul presents to you his credentials of office, and proves his exemption to this license tax by virtue of a treaty or reciprocal custom, then, as in the past, he should be granted personal courtesy letters from your department, on any automobile used in the diplomatic service by them. Automobiles owned by them

4/23/34

but used for another business than the diplomatic mission, is subject to the State and City license tax.

This automobile tax is not a personal tax, but is an excise tax for the privilege of using the highways, and the fact that foreign consuls are exempt from personal tax on themselves and on their effects, does not of itself exempt them from paying this privilege tax on automobiles used in a private business.

A foreign vice-consul is only entitled to the immunity of a consul when the treaty under which he claims immunity extends to vice-consuls. Treaty arrangements with foreign countries differ as to immunities in tax matters, hence each vice-consul's claim for immunity would have to stand or fall on its own merits. No general hard fast rule can be laid down allowing legal immunity to vice-consuls as a class.

Prosecution of Consuls is almost universally provided for by treaty, whereby they must be prosecuted in Federal courts. This right, in some treaties, is extended to vice-consuls. I find no limitation beyond vice-consuls, hence I would say that generally, those native consuls and exchange consuls, together with consular chancellors can be prosecuted in State and City courts for their failure to procure automobile license tags.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS  
Assistant Attorney-General.

REY McKITTRICK  
Attorney-General.

WOS/afj



BUILDING & LOAN ASSOCIATIONS:

Conversion to Federal savings and loan associations by Missouri building and loan associations shall be determined by a friendly test suit.

June 25, 1934. 6-27



Hon. Ira A. McBride  
Supervisor  
Bureau of Building & Loan Supervision  
Jefferson City, Missouri

Dear Mr. McBride:

This is to acknowledge your letter as follows:

"This is to request your opinion as to whether a Missouri building and loan association, chartered and operating under Missouri laws, may convert into a federal savings and loan association under Section 5 (1) of the Home Owners' Loan Act of 1933 as amended by the recent congress and signed by the president on April 27, 1934, irrespective of limitations imposed by Missouri statutes."

The request for an opinion contained in your letter is one that has given this office much concern. We have untiringly searched the statutes and decisions of the court and have come to the conclusion that the law relative to conversion of a building and loan associations, chartered and operating under Missouri laws, into Federal savings and loan associations is so unsettled and uncertain that we do not desire to express an opinion concerning same. We respectfully request, that it is a matter of such far-reaching importance to the stockholders as well as to the association, that a



June 25, 1934.

friendly suit be brought so as to have a decision of the court of last resort. If such a suit is brought this Department will represent you and will take the position that -- A Missouri building and loan association, chartered and operating under and by virtue of the laws of the State of Missouri, may not convert into a Federal savings and loan association, except by the method provided in our opinion to you, dated March 17th, 1934, which opinion was rendered prior to the amendment of Section 5 (1) by Congress on April 27th, 1934.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General

JLH:EG

RELATING: TO THE TAXING POWER OF CITIES HAVING LESS  
THAN TEN THOUSAND AND MORE THAN ONE THOUSAND  
INHABITANTS.

11-9  
October 17th, 1934



Hon. A. H. McCrary, Mayor  
Pleasant Hill, Missouri

Dear Sir:

We have your letter of October 11th, 1934, in which  
you state and inquire as follows:

"Will you please give us the following in-  
formation. Does the city council have the  
authority to make a small levy to support a  
city band, if not, can we vote a small levy  
in addition to our present levy; if voted,  
would it be necessary to vote on this special  
levy each year wanted?

Pleasant Hill has a population of 2,330, operates  
under a special charter, and at present we have  
the following tax levy:

General fund	.50 cents
Special road fund	.25 cents
Water works sinking fund (Bonds)	.25 cents
Trafficway sinking fund (Bonds)	.15 cents

Total \$1.15 on each \$100.00 valuation.

We will appreciate this information very much."

I.

A city which has levied the maximum tax permitted  
by the Constitution for general revenue purposes  
can not levy an additional tax for any purpose,  
Nor can the Legislature give it power to exceed  
the maximum rate provided by the Constitution for  
cities of its class.

Section 11, Article X of the Constitution of  
Missouri, ordains as follows:

"Taxes for county, city, town and school purposes  
may be levied on all subjects and objects of tax-  
ation; but the valuation of property therefor  
shall not exceed the valuation of the same property  
in such town, city or school district for State

and county purposes.....For city and town purposes the annual rate on property....in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation.....said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness."

The limitations upon the power of municipal taxation in Section 11, Article X, Constitution are absolute and cover all taxes of every kind and description and these limitations are self-enforcing.

In *Brooks v Schultz*, 178 Mo. l. c. 227-8, the court said:

"Section 1 of Article 10 declares: "The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes."

Section 10 of Article 10 is: "The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Then follows in immediate connections, Section 11 which we have above discussed. The three sections read together mean that the General Assembly may authorize such corporations to levy taxes within the limits specified, but not beyond the limit unless otherwise in the Constitution specified.

In the case before us, the city had already levied a tax of fifty cents on the hundred dollars valuation of taxable property in its jurisdiction; that was the limit of its taxing power, and therefore this special tax of two mills on the dollar for library purposes is illegal....."

In Arnold v Hawkins, 95 Mo. 1. c. 572-3, the court said:

"In this case it appears from the agreed facts that the county has levied and plaintiff has paid a tax of fifty cents on the one hundred dollars valuation for county purposes. The tax of forty cents on the one hundred dollars appears to have been levied to pay warrants issued since November 30, 1875, to pay current court expenses made and created since that date. It, therefore, cannot be a tax to pay indebtedness existing at the date of the adoption of the present constitution; and being levied to pay warrants for county current expenses, it cannot be a tax to pay for erecting public buildings. Indeed it cannot be a tax for any purpose for which a tax in excess of the fifty cents on the one hundred dollars valuation can be levied. It is, therefore, clearly within the constitutional prohibition, and is an illegal tax, the collection of which should be enjoined."

From the latter clause of section 11 of Article X of the Constitution, it appears that said restrictions as to rate, shall apply to taxes of every kind and description, whether general or special except taxes to pay valid indebtedness now existing or bonds which may be issued to renew such indebtedness.

It further appears that the Constitutional limit for a city of the class of Pleasant Hill, for general purposes is fifty cents on each one hundred dollars valuation and an additional levy for any purpose whatsoever, except taxes to pay a valid indebtedness would be illegal and void.

It is therefore the opinion of this department that your city authorities have levied the maximum tax permitted by the Constitution for general revenue purposes, and therefore can not levy an additional tax for any purpose, nor can the Legislature give it power to exceed the maximum rate provided by the Constitution for cities of its class.

Very truly yours,

APPROVED:

W. W. Barnes

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Asst. Attorney General

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Attorney General

**BUILDING AND LOAN:**

Person who pledged stock to association may not vote on any question which affects the claim the corporation has against such person.

11-24  
November 22, 1934.



Hon. Ira A. McBride, Supervisor  
Bureau of Building and Loan Supervision  
Jefferson City, Missouri

Dear Mr. McBride:

This will acknowledge your letters of November 9th and 21st, 1934.

In your letter of November 9th you referred to this office a copy of a letter received by you from the Cottage Building and Loan Association, wherein the following question was asked:

"Our attention has been called to Section 4533 of the 1929 statutes which reads as follows:

'No person shall be admitted to vote on any shares of stock belonging or hypothecated to the corporation in which the election is held.'

"We do not feel that this applies to Building and Loans and would appreciate a ruling from your office or the Attorney-General whether or not this effects Building and Loans."

In your letter of November 21st you ask the following questions:

"First: Does a borrowing shareholder of a Missouri building and loan association who has pledged his stock as security for a loan, have a right to vote at the shareholders' meetings of the association?

"Second: On what basis can a Missouri building and loan association merge its assets with another institution?"

I.

Section 5593, Laws of Missouri, 1933, page 182, provides in part as follows:

"Any corporation heretofore organized or now existing under the laws of this state relating to 'mutual saving fund, building and loan associations,' and any corporation organized in pursuance of the provisions of this article shall have all the powers provided for in this article, \* \* \*."

In State ex rel. v. Brown, 68 S. W. (2d) 55, l. c. 59, the Supreme Court of Missouri, en banc, said:

"Measured by this standard the public policy of this state for more than forty years has been to place building and loan associations upon a different footing from that of corporations created under the general corporation laws of the state."

The Kansas City Court of Appeals in Appeal of Powell and Doyle, 93 Mo. App. 296, l. c. 300, said:

"\* \* \* The defendant is purely a creation of the statute, having only such powers as the statute gives and such as are necessarily implied."

Section 5590, Laws of Missouri, 1931, page 147, in part provides:

"The shareholders of such corporation may make and adopt all necessary by-laws for

the government of the affairs and business of the corporation, provided that the same shall not be inconsistent with the Constitution or laws of the state."

From the above statutes and decisions it is seen that building and loan associations are purely creatures of the statute and are governed by by-laws and the provisions of the statutes relating to building and loan associations. You have not informed us as to the provisions of the by-laws of the association relative to the matter you inquire, thus making it doubly difficult for us in writing an opinion on the subject. We call this to your attention because the by-laws of an association are an important part concerning and governing its activities. We call your attention to a few of the decisions on that matter.

In *Bertche v. Loan & Investment Association of Missouri*, 147 Mo. 343, 1. c. 360, the Supreme Court of Missouri said:

"One who becomes a member of an association becomes chargeable with the knowledge of the provisions of its charter and by-laws and is bound by them. He cannot be ignorant of them, nor can he refuse obedience to them unless indeed they are illegal, and not requiring the performance of acts which the law forbids. By-laws not illegal, and not requiring the performance of acts contrary to law, must therefore be deemed binding upon all persons who become members."

In the case of *In Re Puget Sound Savings & Loan Associations*, 49 F. (2d) 922, the United States District Court said (1. c. 925):

"The shareholders are bound by the statutory provisions and by-laws not inconsistent with the statute."

Nowhere do we find that the statute permits a building and loan association to deal in its own stock, that is, own its own shares of stock. We do find, however, that a shareholder may pledge or hypothecate his stock to the association as security for a loan.



Corpus Juris, Vd. 9, page 954, Article 67, says the following:

"A building and loan association has no power to traffic in shares of its own stock, at least to the prejudice of its creditors."

Section 5612, Laws of Missouri, 1931, page 158, reads:

"No member of any corporation who has borrowed money from the same shall be allowed to vote on any question affecting the claim of such corporation against himself."

It is thus seen that the policy prescribed by the Legislature governing building and loan associations is similar to that prescribed for corporations by virtue of Section 4533, R. S. Mo. 1929. However, as far as building and loan associations are concerned the rule has been relaxed and permits a borrowing shareholder to vote on any question other than that which affects the claim the corporation has against him. Then the right of a borrowing shareholder to vote will be dependent upon the facts in each instant case, that is, whether his vote is on a matter affecting his claim the corporation has against himself.

In conclusion, it is our opinion that Section 4533, supra, does not apply to building and loan associations in the sense that that statute is read as part of the laws governing said associations. However, the effect of such statute does because (1) a building and loan association cannot own its own shares, and (2) because a borrowing shareholder would have no right to vote on a question affecting the claim the corporation has against him.

## II.

In answer to your second question, contained in your letter of November 21st, we advise that we have heretofore ruled

Hon. Ira A. McBride

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November 22, 1934.

on this subject and refer you to our opinions to you, dated March 17, 1934, and June 25, 1934.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

WLH:EG

INTERMEDIATE REFORMATORY: Eligibility of convicts, eliminations of ineligible convicts.

1.22  
January 15, 1934.



Honorable G. W. McLain, Superintendent  
Intermediate Reformatory  
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated December 20, 1933 is as follows:

"I should like to have your opinion in the following instances:

1. According to the Statutes pertaining to the Intermediate Reformatory, only first offenders between the ages of 17 and 25 years shall be accepted at our institution. In case I should receive a prisoner who is under the age of 17 or over 25 years at the time he was sentenced, what disposition should I make of the prisoner? Shall the Superintendent have the power to return him to the Sheriff, his Deputy, or his office in the county from which he was sentenced?
2. Also, it is my belief that in case an inmate who is convicted on the second offense and sentenced direct to Alcoa Farms is received that the Superintendent of the Intermediate Reformatory shall have the power to transfer him to the Penitentiary."

Section 8466 R. S. Mo. 1929, provides as follows:

"An intermediate reformatory for young men, who for the first time have been convicted of felony as hereinafter designated, is hereby established."

Section 8474 R. S. Mo. 1929, provides as follows:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the

January 15, 1934.

first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

Section 8475 R. S. Mo. 1929, provides in part as follows:

"\* \* \* b. The department of penal institutions shall have the power, with the consent of the governor, to transfer to the penitentiary any prisoner who subsequent to his committal to the intermediate reformatory, shall be shown to their satisfaction to have been, at the time of his conviction, twenty-five years of age or over, or to have been previously convicted of a felony; and may also transfer any apparently incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the inmates of the institution. And the superintendent may, by written requisition, request the return to the intermediate reformatory of any person who may have been so transferred subject to the approval of the commissioners. Each person so transferred to the penitentiary shall be held therein, and subject to all rules and discipline thereof until he becomes eligible for release, according to the rules adopted for the penitentiary, unless recalled to the reformatory, as herein provided, by the department of penal institutions. And it shall be the duty of the warden of the penitentiary to receive such prisoners as may be transferred to him, and properly care for them till such time as their return may be asked for or until the time of their official release from said penitentiary. It is further provided, that if in any case it shall be found by the department of penal institutions

and the governor of this state, that a prisoner confined in the Missouri penitentiary or the Missouri reformatory at Boonville, has been improperly sentenced to either of these institutions, and that such prisoner should have been sentenced to the intermediate reformatory, such prisoner may, with the consent of the governor, be transferred to the intermediate reformatory, to be and become an inmate therein, subject to the rules and discipline of such reformatory; and it shall be the duty of the general superintendent of said reformatory to receive such prisoner into said reformatory as may be so transferred, and properly care for such prisoner therein until such time as such prisoner may be lawfully paroled or discharged therefrom. In like manner, transfers may be made from the Missouri reformatory at Boonville to the intermediate reformatory of any offender who, subsequent to his commitment, shall be shown to their satisfaction to have been, at the time of his conviction seventeen years or more of age, but less than twenty-five and for the first time convicted of a felony. In case of any transfers herein set forth the convict is not to remain under the custody of the department of penal institutions for a longer time than that fixed in the original sentence."

Section 8479 R. S. Mo. 1929, provides as follows:

"Whenever an offender shall be delivered to said intermediate reformatory, the officer delivering such offender shall deliver to the superintendent a certified copy of the sentence received by such offender to be furnished by the clerk of the court, and shall take from the superintendent a certificate of the delivery of such convict. In addition to the certified copy of the sentence said officer delivering the prisoner shall furnish the superintendent information regarding the prisoner covering his age, crime for which committed and circumstances thereof, personal history of prisoner including such facts re-

garding his home environment and his habits of industry as shall be helpful to the superintendent also a statement covering his previous crimes, convictions and commitments. It shall be the duty of the prosecuting attorney in the respective counties and the circuit attorney in the city of St. Louis to prepare and furnish such statement to the officer delivering such offender to said intermediate reformatory."

Section 8470 R. S. Mo. 1929, provides as follows:

"The commissioners of the department of penal institutions shall have control of the institutions ~~determine~~ the policy of the same and make necessary rules not inconsistent with the law, for the discipline, instruction, and employment, and release or transfer, of the inmates; cause to be kept proper records including those of the inmates; and audit the accounts of the superintendent monthly."

Under Section 8466 R. S. Mo. 1929, above set out, we see that the original purpose for an intermediate reformatory, in this State, was to accommodate, away from hardened criminals, young men who were convicted as first offenders, of a felony.

The age prescribed for eligibility, as set out in Section 8474, R. S. Mo. 1929, is for youths who have attained their seventeenth birthday but not past their twenty-fifth birthday at the time of their conviction, as a first offender, and the superintendent must receive such convicted persons. In Section 8479 R. S. Mo., 1929, it provides for the procedure of delivery and receipt of the prisoner and charges the superintendent with finding out the prisoner's age before receiving the prisoner.

The Legislature realized that inmates might, through oversight or misinformation as to eligibility, be committed to the intermediate reformatory, while over twenty-five years of age, but is silent as to underage. Again, inmates who were eligible when committed may become incorrigible, and subject to transfer. In such cases, where the inmate is found to be over the age, or to be a second offender, or is found to be incorrigible, then such information should be brought to the attention of those in charge of the department of Penal Institutions as provided in Section 8475, R. S. Mo. 1929, and said Board with the consent of the Governor may



transfer said prisoner to the penitentiary, and the warden must receive.

Prisoners under seventeen years of age are not eligible to confinement in the intermediate reformatory and should under no circumstances be received by the Superintendent, except under the provisions of Section 8475 R. S. Mo. 1929. That is to say, that the department of penal institutions and the Governor under prescribed conditions may transfer prisoners from the penitentiary or from the reformatory which he must receive, but the Legislature although providing in all events for cases where the prisoner received on commitment of court, be over age. They did not provide, in any event, for a prisoner under the age being received on commitment of a court, or in any other manner than upon order of the penal board and Governor.

Since there is no duty upon the Superintendent at Alcoa to receive under age or over age convicts, upon commitments of the courts, the Superintendent can avoid in most cases, an illegal confinement, at the time of admission, by making inquiry from the prisoner or from any source, and the law so provides, and if the Superintendent's discretion which cannot be arbitrary, he believes the prisoner not eligible, then he should not receive the prisoner and grant the statutory certificate of delivery until further proof of eligibility be submitted him, in addition to the court's commitment. Under the provisions of Section 8470, R. S. Mo. 1929, the Superintendent can lay down an institutional rule, which would require proof of age to accompany all commitments of court, and such a rule would not be inconsistent with the law so long as it be enforced with discretion and not arbitrarily.

Under age prisoners who by chance are received at the intermediate reformatory on commitment of court, in our opinion, have no legal status at said institution, and although our Supreme Court has never passed on the point, it is our opinion that said prisoner would be released from the Superintendent at Alcoa, upon a writ of habeas corpus being issued and the cause heard on its merits.

I am in no position to prescribe what shall be done under such circumstances for that would be an invasion of the right of the Superintendent, under the law, to determine the policy of the institution. It is our opinion, that under such circumstances the Superintendent has the power to return such a prisoner to the



Honorable G. W. McLain

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January 15, 1934.

custody of the sheriff of his deputy, in the county in which he was committed.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

STATE BOARD OF HEALTH: Authority to appoint Local Registrar of  
Vital Statistics in Cities. Section 9043  
R. S. Mo. 1929.

2-9  
February 9, 1934.



Hon. E. T. McGaugh, M. D.  
State Health Commissioner  
State Board of Health  
Jefferson City, Missouri

Attention: Dr. Herman S. Gove.

Dear Dr. Gove:

We herewith acknowledge receipt of a request  
for an opinion of this office on the following matter.

Has the Board of Health of this State  
the power to appoint a local registrar  
of Vital Statistics in the Cities of  
Springfield and Hannibal, Missouri?

We understand there is no longer an issue so  
far as the City of Hannibal is concerned, and shall  
therefore deal exclusively with the City of Springfield.  
In connection with this question, I direct your attention  
to one particular fact. This is found in the first  
paragraph of the letter of Ralph W. Langston to Dr.  
E. T. McGaugh, dated September 9, 1933, and received by  
the State Board of Health December 15, 1933. This  
paragraph reads as follows:

"This is in reply to your letter of  
September 7, 1933. On the 3rd day of  
June, 1932, I received my commission  
under date of June 1st, 1932, appointing  
me to the office of Local Registrar of  
Vital Statistics for the 318 Registration  
District, comprising the Primary Regis-  
tration Districts of Springfield City.  
Prim. Dist. No. 2001, North Campbell Tp.  
Prim. Dist. No. 5439 and South Campbell  
Tp. Prim. Dist. No. 5440."

I.

LOCAL REGISTRAR OF VITAL STATISTICS  
TO BE APPOINTED BY STATE BOARD OF  
HEALTH.

Article II of Chapter 52 R. S. Mo. 1929, provides for the uniform and systematic registration of births and deaths in this State. Under this article a central bureau of vital statistics is provided for. Section 9040 of said Article provides among other things as follows:

"The said Board shall be charged with the uniform and thorough enforcement of the law throughout the state, and shall from time to time promulgate any additional forms and amendments that may be necessary for this purpose."

We emphasize the fact that the above section provides for a uniform system of registration of vital statistics. Section 9043 provides as a part of this system, for the appointment of local registrar by the Board of Health and states:

"Within ninety days after the taking effect of this article, or as soon thereafter as possible, the state board of health shall appoint a local registrar of vital statistics for each registration district in the state. The term of office of local registrars, appointed by said board, shall be for four years, beginning with the first day of January of the year in which this article shall take effect, and their successors shall be appointed at least ten days before the expiration of their terms of office: Provided, that in cities where health officers or other officials are conducting effective registration of births and deaths under local ordinances at the time of the taking effect of this article, such officers shall be continued as registrars in and for such cities, and shall be subject to the rules and regulations of the state registrar, and to all of the provisions of this article.\* \* \* \*"

II.

TERM OF OFFICE OF LOCAL REGISTRAR  
OF VITAL STATISTICS IS FOR FOUR  
YEARS FROM JANUARY 1, 1909, AND  
EACH FOUR YEARS THEREAFTER.

The term of office of local registrars is designated as four years, the first term to start from January 1st of the year in which the act was adopted. We find that this section was Section 4 of Senate Bill 149, adopted by the Regular Session of the Legislature of 1909, Laws of Missouri, 1909, page 538. The law was approved by the Governor May 8, 1909. Page 549. By the requirement of this clause, the first term of office of local registrar expired four years from January 1, 1909, and a new term began January 1, 1913 and expired four years thereafter. Likewise a term of this office expired December 31, 1932 and a new term commenced January 1, 1933. Referring to Mr. Langstons' statement, it is apparent that his appointment of June 1, 1932, was merely to fill the unexpired term of his predecessor and that his term of office expired on the 31st day of December 1932.

As stated by the Supreme Court in the case of State ex rel. Rosenthal v. Smiley et al. 263 S. W. 825, 1. c. 827:

"\* \* \* When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion. This rule, which makes for uniformity, and is in consonance with the general intent of our Constitution and legislative enactments, has had the repeated sanction of this court.\* \* \*"

In affirming the foregoing decision in the case of State ex rel. Jones vs. Smiley et al. 300 S. W. 459, the Court specifically held that an appointment, such as we have in the instant case, did not extend beyond the expiration date of the unexpired term, 1. c. 464:

"The order made December 15, 1924, was in excess of the authority of respondents' predecessors in office in so far as said order undertook to appoint a county counselor to hold office after January 1, 1925, and to that extent respondents had full power to set it aside. Treated as an appointment to fill a vacancy for the remainder of the term of the office of county counselor expiring January 1, 1925, the order of December 15, 1924, was valid and authorized relator to hold the office, discharge its duties, and enjoy its emoluments until respondents entered their order of January 3, 1925, appointing Mr. Nolan as county counselor.\* \* \* \* \*

We therefore conclude the appointment of June 1, 1932, was to fill an unexpired term ending January 1, 1933.

### III.

#### APPOINTMENT OF SUCCESSOR AUTOMATICALLY REMOVES INCUMBENT AS LOCAL REGISTRAR.

While it is true that under Article II of Chapter 52 a local registrar may only be removed for cause, in accordance with the provisions of the law, still such restriction does not apply after the term has expired. It is the uniform holding of the Courts of this State that upon the expiration of the term of office the incumbent acts merely at the will or pleasure of the appointive power. In the case of State ex rel. Withers vs. Stonestreet, 99 Mo. 361 l. c. 376, the following is found:

\* \* \* \* But Belt's appointment, for reasons already given, was only effective for the residue of the term of office which had never been previously filled by appointment, and which began on the expiration of Keedy's term of office, to-wit, on the eighteenth day of June, 1887. This being the case, Belt's term of office was only for the remainder of a term of office which had never been fulfilled, to-wit, the time intervening between September 26, 1888, and June 18, 1889. Keedy had no term of office, in any proper sense of that expression, after June 18, 1887. Upon and after

that date, he was a mere locum tenens; a tenant at will, who could be removed without notice, and without charges preferred, at the pleasure of the executive, and the appointment of Belt accomplished his removal. Ex parte Hennen, 13 Pet. 230, 261.\* \* \* \*

While an incumbent may exercise the powers of one office until his successor is appointed it is apparent that the appointment of a successor to Mr. Langston terminated any authority he had by virtue of the office, and from the date of the appointment of the successor, the successor was the only one to exercise the powers and perform the duties of the office.

While the foregoing discussion is determinative of the issue here involved we shall direct a few remarks respecting the proviso found in Section 9043 hereinbefore quoted. For convenience we requote a portion of that proviso:

"That in cities where health officers or other officials are conducting effective registration of births and deaths\* \* \*\*such officers shall continue as registrars in and for such cities.\* \* \* \*"

By a careful reading of the foregoing provision it is apparent that it is only those officials or officers who are in office at the time of the taking effect of the Act who were permitted to act as local registrar, such continuance being conditioned upon their effectual registration of births and deaths and in compliance with the rules and regulations of the Board. It cannot be contended that by the acquisition of the office a person is entitled, without an appointment, to act in the capacity of local registrar. It is apparent from a reading of the Act that it applies only to those "officers" or "officials" who are then conducting the registration. Most certainly the city official in this instance could not qualify as one who was "then conducting", in 1909, an effective registration of births and deaths. The Legislature meant that upon the expiration of their offices the State Board of Health would appoint a local registrar in accordance with the provisions of the Act, and from thence forth continue to appoint local registrars as the office became vacated either by the expiration of the term of office or for any other reason. Any other construction would place the local officials who were, in 1909 conducting effective registration, in office continuously and up

Dr. Herman S. Gove.

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February 9, 1934.

until the present time if they so desired to retain the position as local Registrar. Such a construction is not within the contemplation of the Legislature and certainly cannot be adopted.

CONCLUSION.

It is therefore the opinion of this office that the term of office of Ralph W. Langston as Registrar of Vital Statistics in the City of Springfield, Missouri, expired on January 1, 1933, and that conceding a proper appointment his successor in office has been the Registrar of Vital Statistics from and after the date of his appointment.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM



RELATING TO THE POWERS OF REGISTRAR OF VITAL STATISTICS, AS  
RELATES TO BIRTH CERTIFICATES.

February 12, 1934. 2-17-34



Hon. E. T. McGaugh  
Chairman, State Board of Health  
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter as of date of  
February 6, 1934, in which you state an inquiry as follows:

"Mr. H. C. Mesch of St. Louis  
Missouri is desirous of adopting  
this child, Mary Ellen Brown,  
registered with State of Missouri  
No. 25503, Randolph County, 1931.

Dr. H. C. Griffiths, Moberly, Missouri,  
attended this birth and sent in said  
certificate, same being filed June  
20th, 1931. December 2, 1933, Dr.  
Griffiths sent in this second certifi-  
cate of birth with notation on side  
that same was to clear up a previous  
one on which the mother made a misstate-  
ment as to her real name.

THE INFORMATION WE ARE DESIROUS OF OBTAINING IS:

1. Did Dr. Griffiths have the right  
to issue this second certificate, in name  
of Mary Ellen Conley, without sending with  
same a sworn statement of mother in which  
she made affidavit to the fact that she  
used an assumed name at time of birth of  
this child?

2. Since the Local Registrar where this birth occurred is unable to locate the mother of this child, is there any other way this record can be changed so that Mr. Mesch may go ahead with adoption proceedings?"

I.

The State Registrar of Vital Statistics has the power to require further information relative to certificates of birth as may be necessary and satisfactory.

Section 9057 R. S. Mo. 1929 provides in part as follows:

"The state registrar shall prepare, print and supply to all registrars all blanks and forms used in registering, recording and preserving the returns, or in otherwise carrying out the purposes of this article; and shall prepare and issue such detailed instructions as may be required to secure the uniform observance of its provisions and the maintenance of a perfect system of registration. And no other blanks shall be used than those supplied by the state registrar. He shall carefully examine the certificates received monthly from the local registrars, and if any such are incomplete or unsatisfactory, he shall require such further in-

February 12, 1934.

formation to be furnished as may be necessary to make the record complete and satisfactory. And all physicians, midwives, informants or undertakers connected with any case, and all other persons having knowledge of the facts, are hereby required to furnish such information as they may possess regarding any birth or death upon demand of the state registrar, in person, by mail, or through the local registrar."

We are of the opinion from the foregoing statutory provision that the State Registrar of Vital Statistics has the power to require additional information relative to any birth certificate received by him which is unsatisfactory, and all persons having knowledge of any fact or facts which would render said certificate complete and satisfactory to said registrar, are required to furnish such information as they may possess regarding any birth.

We are of the opinion that this information may come from any person having knowledge of the truth, whether parent, physician, midwife or any other person. If this be true, then it is a matter with the registrar as to what constitutes a satisfactory certificate within the meaning of the law.

Very truly yours,

W. W. BARNES  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

WEB:FE

SCHOOLS: Non-resident tuition.

2/23

February 22, 1934.



Hon. Sam M. McKay  
Prosecuting Attorney  
Jefferson County  
De Soto, Missouri

Dear Mr. McKay:

This is to acknowledge your letter dated February 12, 1934, as follows:

"I have had considerable complaint from persons living in rural communities who have children attending the High School here at De Soto. The School Board has been making the children, or their parents, pay tuition by the month, over and above the amount which the local School District in which they reside was liable. In other words, they divided the \$50.00 supposed to have come from the State, by the months in the school term, and were charging them that monthly rate. In the event they did not pay, they were suspended and refused the grades they had made, etc.

I secured a copy of your opinion, dated November 28th, 1933, given to the Prosecuting Attorney of Cole County, which, if I understand it correctly, holds that a non-resident pupil cannot be charged any sort of a fee that is not chargeable against a resident student.

I wrote to State Superintendent Lee, making an inquiry as to what attitude his Department was taking in the matter, and I have received a letter from J. R. Scarborough, Director of High School Supervision, which I quote below:

'Section 9207, page 25, Revised School Laws 1931, states that boards of education may set up rules and regulations governing the admittance of non-resident students.

The law of 1931, Section 16, page 238, provided that the state would pay the tuition of non-resident students up to fifty dollars, and that the rural districts from which the students come would pay the tuition costs in excess of fifty dollars. This law does not prohibit the charging of a fee from the individual students.

I wish to call your attention to the fact that the state is now paying only about 25% of this fifty dollars, or \$12.50, per pupil.

Let us assume that the pupil cost in De Soto is sixty dollars. I do not know what it is, but am assuming an arbitrary figure for the sake of illustration. The State is now paying only \$12.50. The rural district from which the student comes would be liable for ten dollars per pupil. This would make a total of \$22.50 which the De Soto school would receive for each non-resident student if no charge were made on the individual. I believe you will agree with me that the De Soto school could not afford to take non-resident students at this price when the per capita cost, under our assumption, is sixty dollars.

I am sorry that conditions in the State revenue have made it impossible for the state to meet its obligation, and as a result a large percentage of the high schools in the state are forced to charge fees or reject non-resident students. It would be much better if the 1931 law were financed in full and the individuals relieved of this burden. As much as I regret the necessity of charging fees, it seems that a high school board is acting within its legal rights when it charges these fees.

'If this Department can be of any help in this problem, I shall be glad to have you write me at any time.'

If I understand this letter correctly, they are holding directly opposite to the view contained in your recent opinion.

I would appreciate it very much if you would, after reading their letter, let me have your instructions in the matter."

You are correct in stating that the letter you received from the Department of Education holds contrary to the opinions rendered by this office relative to tuition of non-resident students. You do not state that you have copies of these opinions and we are enclosing herewith same for your information.

Please be advised that this date a mandamus suit was filed in the Supreme Court with this question involved; the style of the case is State ex rel. Mildred Burnett et al., v. Jefferson City High School et al. The litigants, to hasten an early decision, entered stipulation which materially shortened the time allowed under the rules of the court, consequently, by April 15th we believe the court will have rendered its opinion settling this controversial point.

We are cognizant of the fact that the Board of Education has taken a contrary view from that expressed by this office. In fact, we have had conferences, as well as correspondence, over this controversy and we cannot help it if they see fit to substitute their own judgment in lieu of how we interpret the law. However, we do not recede from our first position and will only do so when the Supreme Court of Missouri determines the matter as in conflict to those promulgated by this Department.

We seldom discuss the equities involved in a controversy and only write our interpretation of the law as to what we think the Legislature intended and said. True, in many cases legislation has left individuals in unfortunate situations but this Department is powerless to remedy such a condition.

The Supreme Court of Missouri, en Banc, in the case of State ex inf. Mytton v. Rackliffe, 164 Mo. 453, l. c. 460, said the following on a similar question:

"The courts have no power to reform legislation. As it comes from the hands of the Legislature so we must take it, good or bad, perfect or imperfect, and however much we may regret the unfortunate situation in which this legislation leaves cities of the second class in regard to one of the most important departments of municipal government, it is beyond our power to relieve it."

When the Supreme Court decides the case now pending this Department will no doubt have same digested and copies sent to all Prosecuting Attorneys; so, until that time we leave this matter without further comment or discussion.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG  
Encs.



TAXATION-SCHOOL DISTRICT:

Assessor's duty to indicate district whose land is located in making out list; Sec. 9261, R.S. Mo. 1929 applies only to personal property.

5-14

May 1, 1934.

FILED  
60

Honorable S. T. McIntyre,  
Assessor of Marion County,  
Hannibal, Missouri.

Dear Sir:

This department is in receipt of your letter dated February 8, 1934, wherein you state as follows:

"Referring to Hon. Walter G. Stillwell's letter of December 7, 1933 and also December 28, 1933 to you in regard to School Districts 58 and 59 (Marion County) in which he requested an opinion as to whose duty it is to keep a record of the several school districts.

"You held that this was the duty of the Assessor's office--which I question. It is a fact that there was changes made in districts 58 and 59, or at least there was an attempt made to change these two districts. It was brought out at a meeting of these two districts last night that at no time was the Assessor's office ever consulted about the boundary lines or the land which was consolidated, district 59, until after two years from the time of this consolidation.

"While in Jefferson City some time back I had a talk with Mr. Oliver W. Nolan, Assistant Attorney General, and he advised me to take up with your office any part of this opinion that was not clear. I am, therefore, setting up two sections in question. I would appreciate having an answer and in addition will make a further request to ask, in case of any consolidation or changes in common school districts whose duty is it to make the changes on the plats or the Assessor's and tax books?

"Section 9315 reads that the district clerk shall record the copy of all reports made by him to the county superintendent. He shall also record in the record book of the district a correct plat of the district, changing the same as often as alteration is made in the boundary lines by the proper authority and shall furnish the county clerk and the county superintendent with copies of the same and shall officially notify them of any change whenever made.

"From the above section I am at a loss to know how the Assessor would ever know what boundary lines were changed when he was never notified by the school district or any statute where the clerk of the school district was required to furnish the Assessor with this information.

"In view of Section 9315 are you quite sure that it is the duty of the Assessor's Office to keep a record of the different school districts when there is no provision made for the district clerk to notify him of any changes made in any particular district? The change in the two districts now in question was not brought to the attention of the Assessor until September, 1933 and neither did I know what lands were taken in this consolidation, as I was at no time consulted in regard to any of the boundary lines and had no way of knowing of any changes being made.

"It is possible that I have failed to find the statute wherein I should have sought the information as to the boundaries of the two school districts in question other than the previous assessment book, which showed them to be in the district they were always in. If there is such a statute I would be pleased to have you quote me same. Section 9261 sets out the duties of the county clerk and in the last part of this statute it reads: It shall be the duty of the county assessor in listing property to take the number of the school district in which said tax-payer resides at the time of making his list to be by him marked on said list and also on the personal assessment book, which I do, and which I firmly believe applies only to personal property and in no way applies to real estate.

"I am very anxious to get this matter straightened out and if it is the duty of the Assessor's office or not the duty but if there is some authority for the assessor to request the clerks of the different school districts for the plat of their district. I will be very glad to do the same."

Your question reads as follows: "In case of any consolidation or changes in common school districts, whose duty is it to make the changes on the plats or the Assessor's and tax books?"

Section 9353, R.S. Mo. 1929 provides in part as follows:

\*\*\*\*The county superintendent shall file a copy of the petition and of the plat with the county clerk and shall send or take one plat to the special meeting. \*\*\*\*The county superintendent shall proceed as above set forth and in addition shall file a copy of the petition and of the plat with the county clerk of each county from which territory is proposed to be taken: \*\*\*\*

Under the foregoing section, which applies to consolidated schools, it is the duty of the county superintendent to file with the county clerk the plat which sets forth the limits and boundaries of districts and the land contained therein, and to make all necessary changes on the plats.

Section 9315, R.S. Mo. 1929, applies to common schools and provides as follows:

"The district clerk shall record a copy of all reports made by him to the county superintendent. He shall also record in the record book of the district a correct plat of the district, changing the same as often as alteration is made in the boundary lines by the proper authority, and shall furnish the county clerk and county superintendent with copies of the same, and shall officially notify them of any change whenever made."

Under the foregoing section, if the district is a common school district, it is the duty of the clerk to file the plat with the county clerk; and to make all necessary changes on the plats.

If the district is a consolidated district, it is the duty of the county superintendent to make all necessary changes on the plat, and if it is a common school district, it is the duty of the district clerk to make the necessary changes on the plat.

Section 9769, R.S. Mo. 1929 provides for the delivery of books to the assessor and for their return to the county clerk, reading in part as follows:

"The clerk of the county court shall deliver to the assessor \*\*\*\* the assessor's book of last assessment of real estate, and the list of taxable lands furnished by the register of lands. and take his receipt therefor. and

the assessor, as soon as he shall have completed his assessment and made his assessor's books for the year, shall return the whole of such papers and documents to the clerk."

Section 9778, R.S. Mo. 1929 provides that the assessor's book is to be made, and reads as follows:

"The assessor, on examination and comparison of the list of property delivered by individuals, and the list of lands furnished by the secretary of state, and said maps and plats, and after diligent efforts for ascertaining all taxable property in his county, shall make a complete list of all the taxable property in his county, to be called the assessor's book."

This section sets out the manner in which an assessor's book is to be made and provides, among other things, that the assessor shall make an examination of maps and plats and make a diligent effort to ascertain all taxable property in his county.

Section 9261, R.S. Mo. 1929, among other things, provides as follows:

\*\*\*\*\*it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

In the case of School District v. Bowman, 178 Mo., 1.c. 658, Marshall, J., said:

"Primarily the assessment and collection of taxes are proceedings in rem. Therefore, where the property is actually located is the place where the assessment is made and the tax collected. It is, of course, competent for the Legislature to prescribe where personal property shall be assessed and taxed, and when the Legislature has so prescribed, such regulations must be followed. But when the statute is silent, the ordinary rules of law must obtain."

May 1, 1934.

Sec. 9745, R.S. Mo. 1929 provides in part as follows:

"All personal property of whatever nature and character, situate in a county other than the one in which the owner resides, shall be assessed in the county where the owner resides, except as otherwise provided by section 9763;"

In the case of State ex rel. v. Shepherd, 218 Mo. 656, the Court said (l.c. 663):

"It is conceded by counsel for both appellant and respondent that personal property is taxable at the domicile of the owner and in the school district in which he resides".

#### CONCLUSION

In the light of the foregoing sections, we are of the opinion that in case of any consolidation or changes in common school districts, it is the duty of the county superintendent or district clerk, respectively, to make the changes on the plats and that under Section 9315, supra, if the district is a common school district, it is the duty of the district clerk to file the plat with the county clerk; and under Section 9353, supra, if the district is a consolidated district, it is the duty of the county superintendent to file the plat with the county clerk.

In view of the authorities heretofore cited, it is fundamental that real property is taxable in the school district where located and that personal property is taxable in the school district wherein the owner maintains his legal domicile. We are therefore of the opinion that Sec. 9261, supra, referring to the duties of the county assessor, applies only to personal property. Any other construction of the statute would be meaningless for the reason that it makes no difference where the taxpayer resides with reference to the taxation of real property, said property as heretofore stated being taxable where located. Therefore, in order to give Sec. 9261 any meaning whatsoever, it must be construed to apply to personal property only.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

ROY MCKITTRICK,  
Attorney General

OWN: AM



RELATING TO POWER OF STATE REGISTOR TO MAKE ALL  
RULES AND REGULATIONS TO THE END THAT, PERSONS BORN  
PRIOR TO 1909, EITHER IN THIS STATE OR OUT OF THE  
STATE AND NOW RESIDENTS TO REGISTER BIRTH.

May 9th, 1934 5-14



Dr. L. T. McGaugh  
State Health Commission  
Jefferson City, Missouri

Dear Doctor:

We acknowledge receipt of your letter of  
date May 1st, 1934, in which you state and inquire  
as follows:

"I am hereby requesting your opinion  
concerning the interpretation of the  
amendment 905a to Article 2, Chapter  
52, Revised Statutes of Missouri, 1929,  
entitled "Registration of Births and  
Deaths."

The reading of Section 905a with which  
we are particularly concerned is as  
follows:

Whenever, prior to the taking effect of  
this article, a person was born in the  
state of Missouri, or a resident of  
Missouri born outside this state, such  
birth may be registered in the manner  
and according to, nearly as possible,  
the provisions of section 9053 of this  
article, etc.

The question has arisen as to how it  
would be possible to register the birth  
of a person occurring outside of the  
State of Missouri. It has been our  
opinion that we cannot register such a  
birth but that it must be forwarded on  
to the state in which the said birth  
occurred for registration there.

This question was brought up by Mr. C. D.  
Bray, an attorney at law, at Campbell,  
Missouri.

For your convenience copies of part of  
the correspondence are enclosed herewith."

Dr. E. T. McCaugh

May 9, 1934

I.

State registrar has power and authority to make all rules and regulations necessary and appropriate to register persons born in the state, or residents born out of the prior to 1909, upon application properly made, but registrar must be satisfied of no fraud.

9775

Section 9034a Laws Missouri 1931, page 230  
provided as follows:

"Whenever, prior to the taking effect of this article, a person was born in the state of Missouri, or a resident of Missouri born outside of this state, such birth may be registered in the manner and according to, nearly as possible, the provisions of section 9034 of this article, by filling out blank registration papers secured from the local registrar and filing same, together with a registration fee of \$2.50, with the state registrar of vital statistics. Such papers shall contain the affidavits, sworn to before a notary, of at least two persons, knowing the facts. The state registrar may require further affidavits to establish the truth of the facts endeavored to be made of record by the certificate and may withhold filing of such birth certificate until his requirements are complied with. The state registrar may make and enforce appropriate rules and regulations to carry out this act and to prevent fraud and deception."

The above statute was passed as an amendment to article II of Chapter 52 of the Statutes of this state.

It appears the purpose of the amendment was to provide a way by which persons born in this state prior to this law, which was passed in 1909, and also persons who were born out of the state, but now resident of the state could have their birth registered.

The law provided that proof of the facts relative to such births shall be by affidavits, of at least two. It will be borne in mind, that the state registrar must be satisfied of the truth in relation to any birth coming under this class, and may withhold filing such birth certificates until he is fully



Dr. E. T. McCaugh

May 9, 1934

satisfied that no fraud or deception is attempted in filing a birth certificate.

It further appears the state registrar is empowered to make all rules and regulations necessary and appropriate to carry out said amended act, that fraud and deception may be prevented.

<sup>4995</sup> We hold that the interpretation of said section 2054a Supra, to be that the state registrar has the power and authority to make all rules and regulations necessary and appropriate to effect the registration of persons born either in this state or out of the state, but now residents, thereof prior to August 17th, 1909, when the original act became a law; upon a proper application and a payment of a fee of Two and 50/100 (\$2.50) Dollars.

Respectfully submitted,

W. W. Barnes

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Assistant Attorney-General

APPROVED:

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Attorney General

DEAD BODIES:

DISPOSITION OF SAME WHEN THE PROPERTY OF A PENAL INSTITUTION.

5-21  
May 15, 1934.

Hon. G. W. McLain  
Superintendent  
Algoa Farms  
Jefferson City, Missouri.



Dear Sir:

Your request of May 15th reads as follows:

"One, William Jackson Carroll, our number 865, who was sentenced to this institution from Kansas City, Jackson County, Missouri, on January 29, 1934, to serve a term of two (2) years after having plead guilty to the charge of Larceny of a Motor Vehicle, became ill as the result of an infection on the nose which developed into Cellulitis, and died this morning at 1:30 a.m.'.

"This inmate was taken to prison hospital for treatment for cellulitis. Under the law, is it possible for me to return the corpse to the nearest of kin? If not, what disposition shall I, as Superintendent of the Intermediate Reformatory, make of the corpse under the law.

"I will appreciate an early opinion as this is an emergency."

Section 8472, R. S. Mo. 1929, provides in part

as follows:

"The superintendent, subject to the direction and control of the commissioners of the department of penal institutions, shall:

"(a) Manage said institution and have control over the inmates thereof."

Section 9139, R. S. Mo. 1929, provides as follows:

"Superintendents or wardens of penitentiaries, houses of correction and bridewells, of hospitals, insane asylums and poor-houses, and coroners, sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers in whose custody the body of any deceased person, required to be buried at public expense, shall be and are hereby required immediately to notify the secretary of the board of distribution, whenever any such body or bodies come to his or their possession, charge or control, and shall thereafter dispose of such body or bodies, as the secretary of the state board may direct: Provided, that at any time before said body or bodies have actually been distributed, as provided in this article, any relative or friend of any such deceased person or persons, shall have the right to take and receive the same from the possession of any person in whose charge or custody it may be found, for the purpose of interment: Provided, that when a claim is made for such body or bodies by any person, not a relative of such deceased person or persons, the expense of the interment shall be borne by the person making such claim. The school or college securing such body shall pay all necessary expense incurred in the delivery thereof,

including cost of notice to secretary, which notice shall be by telegraph, when necessary. A correct record of all such bodies, name and date of death, shall be kept in a book kept for that purpose with the county clerk of the county in which such person died, or the city health commissioner of St. Louis city, and such record must be furnished said county officer by person or persons reporting said bodies to the state anatomical board."

#### CONCLUSION.

We are assuming that the Board of Penal Commissioners have left the matter of disposing of this corpse up to you as Superintendent of this institution; that they have not given any directions or asserted their authority over the disposition of this corpse, nor have they laid down any general rule to be followed by you in all cases where you have an inmate to die.

In such a case it is our opinion that you have the right, under your general power to "manage said institution," to dispose of this corpse as provided in Section 9129, supra, but in no other manner, for this section is mandatory.

Under the provision of this section, any relative or friend, for the purpose of interment, may take this corpse from your possession or custody, at any time before it is taken over by the state "board for the disposition and delivery of dead human bodies." There is nothing in this law providing that the state shall pay the expense of returning the corpse to the nearest of kin of ~~the~~ interment.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS  
Assistant Attorney-General.

ROY McKITTRICK  
Attorney-General.

WOS/afj

DEATH CERTIFICATE: By whom to be signed.

8-2

July 27, 1934.



E. T. McCaugh, M. D.,  
State Health Commissioner,  
Jefferson City, Missouri.

Dear Sir:

We acknowledge receipt of your letter of July 10, 1934 asking for an opinion on certain questions raised in a letter from Thomas Chamberlain, Deputy Registrar of Vital Statistics, of St. Louis, Missouri, Mr. Chamberlain's letter being in the following terms:

"We should be very glad if you could secure for us an opinion as to what constitutes a coroner's case. Our understanding, on study of the 'Missouri Statutes', is that the coroner should sign only such death certificates as stated in Section 9047: 'If the circumstances of the case render it probable that the death was caused by unlawful or suspicious means'; followed by, 'where there was an attending physician, medical certificate must be signed by him.'"

At present the coroner in St. Louis signs certificates for the following:

All deaths resulting from accident or injury, including deaths from burns and accidental poisonings, even if such deaths take place as long as a year after the date of the accident and regardless of whether or not there was a physician in attendance.

All deaths of patients who have been in hospital less than twenty-four hours, regardless of care by hospital physicians during that time.

Also when deaths occur in a private home and the dead person is taken to the hospital where he is pronounced dead, the coroner writes in the hospital as the place of death rather than the home address where the death actually occurred. This procedure is often followed in the case of stillbirths which occur in a home; if the mother and dead child are taken immediately to a hospital, the coroner writes in "Enroute to hospital" rather than the home as the place of death of the stillborn child."

We feel that a physician, called in on a case, should always sign a death certificate, regardless of the length (or brevity) of time in attendance, except in cases of suspected unlawful or suspicious means; and that the death certificate should show the actual place of death, not the place where the death was pronounced.

July 27, 1934.

It is our opinion that this office may be placed in a very embarrassing position unless we can learn the correct and lawful procedure and take steps to enforce it."

The questions raised in such request seem reducible to the following: I. What certificates of death are to be signed by the attending physician. II. What certificates of death are to be signed by the Coroner. III. Whether such certificate should show the place of death of the place of the pronouncement of death.

I.

CERTIFICATES OF DEATH TO BE SIGNED BY ATTENDING  
PHYSICIAN.

Revised Statutes Missouri 1929, Section 9046, after providing for the items to be included in the certificate of death, provides as follows:

"The medical certificate shall be made and signed by the physician, if any, last in attendance on the deceased."

and the same section, after providing that such physician shall state the various specified facts in such certificate continues:

"Causes of death, which may be the result of either disease or violence, shall be carefully defined; and if from violence, its nature shall be stated, and whether (probably) accidental, suicidal, or homicidal."

The provisions above quoted show that wherever a physician has been in attendance, even where death was caused in such a manner as to justify or require a Coroner's inquest, such physician shall sign the certificate.

II.

CERTIFICATES TO BE SIGNED BY CORONER.

Revised Statutes Missouri 1929, Section 9047, defines the deaths in connection with which it is the duty of the Coroner to sign a certificate. Such section provides as follows:

"Sec. 9047. Undertaker to notify registrar, when - coroner called in, when - coroner's duties.--In case of any death occurring without medical attendance, it shall be the duty of the undertaker to notify the registrar of such death, and when so notified, the registrar shall inform the local health officer and refer the case to him for immediate investigation and certification, prior to issuing the permit: PROVIDED, that when the local health officer is not a qualified physician, or when there is no such official, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other persons having adequate knowledge of



July 27, 1934.

the facts: PROVIDED, FURTHER, that if the circumstances of the death render it probable that the death was caused by unlawful or suspicious means, the registrar shall then refer the case to the coroner for his investigation and certification. And any coroner whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing death, or the means of death; causes or violence, and whether (probably) accidental, suicidal, or homicidal, as determined by the inquest; and shall, in either case, furnish such information as may be required by the state registrar properly to classify the death."

An examination of this statute shows that for a case to warrant certification of the cause of death by a Coroner for purposes of registration two conditions must exist: (1) absence of medical attendance; (2) a probability that the death was caused by unlawful or suspicious means. The last part of Section 9046 in its juxtaposition with Section 9047 shows that the former was to cover certificates where a physician had been in attendance and the latter to cover cases where a physician is not in attendance, the two being mutually exclusive and designed to cover these two possible types of situations. Attention is called to the first phrase of Section 9047 which provides "in case of any death occurring without medical attendance" upon which phrase depends the rest of such section.

The statement above that the last part of Section 9046 and the whole of Section 9047 are mutually exclusive might seem superficially to be open to attack on the ground that deaths by violence are required by Section 9046 to be certified by the attending physician, and such deaths are by Section 9047 likewise required to be certified by the Coroner. However, it would seem that two different types of certificates are contemplated in such cases, the certification to be made by the Coroner being a certificate of the finding of the Coroner's jury and not the medical certificate of death, so that it is our conclusion that the certificate of death in the form provided for in Section 9046 is never to be signed by the Coroner when the signature of the attending physician is available.

The only situation which has been found in the statutes in which the Coroner is authorized to sign a certificate of death other than cases where death occurs by violence or a casualty and there is no physician in attendance is covered by Revised Statutes Missouri 1929, Section 11634, which provides that in cases where a certificate of the cause of death is necessary for the burial of the body of any person, the Coroner shall make such certificate if requested by relatives or friends of the deceased to do so, in which event the person making such request shall pay all costs, fees and expenses of the inquest and certificate.

The conclusions set out above are confirmed by the adjudicated cases. In O'Donnell v. Wells, 323 Mo. 1170, 21 S. W.<sup>2d</sup> 762 (1929) the admissibility in evidence of a certificate of death was questioned on the ground that such cer-



July 27, 1934.

tificate had not been certified by the proper person, having been signed by the Coroner and the court was led to a rather thorough consideration of the proper form and signature for such certificate. The court reversed a judgment for the plaintiff on the ground that the certificate received in evidence was not properly admissible as not having been signed by the proper person under the statutes. The court in the course of its opinion said:

"Defendant insists the medical certificate must be made and signed by the attending physician. Plaintiff thinks the coroner was authorized by section 5803, Rev. St. 1919, to make and sign said part of the certificate of death. Said section does authorize the coroner to make the medical certificate when the case is referred to him by the registrar as a case without an attending physician and a case where death may have been caused by unlawful and suspicious means. When the coroner is so authorized, he must make the certificate as directed in said section. This duty is incidental to the duties of a coroner under chapter 48 (sections 5916-5957) Rev. St. 1919, which provides for taking inquests of violent and casual deaths. This chapter directs the coroner to perform no duty in aid of the registration of births and deaths.

Defendant's contention must be sustained. It is clear the law-makers had in mind the best information obtainable, for they provided in section 5802, Rev. St. 1919, that the medical certificate of the death certificate must be made and signed by the attending physician. They not only commanded the attending physician to make and sign the medical certificate but provided he would be guilty of a misdemeanor if he failed or refused to do so. Section 5817, Rev. St. 1919. In cases calling for an inquest it would be the duty of the attending physician to notify the coroner. It would then be the duty of the coroner to hold an inquest under chapter 48 (sections 5916-5957) Rev. St. 1919. But the holding of an inquest does not authorize the coroner to make and sign the medical certificate unless the case was referred to him by the registrar as provided in section 5803. If there is an attending physician, the medical certificate must be made and signed by him. In the case at bar, there was an attending physician, and he did not make and sign the medical certificate. It was made and signed by the deputy coroner who was not an attending physician. Therefore it was not made in substantial compliance with the statute and should not have been admitted in evidence." (21 S. W. 765)

2d

## III.

PLACE OF DEATH TO BE STATED

Revised Statutes of Missouri 1929, Section 9046, provides that the certificate of death shall contain, among other things "place of death". A statement in the certificate of the place where the deceased was pronounced dead, omitting the place of death if such was known, would not, in our opinion, be a compliance with this provision of the statute.

5. E. T. McCaugh, M. D.

July 27, 1934.

CONCLUSION.

It is our opinion that certificates of death are to be signed by the physician in attendance, if any, regardless of the length of time of the attendance or the cause of death, and that where the signature of such physician is available, the Coroner has no authority to sign such certificate and, further, it is our opinion that the certificate of death must state the place of death and not the place of the pronouncement of death.

Yours very truly,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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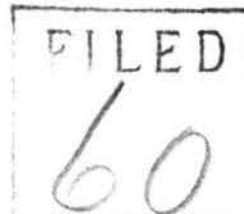
ATTORNEY GENERAL.

CERTIFIED COPIES:

Right of State Registrar of Vital Statistics to Certify  
Photostatic Copies of Birth and Death Certificates.

8.23

August 10, 1934.



Honorable E. T. McCaugh, M. D.  
State Health Commissioner,  
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of July 27th, 1934, such request being in the following terms:

"It is the plan of the State Registrar of Vital Statistics to install a photostating machine to photostat all certified copies of births and deaths sent out from this office. A definite reason for this being that it is impossible to accurately read many of the certificates from which the certified copies are written. The State Registrar feels that all photostatic copies of the original certificate duly certified by him will be much more accurate and much more acceptable than the written form which we are not using.

It is the understanding of the Registrar of Vital Statistics that by the Revised Statutes 1929, Chapter 52, Article 2, Sections 9057 and 9060 he has the authority to make any changes of this character that he desires.

A copy of the photostated material of the type which will be used for certified copies is hereby attached.

It is requested that the Attorney General render an opinion to the State Registrar as to whether or not he is correct in his assumption that it is within his power to make this change in the method of furnishing certified copies of birth and death certificates."

Revised Statutes Missouri 1929, Section 9057, provides in part as follows:

"The state registrar shall prepare, print and supply to all registrars all blanks and forms used in registering, recording and preserving the returns, or in otherwise carrying out the purposes of this article; \* \* \* \*"

From this statute it will be observed that the registrar is given considerable latitude in the matter of determining the form of his records.

Revised Statutes Missouri 1929, Section 9060, provides in part as follows:

August 10, 1934.

"The state registrar shall, upon request, furnish any applicant a certified copy of the record of any birth or death registered under provisions of this article, for the making and certification of which he shall be entitled to a fee of fifty cents, to be paid by the applicant. And any such copy of the record of a birth or death, when properly certified by the state registrar to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated."

It will be observed that Section 9060 imposes no definite type of restriction upon the kind of copies which may be prepared and furnished by the registrar, there being nothing in such statute which would indicate that a written copy would be preferred over a photographic copy of the original certificate.

There seems to be no general provision in the statutes relating to the manner of copying public records for certification. As illustrative of other statutes relating to certified copies are the following:

"Sec. 1652. Copies of, certified by secretary of state.--Copies of any act, law or resolution contained in any such book, now or hereafter deposited in the office of the secretary of state, certified under the hand and official seal of said secretary, shall be received in evidence."

"Sec. 1660. Copies of papers, etc., in office of auditor and treasurer.--Copies of all papers and documents lawfully deposited in the office either of the treasurer or auditor of the state, when certified by such officer and authenticated by the seal of office, shall be received in evidence in the same manner and with the like effect as the originals."

On principle it would seem that a photostatic copy of a public document or record would be more desirable than a graphically transcribed copy because there would be no possibility of error in the former assuming that the photostatic impression was clear and distinct, and likewise a photostatic copy would not involve the risk which would be involved in making a decision as to letters or words which might be indistinct, which decision would be necessary if a written copy were being made, so that it would seem that both upon a construction of the statutes and upon principle and reason there would be no objection to the use of photostatic copies of birth and death certificates.

In conclusion, it is our opinion that the Registrar of Vital Statistics would be authorized to certify photostatic copies of birth and death certificates.

Yours very truly,  
EDWARD E. MILLER

APPROVED:

ASSISTANT ATTORNEY GENERAL.

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ATTORNEY GENERAL.

SCHOOL DISTRICTS:

APPEAL AND SUPERSEDEAS: Where Circuit Court renders judgment of ouster against director, appeal and filing of bond does not act as supersedeas; ousted director is not member of board pending the termination of appeal.

8.17  
August 15, 1934.

FILED  
62

1.2  
Mr. Sam M. McKay,  
Prosecuting Attorney,  
De Soto, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"A few days ago our Circuit Court, in a Quo Warranto proceedings, rendered a judgment of ouster as to the respondents, holding that they were unlawfully usurping the offices of School directors of Consolidated School District No. 1 of this County. These respondents were never elected directors, but claimed their rights by appointment by the County Superintendent of Schools, under the provisions of Section 9290, R. S. Mo. 1929, and the Court held their appointment was illegal, in that the elected directors had never refused to serve, and therefore, there was no vacancy justifying an appointment.

"Said respondents, after said judgment of ouster, took an appeal to the Supreme Court, with leave to file bond within ten days after adjournment of court. The bond has not been filed as yet, neither has the docket fee been paid, but I desire your opinion as to whether the appeal and the giving of the bond, after said judgment of ouster, would operate to suspend said judgment and continue the respondents in office. I find no statute in Missouri to the contrary, and according to 51 C. J. page 363, Note 56, the taking of the appeal and filing of the bond would not operate to suspend the judgment, which I presume is because of the rule that the burden is on the respondent to show his title to the office he claims. State ex rel. v. McCann, 13 M. A. 588; 51 C. J. page 355, note 65.

"If the bond does operate to suspend said judgment and continue the respondents in office, the terms of the elected directors will have expired before the case can possibly be decided by the Supreme Court."

Section 1023, R. S. Mo. 1929, among other things, provides:

"Upon the appeal being made, the court from which an appeal is prayed, shall make an order allowing the appeal, and such allowance thereof shall stay the execution in the following cases, and no others: First, when the appellant shall be an executor or administrator, guardian or curator, and the action shall be by or against him as such, or when the appellant shall be a county, city, town, township, school district or other municipality; second, when the appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court, shall, during the term at which the judgment appealed from was rendered, enter into a recognizance to the adverse party in a penalty double the amount of whatever debt, damages and costs, have been recovered by such judgment, \* \* \*."

Under the foregoing section it is apparent that the allowance of the appeal shall act as a supersedeas in the instances set out under the first subdivision dealing with cities, administrators, etc., and where an appeal bond has been filed. Whether or not an appeal, where a bond is filed, under the foregoing section, will operate as a supersedeas depends, as we understand, on whether or not the judgment appealed from is self-enforcing. If the judgment is not self-enforcing and requires no action upon the part of the court, then the appeal and bond does act as a supersedeas, but if the judgment is self-enforcing, then the appeal and bond does act as a supersedeas. It is said in *State ex rel. v. Hennings*, 194 M. A. 545, 549, as follows:

"It is true that certain judgments are held not to be within this statute, and remain in operation and effect notwithstanding the allowance of an appeal and the giving of the statutory bond. But these are judgments which may be termed self-enforcing, or which, at any rate, are of such character as to require the aid of no writ, process or proceedings to



make them operative or effective. Thus it is said that a judgment suspending an attorney from the practice of his profession is not suspended, during appeal, by the giving of an appeal bond (State ex rel. v. Woodson, 128 Mo. 1. c. 518, 31 S. W. 105, citing Walls v. Palmer, 64 Ind. 493); and that the operation and effect of a judgment revoking a saloon license is not stayed or suspended pending an appeal with bond (see State ex rel. v. Denton, 128 Mo. App. 1. c. 314, 107 S. W. 446). And it is held that an appeal, with bond, from a final decree granting an injunction which does not affirmatively command something to be done, but which restrains the commission of an act or acts, does not have the effect of dissolving the injunction or suspending the operation of the decree, pending the appeal (see State ex rel. v. Dillon, 96 Mo. 56, 8 S. W. 781); though the court rendering the decree may be called upon to take positive action, by way of contempt proceedings, to prevent a subsequent violation thereof."

A judgment of ouster in which an official is ousted from office has been held to be self-enforcing and, therefore, an appeal and bond will not act as a supersedeas. The Supreme Court, in the case of State ex rel. v. Woodson, 128 Mo. 497, 517, has the following to say on this subject which we believe correctly states the law:

"Furthermore, when a judgment of ouster is rendered, whatever may be the form of procedure, whether by quo warranto or information in that nature, or some special statutory method, the result reached is the amotion of the then tenant of the office, and the party thus ousted is divested of all official authority so long as the judgment remains inforce.

"And when a judgment is self-enforcing, a supersedeas does not alter the state of things created by the judgment from which the appeal is prosecuted. Elliott, App. Proc., sec. 392, and cas. cit. This doctrine finds striking illustration in a case where a judgment suspended an



attorney from practice, and it was ruled that the judgment executed itself, except as to collection of costs and that granting a supersedeas only suspended the right of such collection and did not allow the attorney to practice pending the appeal. *Walls v. Palmer*, 64 Ind. 493.

"In *Mayor, etc., v. Shaw*, 14 Ga. 162, where Shaw, the marshal of Macon, had been removed by the mayor and council on charges preferred, it was held that a writ of certiorari did not reverse that judgment, nor supersede the execution of it.

"And in *State ex rel. v. Meeker*, supra, it was ruled that where an officer has been removed for misconduct by a county board, that the removal by the judgment of ouster having been accomplished, the filing of a supersedeas bond did not reinstate the removed officer.

"For the reasons aforesaid, we hold that the appeal taken and bond given by relator, after judgment of ouster pronounced against him, did not vacate, supersede or in any manner affect that judgment, and therefore the trial court very properly issued an attachment against him. In consequence of this view, we deny the writ of prohibition."

While our statute does not expressly make provision for this kind of a case, yet the above decisions do not construe the statute as applying to all judgments, but to only those judgments which are not self-enforcing. We believe, under the foregoing quotations, that the judgment declaring the school director not legally elected is self-enforcing, and since it is self-enforcing the appeal and bond will not act as a supersedeas. Subh being true, the ousted director, while the judgment of the Circuit Court stands, is no longer an official member of the board.

It is therefore the opinion of this Department that under the foregoing facts and authorities, where the judgment of the Circuit Court was for the ouster of the director, that an appeal by him, where the required statutory bond is filed, will not act as a supersedeas. Subh being true, he cannot hold the office pending the appeal.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

✓  
MEDICINE--PRACTICE OF MEDICINE--INJUNCTION will lie to restrain any person engaged in the practice of medicine without a license, and same is to be brought by the Prosecuting or Circuit Attorneys in the County or City where the alleged offense occurred.

9-12

September 4, 1934.



Dr. E. T. McGaugh  
State Board of Health  
Jefferson City, Missouri

Dear Dr. McGaugh:

This Department is in receipt of your letter of July 30, 1934, requesting an opinion wherein you state in part as follows:

"I am writing to have your opinion whether or not the State Board of Health of Missouri, under existing laws, may restrain any one from practicing medicine by permanent injunction.

"In Iowa they have a law-Injunction against illegal practice, which reads as follows: 'Any person engaged in any business or in the practice of any profession for which a license may be restrained by permanent injunction.' Section 2519 of the Code of Iowa, 1931. The Iowa law further provides that the state department of health shall enforce the provisions of the act and make the necessary investigations relative to it. The law also makes it the duty of the attorney general and the county attorney to institute and prosecute the proper proceedings against any such defendant.

"The use of such an injunction is also authorized in the State of Indiana by legislation that has been enacted. Have we any such authority?

Section 9118 R. S. Mo. 1929, prohibits the practice of medicine and treatment of the sick and reads in part as follows:

"Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever,

or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the State board of health, as provided in this article, or after the revocation of such license by the state board of health, as provided in this article, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days nor more than one year, or by both such fine and imprisonment for each and every offense; and treating each patient shall be regarded as a separate offense.  
\* \* \* \*."

Under the above statute, any person practicing medicine without a license from the State Board of Health is deemed guilty of a misdemeanor and punishable by fine and imprisonment or both.

The vital question in your query is: Can the remedy by injunction be resorted to for the purpose of preventing one practicing the profession of medicine without complying with the provisions of the Statute by procuring a license and complying with its other requirements?

A general proposition of law usually laid down is that the equitable relief of injunction may not be employed to enjoin a defendant from the commission of a crime, and we have no quarrel to make with the broad statement of the doctrine as stated by all text writers. However, a reading thereof will disclose that many exceptions have been ingrafted on the doctrine as so broadly stated, and that courts in the exercise of equitable jurisdiction will in a number of cases employ the injunctive remedy to prevent the commission of forbidden acts, although the perpetrator may be guilty of a crime or subject himself to a penalty by committing them.

Mr. Pomeroy in his excellent work on Equitable Remedies (1919 Ed.) Vol. 5, Section 1893, and which is Section 478 of his Equity Jurisprudence to which his Equity Remedies is supplemental, at the beginning of that text the learned author says:

"As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it."

In the case of State ex rel. Attorney General v. Canty, 105 S. W. 1078; 207 Mo. 439, 1. c. 449, our Court had before its consideration and determination what a public nuisance was within the meaning of the law. The Court in its opinion said:

"Mr. Joyce, in his valuable work on the Law of Nuisances, section 5, defines a public or common nuisance in the following words: 'A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property required, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights of property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury or damage may be unequal or may vary in its effect upon individuals. \* \* \* \*'"

According to the above definition, a public nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the public right to life and health requires.

The Supreme Court of Kansas in the case of State v. Lindsay, 116 Pac. 207, 85 Kan. 79, 35 L. R. A. (N. S.) 810, had before it a question precisely analogous to the one involved here. A statute of that state provided that owners and operators for compensation of institutions for the care and treatment of persons mentally deranged or of unsound mind should first obtain a license from the State Board of Health. The Defendant in that case undertook to operate such an institution without first obtaining the statutory license, and the State Board of Health filed an action to enjoin him from doing so. The relief was granted notwithstanding the fact that the statute provided for a penalty for operating the institution without license. The Court recognized the general doctrine, supra, that ordinarily a Court of equity would not enjoin the commission of a crime and the reluctance with which it would in any case do so, but said:

That the relief would be granted unhesitatingly "where the remedy is not adequate and it is necessary to protect the rights of the public or an individual. A Court is not powerless to prevent the doing of an act merely because it is denounced as a public offense."

Further along in its opinion it is said:

"The obligation of the government to promote the interest of all, and to prevent the wrong doing of one resulting in injury to the general welfare, is often sufficient to give it a standing in Court to obtain an injunction.\* \* \* \*."

The Supreme Court of the United States in the case of *In Re: Debbs*, 15 S. C. 900; 158 U. S. 564; 39 L. E. 11092, 1. c. 1102, in commenting on the right of the government to maintain an equity action for an injunction, although the violations involved constituted a crime, said:

"Every government, entrusted by the very terms of its being with the powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court."

In the case of *State ex rel. v. Lamb*, 237 Mo. 437, 1. c. 457, the Court in answering the argument that Courts of equity will not lend their aid in the enforcement of criminal laws or in restraining acts which are criminal in their nature said:

"We have ruled many times that injunction will not lie to prevent the commission of a crime. We said in the *Canty* case, speaking through Woodson, J., that 'this court has uniformly held that a court of equity



has no jurisdiction to enjoin the commission of a crime; ' but Judge Woodson said further in that case (l. c. 459): 'The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State, is not tenable.' And the court, speaking further through Valliant, J. says (l. c. 460): 'A court of equity will not undertake to enforce the criminal law; therefore it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withhold its equitable relief in a case in which, for other reasons, it has jurisdiction, merely because the act when committed would be a crime.' "

#### CONCLUSION.

Section 9118 R.S. Mo. 1929, supra, prohibiting the practice of medicine and treatment of the sick without a license is intended to protect those in need of medical treatment and to, in a measure at least, guard against empiricism and incompetency in said profession. The statute was enacted in furtherance of a high and most commendable public policy. It has in view, not only the possible consequences ordinarily resulting from inefficiency, but also the protection of the lives of the patients which might be placed in peril if the incompetent practitioner of medicine was permitted to ply his trade; for it is a well known fact that modern methods of treatment of those needing the services of a physician require the administration of deadly concoctions, and those intrusted with prescribing them should be qualified for the purpose. It was the intention of the Legislature by this statute to require Medical Doctors to be licensed, in order that they may standardize their profession to the highest degree of public service.

The statute involved here is not purely a criminal one. It was enacted under the police power of the State and in

furtherance of a wholesome public policy. The purpose was not to create a crime, but to provide for the public welfare. The criminal feature was only intended as a deterrent and a partial restraint, and was inserted for the purpose of admonishing the practitioner that he must comply with the salutary terms of the statute, and which compliance was the chief purpose in enacting the statute, the penal section being merely incidental and collateral thereto.

In view of the foregoing, we are of the opinion that equity will not enjoin the commission of a crime as such, but where the chief purpose of the statute as here, is the protection of health and life of those needing medical service, injunction will lie to prevent the practice of medicine without a license notwithstanding such unlicensed practitioner lays himself open to penalties imposed by Section 9118 R. S. Mo. 1929, supra.

The next question for determination is one of practice. Who is to institute the proceedings to enjoin the practice of medicine without a license?

Section 9118 R. S. Mo. 1929, provides in part as follows:

"Upon receiving information that any provision of this section has been or is being violated the secretary of the state board of health shall investigate the matter and upon probable cause appearing shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney in the county or city where the alleged offense occurred.\* \* \*"

Section 11316 R. S. Mo. 1929, describes the powers and duties of the prosecuting attorney and authorizes the prosecutor to proceed at the relation of the State of Missouri in all cases where the State or county may be interested.

In the case of State ex rel. v. Lamb, 237 Mo. 437, 1. c. 455, our Court said:

"Our conclusion is that the prosecuting attorney was authorized by law to institute a suit in the circuit court of Chariton county to enjoin, in behalf of the State, a public nuisance,\* \* \*"



Dr. E. T. McGaugh

-7-

September 4, 1934.

In view of the foregoing we are of the opinion that a prosecuting or circuit attorney may upon a complaint from the State Board of Health that any person is practicing medicine without a license, proceed in a suit in equity at the relation of the State to enjoin them; such suits being brought in the County or State where the nuisance is being perpetrated.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

H  
DEAD BODIES - Right to remove from one registration district  
to another without permit.

4-2 ✓  
FILED  
60

September 20, 1934

State Board of Health of Missouri,  
Jefferson City, Missouri.

Attention E. T. McGaugh, M. D.,  
State Health Commissioner

Gentlemen:

A request for an opinion has been received from  
you under date of September 1st, 1934, such request being  
in the following terms:

"If a person dies in a Hospital, can the  
undertaker from his home town claim the  
body, and remove to a neighboring county  
for burial, and is it necessary for him  
to get a permit from the local registrar  
in the city in which the death occurred to  
remove the body or can he remove it and have  
the local registrar, where the death oc-  
curred, issue him a permit for burial?"

Some hospitals in the city have forbade  
county undertakers from coming to the hos-  
pital and taking bodies back to the county  
in which they live, without procuring a  
burial permit before the body is moved. I  
want to know if the body can be moved with-  
out a permit, and the permit procured from  
the local registrar where the death occurred,  
before the body is buried, at a later date."

Revised Statutes Missouri 1929, Section 9044, pro-  
vides in part as follows: (as amended, Laws of Mo. 1933, p. 270):

"The body of any person whose death occurs  
in the state shall not be \* \* \* removed from  
or into any registration district until a  
permit for burial, removal or other disposi-  
tion shall have been properly issued by the  
local registrar of the registration district  
in which the death occurs. Provided, no such  
removal permit shall be required when a dead

2. State Board of Health of Missouri.

September 20, 1934

body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs. And no such burial or removal permit shall be issued by any registrar until a complete and satisfactory certificate of death has been filed with him as hereinafter provided:"

It is therefore our opinion that no removal permit is necessary for the removal of a dead body from one registration district into another for the purpose of preparing such body for burial, although of course, a burial permit must be obtained before the ultimate disposition of such body can be made.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

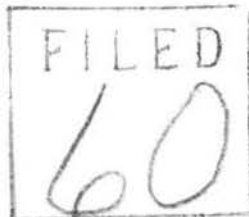
APPROVED:

(Acting) ATTORNEY GENERAL

GAMBLING - "Whiffle Boards"

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10-5  
October 3, 1934



Honorable J. B. McGuffin  
Prosecuting Attorney  
Lawrence County  
Mt. Vernon, Missouri

Dear Sir:

We received your request of September 25, 1934 for an opinion as to whether or not "Whiffle Boards" are gambling devices. Your letter, describing such boards, is as follows:

"I assume that you know what these last devices are. They are operated by placing a nickle in receptacle, and pushing a lever. Then a marble is shot out, and if it lands fortunately, a payoff is due, which may be a dollar (or more or less); if it lands unfortunately then they claim you have merely paid a nickle for the privilege of playing the machine. I believe that is about the way it is operated.

"They claim that the operation of this last named machine is a matter of science or skill, and not a gambling device."

From your letter, it is apparent that this machine is a device, designed for gambling, and comes within the statute, Section 4287 R. S. Mo. 1929, defining criminal offenses as follows:

#2 - Honorable J. B. McGuffin

"Every person who shall set up or keep any table or gaming device \* stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property \* \* shall, on conviction, be adjudged guilty of a felony, \* \* "

The essential elements of a lottery are consideration, chance and prize. - State v. Emerson, 1 S. W. (2d) 109 (1927). The Whiffle Boards contain all these elements, and for convenience are set out as follows:

- (1) Prize - The payoff of one dollar more or less.
- (2) Chance - Depending upon the marble coming to rest in some particular niche or hole. If it lands in one hole you win; if it lands in others, you lose.
- (3) Consideration - The placing of a nickle in the machine and pushing of a lever.

It is, therefore, the opinion of this office that "Whiffle Boards" are gambling devices prohibited by the laws of the State of Missouri.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

MEDICINE - Qualifications necessary to right of applicant for license to practice medicine to be examined for registration by the State Board of Health.



October 8, 1934.

The State Board of Health of Missouri,  
Jefferson City, Missouri.

Attention: E. T. McGaugh, M. D.  
State Health Commissioner

Gentlemen:

A request for an opinion has been received from you under date of September 12, 1934, such request being in the following terms:

"The State Board of Health of Missouri desires that you render them an opinion upon the following subject:

'Is it mandatory upon the Missouri State Board of Health to accept, for examination, students who have graduated from some foreign medical school, provided that they are passed upon favorably by the New York Medical Association?' "

I

STATUTORY PRELIMINARY REQUIREMENTS FOR EXAMINATION.

R. S. Missouri 1929, Section 9113, provides that persons desiring to be examined for the purpose of securing a license to practice medicine in this State must, before they are entitled to be examined on their substantive medical knowledge, satisfy the State Board of Health that they possess three preliminary requirements, these being (1) high school education or its equivalent, (2) a diploma from a reputable medical college with a certain type of graduation requirement, and (3) good moral character. That part of such statute so providing is as follows:

"All persons desiring to practice medicine or surgery in this state, or to treat the sick or afflicted, as provided in section 9111 of this article, shall appear before the state board of health, at such time and place as the board may direct and there shall be examined as to their fitness to engage in such practice. All persons

appearing for examination shall make application in writing to the secretary of the said board thirty days before the meeting. They shall furnish satisfactory evidence of their preliminary qualifications, to-wit, a certificate of graduation from an accredited high school, or its equivalent. They shall also furnish satisfactory evidence of having attended throughout at least four terms of thirty-two weeks of actual instruction in each term and of having received a diploma from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at time of graduation; provided that the time of graduation has been since March 12, 1901, and two years' requirements if the date of the graduation is prior to March 12, 1901, and shall also furnish evidence of good moral character."

While the language of the statute would not require the elucidation, we quote from the opinion of the Court in the case of *State ex rel. Abbott v. Adcock*, 225 Mo. 335, 124 S.W. 1100 (1910), which in discussing such statute, says:

"By reading that section of the act it will be seen that it requires three things of each applicant who desires to be examined, touching his qualifications to practice medicine and surgery in this State, namely: first, that he shall make application in writing to the secretary of the board thirty days before the meeting thereof; second, that he furnish to the board satisfactory evidence of his scholastic qualifications, as therein provided for; and, third, that he shall also furnish to the board satisfactory evidence of having received a diploma from some reputable medical college of four years' requirement at the time of his graduation.

The act mentioned does not undertake to state what medical colleges are or what are not reputable within the meaning thereof; but by clear implication it leaves that question for the determination of the Board of Health. This is made manifest by the act requiring the proof of reputation to be furnished to the board when the applicant presents himself for examination, and by withholding from the board the authority to issue the license until such satisfactory evidence is furnished. There is no pretense in this case that relators or any of them furnished or offered to furnish any evidence



whatever tending to show that the Barnes University, the one from which they had graduated and from which they held their diplomas, was a reputable medical college within the meaning of that act. In our opinion the language of this act is susceptible of no other construction than that it placed the burden upon the relators, when they presented themselves for examination before the board, to prove to its satisfaction by satisfactory evidence the reputableness of Barnes University, and especially the medical department thereof." (225 Mo. 356-7).

We assume from your letter that the first and third of the preliminary requirements are not in question and that the only question raised is as to the second preliminary requirement, i.e. the reputability and graduation requirements of the medical school attended.

## II

### WHAT AN APPLICANT FOR EXAMINATION MUST SHOW AS TO HIS MEDICAL COLLEGE.

To enable an applicant for a license to practice medicine to the right to be examined on his substantive medical knowledge, he must be able to satisfy the Board of Health that he has received a diploma from a medical college having at least the requirements of the statute set out above, and he must likewise satisfy the Board that such college is a "reputable" medical college. The quotation above from State ex rel. Abbott v. Adcock shows that the burden of proving these facts is on the applicant, and R. S. Missouri 1929, Section 9114, provides that this question of fact is left to the determination of the Board. Such section provides as follows:

"The question as to whether any medical school is one entitled to recognition, by the state board of medical examiners, as a medical school of good standing and the action of said medical examiners in refusing a license to any applicant is hereby declared to be a question of fact and any person aggrieved by reason of the action of the board, shall have the right to have such question reviewed by suing out a writ of certiorari in the circuit court and such question shall be tried de novo by the court issuing such writ, and the court of review shall render such judgment as should have been rendered in the first instance."

The Board of Health cannot refuse to hear the applicants on whether or not their school is entitled to recognition. In the case of *State ex rel. Abbott v. Adcock*, supra, the Board had adopted in 1907 a rule eliminating the burden of proof on the applicant if the college from which he had graduated had certain minimum requirements. The Court in discussing this rule said:

"But suppose, for argument's sake, we are in error in our views before expressed regarding the meaning and object of said rules of the board establishing said standards, and that it was the intention of the board to thereby notify, in advance, all persons who might present themselves for examination for licenses to practice medicine and surgery, that it would examine no one except those who presented a diploma from some one of the medical colleges which had adopted said standards. Still, that would no more excuse the applicant for examination from tendering to the board such evidence as he might have, tending to prove that his alma mater was a reputable school within the meaning of said act, than would the adoption of a rule by a judge upon the bench, promulgated a year in advance, to the effect that on and after a certain date he would try no case except where the plaintiff held a certificate from a minister of the Gospel stating that he belonged to a church which believes in and teaches the Christian religion, would excuse the plaintiff from offering whatever evidence he might have tending to prove his case, even though he held no such certificate. Both, such rules of the board and of the court, would be illegal and void, and would constitute no legal bar to the applicant's right to stand the examination for his license, nor to the plaintiff's right to have his case tried according to law." (225 Mo. 361).

If such a rule of the Board is still in effect and if the applicant is able to show that the New York Medical Association has as high standards as the minimum standards required in such rule, this case would seem to stand for the proposition that this would be sufficient proof by the applicant for his examination and license. In any event, whether such a rule is in effect or not, the evidence as to the qualification of the school from which applicant has received a diploma must be heard by the Board. This is settled by the same case in which it was argued that the rule above discussed was void on the ground that properly construed it prohibited the right of the applicant to offer proof as to the qualifications of his medical college. The Court said that such a construction was improper and the true construction of the rule

5. The State Board of Health of Missouri.

October 8, 1934.

was merely to eliminate the trouble and expense to applicants of making complete proof where the medical college from which they had graduated met the minimum requirements of the rule. The Court then continued:

"That rule simply provides that all medical colleges, wherever located (and not simply those situate in this state), which should on or before October 1st, 1907, conform to the standards specified in the schedule of minimum requirements, adopted by the board on July 11th, 1907, 'should be rated and classified as accredited and reputable, and whose students, after being graduated therefrom, should be admitted to the examination of the State Board of Health for licenses to practice medicine and surgery in the State of Missouri,' without being required to furnish other proofs of reputableness, and thereby save each of them the time, cost and expense of furnishing the proofs required of them by said act." (225 Mo. 359).

This last quotation likewise settles the fact that whether the medical college is in Missouri or elsewhere is immaterial.

In conclusion, it is our opinion that before an applicant for a license to practice medicine in this State is entitled to an examination on his substantive knowledge of medicine, he must as a preliminary requirement satisfy the State Board of Health that he has a diploma from a medical college having the statutory requirements for graduation of R. S. Missouri 1929, Section 9113, that the reputability of such college is a question of fact to be determined by the Board, but that regardless of any rule which the Board might adopt, it must hear and examine evidence of the applicant as to whether or not the medical college from which he has a diploma conforms to the statutory requirements, and it is our further opinion that if there is at present in force a rule of the State Board of Health dispensing with this burden of proof where the medical college from which the applicant has a diploma has certain minimum requirements and the applicant is able to satisfy the State Board of Health that the requirements of the New York Medical Association are as high as the requirements of such rule in every respect, that the applicant would have a right to be examined as to his substantive medical knowledge without making further proof as to his college, assuming that the applicant is able to satisfy the Board that he has had a high school education or its equivalent and is of good moral character.

Very truly yours,

APPROVED:

Edward H. Miller  
Assistant Attorney-General

~~Attorney-General~~

ASSESSOR: Rights of assessors in counties of less than 25,000 to succeed himself in office.

10-13  
October 12, 1934.



Mr. F. B. McNeely  
Macon County Assessor  
Atlanta, Missouri

Dear Sir:

Your request for an opinion dated September 17, 1934, is as follows:

"Will you please advise me if there is any law against an Assessor holding office, any limit of time in Counties with a population of less than 25,000."

Section 9749, R. S. Mo. 1929, as amended by Laws of 1931, page 376, provides as follows:

"At the general election in the year one thousand nine hundred (thirty-two,) and every four years thereafter, there shall be elected by the qualified voters of the several counties in this state a county assessor, who shall hold his office for a term of four years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that this section shall not apply to the city of St. Louis."

Under the amended law as above set out, which is the only law in point, it is the opinion of this office that there is no limit in counties of less than 25,000 population to the number of times that a county assessor can succeed himself in office.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.  
WOS. H

COUNTIES - Liability for personal injuries caused by negligence.

12-13  
December 4, 1934.

Hon. Sam M. McKay,  
Prosecuting Attorney of Jefferson County,  
DeSoto, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of November 24, 1934, such request being in the following terms:

"At the request of the County Court of Jefferson County, Missouri, I want to state a case to you for the purpose of having you give us a written opinion on it.

Jefferson County maintains its roads by a system of maintenance men, who have charge of the machinery used in their district. When a maintenance man needs any help in operating graders and so forth, he has regular helpers.

On the 31st day of Jan., 1933, one of our maintenance men's helpers was unable to work and sent his father to take his place on the grader. The maintenance man was running the tractor with two men on the grader. In some way the grader was overturned, on account of getting too close to an embankment, and the old man who was taking his son's place was severely injured, his leg being crushed and broken below the knee. A local doctor gave him temporary treatment and sent him immediately to St. Anthony's hospital, where he was confined for a number of weeks before he was able to be moved home. He is still badly crippled and requires the care of a doctor.

The maintenance man nor the Highway engineer did not make a report to the County Court, so far as the record shows, until after the injured man was out of the hospital. The doctor bills and hospital bills together with the home treatment amount to somewhere near \$1500. This injured person has filed a claim with the County Court asking for the payment of all



2. Hon. Sam M. McKay.

December 4, 1934.

his expenses and additional damages on account of his permanent injury.

The County Court asked for my opinion, and I advised them that the county was not liable, being a subdivision of the State. The County Court has accepted my opinion as being the law, but in discussing the matter with them I suggested to them that it might be well to get an opinion from your office, and they then asked me to procure it for them.

Our County Court meets on the first day of December and I would appreciate the receipt of the opinion by that date."

In the case of Moxley v. Pike County, 276 Mo. 449, 208 S. W. 246 (1918), a personal injury suit against a county, based on negligence, was before the Supreme Court of Missouri which held that such a suit could not be maintained against a county. The court said:

"When, for convenience in the administration of its laws, the State, through the Legislature, calls to its aid those territorial organizations sometimes called, with more or less accuracy, quasi-corporations, such as counties, townships and school districts, the question has frequently arisen whether these agencies share, with the State itself, immunity from common-law liability for the negligence of their officers in the exercise of their territorial duties. The answer, from the courts of this State, has generally been a negative one. From Beardon v. St. Louis County, 36 Mo. 555, down to Lamar v. Bolivar Special Road District, 201 S. W. 890, are many cases which will be found collected in the case last cited which have settled the general principle so firmly that it is not questioned by this appellant." 276 Mo. 453.

In conclusion, it is our opinion that a county of this State is not liable for personal injuries caused by the negligence of officers or employees of the county.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKittrick  
Attorney-General

INSURANCE - FIRE -  
SCHOOL DISTRICT:

"A COPY OF THIS OPINION SHOULD NOT BE RELEASED  
BECAUSE IT IS QUESTIONABLE WHETHER OR NOT IT  
EXPRESSES THE LAW AT THE PRESENT TIME. STUDY  
IS BEING MADE TO DETERMINE WHETHER OR NOT IT  
SHOULD BE WITHDRAWN."

J.M.D.

January 17, 1934

Honorable Edward H. Miller  
Assistant Attorney General  
418 Olive Street  
St. Louis, Missouri



Dear Mr. Miller:

Receipt of your letter dated December 30, 1933,  
is acknowledged. The letter is as follows:

"I am enclosing a request for opinion made by Emmet V. Thompson of St. Louis, member of the insurance firm of Thompson, Kincade, O'Connor & Powers, regarding mutual fire insurance companies, such request being dated December 6, 1933, with supplemental letter dated December 11, 1933, and I am also enclosing specimen policy, copy of opinion rendered by you under date of October 24, 1933 to Board of Education, Normandy Consolidated School District, Fred B. Miller, Superintendent, 6701 Easton Avenue, St. Louis, Missouri, and also article reprinted from January 1931 issue of Journal of American Insurance.

It seems to me that your opinion above referred to covers this precise point, and I am prepared to write to Mr. Thompson stating that the matter has already been ruled upon and referring him to your opinion, if such a course would meet with your approval. My point in writing you and sending you this material is chiefly to mention the article from the Journal of American Insurance for your consideration which was of considerable interest



January 17, 1934

to me, and if the view expressed in your opinion is not modified after reading such article, and you will so advise me I shall write to Mr. Thompson along the lines above suggested. When you have finished with these documents, will you please return them to me?"

Numerous inquiries have been addressed to this office concerning our opinion to the Board of Education of Normandy Consolidated School District dated October 24, 1933. An answer to your letter will serve as an answer to all such inquiries.

In *Rosebraugh v. Tigard* 252 Pac. 75, the Supreme Court of Oregon defining mutual insurance, at page 77 of the opinion said:

"In a mutual insurance association, the system is that the members mutually insure each other. It is that form of insurance in which each person insured becomes a member of the company or association and members reciprocally engage to indemnify each other against losses; any loss being met by an assessment laid on all members. As an object to be effected, mutual insurance does not differ materially from any other kind of insurance; it is not properly a distinctive class of insurance, but may embrace all other classes. A mutual insurance association is one in which the members are both the insurers and the insured; and the premiums paid by them constitute the fund which is liable for the losses and expenses, and they share in the profits in proportion to their interest and control and regulate the affairs of the association. 32 C. J. Sec. 67, p. 1018."

In *Lamb and Company v. Merchants' Nat. Mut. Fire Ins. Co.* 119 N. W. 1048, the Supreme Court of North Dakota discussing mutual insurance, at page 1049 of the opinion said:

"May on Insurance, at section 146, says: 'Mutual insurance, it is truly observed, is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this

difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. ' "

On the same subject the appellate court of Indiana in the case of *Miller v. State Life Insurance Company* 60 N. E. 958, at page 960 of the opinion held:

"It cannot be said that the mutual principle, of itself, necessarily requires that each member shall be insured upon exactly the same terms. Thus, in *Mygatt v. Insurance Co.* 21 N. Y. 52, the court said: 'An mutual insurance company is simply a company whose fund for the payment of losses and expenses consists, not of a capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured. \* \* \* When it is considered that the term 'mutual', as applied to an insurance company, does not import any peculiar and exact method of producing mutuality, in the sense of equality among its members, but that it is simply significant of an association for the purpose of insurance, whose fund for the payment of losses consists, not of a capital furnished by uninsured parties, but of the premiums mutually contributed by the persons insured, all difficulty on the subject is at an end.' "

The Supreme Court of the State of Missouri, in *State ex rel v. Insurance Company* 91 Mo. 311, discussing the insurance policy involved in that litigation and in reference to defendant being a mutual insurance company, at page 316 of the opinion said:

"The principle of the scheme throughout is mutuality and the contrary not being declared by the law, each policyholder becomes a member of the association and

continues such, certainly, during the life of the policy."

The foregoing authorities define mutual insurance companies as we understand it now and as we understood it when the opinion of this office dated October 24, 1933, addressed to the Board of Education of the Normandy Consolidated School District was written.

If the liability and obligation of a policyholder under his insurance contract is fixed or determinable in amount at the date of the issuance of the policy or if the obligation and liability of the policyholder does not depend on the losses of similar policyholders or other such contingencies, then the acceptance of such a contract would not make the holder thereof a member or nor stockholder in a mutual insurance company in the real and strict sense of mutual insurance. In other words, such insurance would not be mutual insurance. The character or classification of a fire insurance company, generally speaking, is to be determined from the contract or policy issued by the company and not from the name employed and in use by such company.

On the other hand, when by the terms of a fire insurance policy and contract each policyholder is liable for the fire losses of all like policyholders and to the full amount of the insurance held by such policyholders, whether the liability is to be paid according to assessments levied therefor or otherwise, then and in that event the policyholder in such a company becomes a member of and thereby a stockholder in a mutual fire insurance company.

We adhere to our opinion dated October 24, 1933, holding that the Board of Directors of a school district in the State of Missouri does not have the legal right to insure the property of a school district in a mutual fire insurance company, as mutual insurance is defined and when the same is of the character described in the last foregoing paragraph.

It is and will be the policy of this office not to express an opinion as to any particular form of policy or contract of insurance with reference to whether the same is a contract for mutual insurance or not. The foregoing should make it clear as to what our idea of mutual insurance is and those interested will determine for themselves the legal effect

Honorable Edward M. Miller

-5-

January 17, 1934

of the policy or insurance contract they may or may not accept.

We return you your inclosures herewith.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

Inclosures

SCHOOL BONDS: / Proceeds from Bonds voted for purpose of repairing buildings cannot be diverted and used for the teacher and incidental funds.

1-22

January 19, 1934.



Mr. Ray E. Miller, Secretary,  
Board of Education,  
Carl Junction High School,  
Carl Junction, Missouri.

Dear Sir:

This department acknowledges receipt of your letter as follows:

"Mrs. Evans, President of the Board of Education of Carl Junction Consolidated School District, has directed me to write you for an opinion on the matter of the liability attached to a Board of Education who issue building and repair bonds, use only a part of the funds derived from these bonds to make repairs and use the balance to relieve a shortage in the teachers and incidental funds.

The state having failed to pay this district, which is state supported, we are broke. Having a large community high-school, 240 students enrolled in the high school alone, also having a live and energetic Community Club, and four wide awake churches, they have petitioned the Board of Education to call an election to issue repair bonds, make some minor repairs and then as the law provides that any funds left over after the object of the issue is completed, may be apportioned wherever needed, to use any balance to run our schools.

The call for this bond issue has been posted, and the Board desires to know, will they as members be held responsible, should some one object to the manner in which this bond money is used? If they are liable, then the money derived, should the issue carry, will be used to make some much needed repairs, but if it is possible under such dire circumstances, to make some much needed repairs, then whatever amounts are left to use them to assist on this

## I.

Part of proceeds from school bonds in common school district voted for the purpose of repairs cannot be diverted and used for the Teacher's or Incidental Funds.

It has been held by the courts of this state that the proceeds from bonds voted for one purpose cannot be used for another purpose. As was said in the case of Horsefall v. School District, 143 Mo. App., l.c. 544-545:

"Plaintiffs, in their petition, allege that the election for the purpose of authorizing the board to issue the bonds of the district was void and assigns therefor ten reasons. Several of these relate to the use which the board is proposing to make of the money realized from the sale of the bonds and to the action of the board and the conduct of the election in relation to the question of a site on which to build a new high school building. As to the intended use of the money, it is sufficient to say that the order of the board providing for the election and the notice of election provide only for the issuing of bonds in the sum of twenty-five thousand dollars for the purpose of erecting a high school building, and the board of directors have no authority to use any of the money they realize from the sale of these bonds for any other purpose. The notice of election notified the voters that this money was to be used for the purpose of erecting a high school building, and they, having voted upon that proposition, the hands of the board are tied, and they cannot use any part of it for the purpose of purchasing a site, nor for paying existing indebtedness, nor for any purpose except that for which it was voted, which is the erection of a high school building. The evidence, however, that the board was attempting to divert any part of this money from the purpose for which it was voted is not very satisfactory, and we assume that on this issue the finding of the court was for the defendant for the reason that the plaintiff had failed to prove his allegations."



January 19, 1934.

It has also been held that funds collected by taxation for school purposes cannot be diverted from one fund to another. In the case of Cleveland Village School District v. Zion, 195 Mo. App. 299, the Court said (l.c. 304):

"Again money collected by taxation for school purposes cannot be diverted from one fund to another. Certainly money in the teacher's fund cannot be transferred to and used in the incidental fund. There is nothing in either the petition or judgment showing to what fund the money belongs or to what fund it should go when paid to plaintiff. If the division is made between the two districts as provided by sections 10839 and 10840 the matters as to the various funds will be fully known and the money can be properly distributed."

CONCLUSION

From the decisions quoted above (and there are numerous other authorities to like effect), we are of the opinion that your school board would be liable if the money derived from part of the bonds in question were used for repairs and the balance diverted to the Teacher's and Incidental Funds.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General.

OWN:AH



**SHERIFF:**

Where prisoner convicted of felony is unavoidably injured while Sheriff is taking him to State reformatory, the State should pay for the necessary medical care.

March 1, 1934.

3-5



Mr. Merritt Miller,  
Sheriff of Gentry County,  
Albany, Missouri.

Dear Mr. Miller:-

We have your letter of January 29, 1934, in which is contained a request for an opinion as follows:

"I desire the opinion of your office as to whether or not the state of Missouri or Gentry County is liable and should pay the medical expenses and care of a juvenile boy who was injured in an automobile accident while I was conveying him to the state reformatory at Booneville, pursuant to an order of the Juvenile Court of Gentry County, Missouri, and a judgment of conviction.

"Delbert Armstrong and Clifford Redmond, two juveniles here, were complained against in the Juvenile Court of Gentry County, and found guilty of burglary and larceny, by D. D. Reeves, Circuit Judge and Juvenile Judge, and were sentenced to the Missouri State Reformatory for Boys for a term of four years. I was handed a commitment requesting me to convey these boys to Booneville, which I started out to do. But on the way, the morning being icy and slick, my car very unexpectedly skidded and struck a heavy post as we were going under an overhead railway crossing, at a sharp curve. This occurred at the edge of New Hampton, Missouri. In addition to damages to my car and personal injuries to myself, one of these boys, Delbert Armstrong, received a broken leg. I had him taken to the county physician immediately, and every precaution was taken in setting his leg, ex-raying it before and after setting. I have had a nurse with him ever since in my home at the jail house in Gentry County. This boy has gotten along famously and is now up and around.

"Query: On the theory that the accident was unavoidable, should the State of Missouri pay for the medical care and attendance of this boy while he is still in my custody and recuperating, until I may turn him over to the authorities at Booneville? Or if the state and county are both liable, which should pay?"

Section 8526, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 8526. Who shall be jailer.--The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Section 8554, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 8554. Medicine and medical attendance to be procured -- physician may be hired by the year.-- In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid."

Section 8357, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 8357. Costs, how paid.--In all cases of conviction of felony, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the state; and in all cases of misdemeanor, wherein the punishment is commitment to the reformatory, the cost of the proceedings and of the delivery of such person to the reformatory shall be paid by the county in which the conviction is had.  
\* \* \* \*"

Inasmuch as the accident and the resultant injuries were unavoidable, and therefore in the nature of an illness, so far as the legal rights and liabilities are concerned, we consider them to be within the purview of Section 8554 above cited. It is true that that section refers to prisoners confined in the jail, but we are of the opinion that a prisoner in custody of the Sheriff is within that status for the purposes above mentioned.

By Section 8526 above cited, the Sheriff is made the true jailer of the county and hence, under Section 8554 has the power in his discretion to procure medical attendance for any prisoner when he deems

Mr. Merritt Miller

-3-

March 1, 1934.

such necessary. The latter section further provides that the costs of such medical attention shall be paid as other costs in criminal cases.

Section 8357 above cited sets forth the manner in which the above mentioned costs shall be paid. Since the conviction in this case was of a felony, the state is by said Section made liable for the costs and hence for the cost of the medical attention, the same being construed by us to be not only a part of the costs of the general proceeding, but also a part of the costs of the delivery to the reformatory. Furthermore, this Section, read with Section 8554, clearly points out the legislative intention towards liability on the part of the state in such a situation as the one at hand.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

Approved:

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Attorney General.

SCHOOLS: --

{ Liability of Board of Directors.  
{ Right of Teachers to Sue on Contract.  
{ Payment of Back Warrants.

March 19, 1934.

Mr. Ray E. Miller, Secretary  
Board of Education  
Carl Junction, Missouri.



Dear Sir:

This is to acknowledge your letter as follows:

"These depressing times have caused no end of trouble to boards of education and ours is no exception. Our teachers still hold three months of last years warrants and January and February warrants for this year. The Department of Education have promised to put us on the Federal relief rolls about March 1st, yet some of the teachers say they will hold the board responsible for every cent the contracts call for. They even say that should the federal aid be less than their contract salary, they will accept the aid and expect the Board to make up the difference, with these questions in mind, the Board have ask for your interpretation on the following.

- "1st. If a Board sets a levy, signs contracts with teachers, makes incidental bills, all with the expectation of having sufficient funds with which to pay, but finds through such circumstances as have occurred the last two years that they cannot pay, then is the district liable for the full amount of the contracts or are the contracts automatically paid when funds run out?
- "2nd. If the teachers accept government aid March 1st and the salary is less than

their contract salaries, can they hold the Board responsible for the difference?

"3rd. Can a teacher bring suit against a Board for salary as per contract, when the funds have run out through no fault of the Board? You understand that when one year lapses, then those salaries can only be paid with back taxes or collection for that year, How is a board to tell how to divide the money received? What if the taxes never come in and it looks as though they would not, then how can a Board raise money to pay such back warrants? We don't see how they can be paid as you are not allowed to vote bonds for such payments are you?

"4th. If the teachers do sue the district, is it only possible to get judgment against the district? They could not get Judgment against the Board members could they? Is there any law that could force a Board of Education, against which judgment had been rendered, to devise means to pay the judgment? If not then what good would the judgment be to the teachers?

"5th. Please tell this board just what to expect, or what can legally be done to them, when it looks as though we would end the present school term owing the teachers about three months salaries, and no funds in sight with which to ever pay them, also. on top of this they still hold three warrants from last school term? Can they obtain a judgment for the amount of these warrants? Should the Board issue another warrant now that it looks as though they might not be paid?

"Hope my questions are not too confusing, and that we can have an interpretation soon."

In looking over our files, we find that on October 25, 1933, this department rendered an opinion to the Board

of Education, Carl Junction, Missouri, which answers practically all of the questions contained in your present request. Assuming that you do not have a copy of this opinion, we are herewith enclosing a copy of same.

We will answer the questions asked in your letter as briefly as possible and the enclosed opinion will sustain the authority for such.

At the outset, we desire to call to your attention certain fundamentals which are to be borne in mind when an answer appears to your specific question, namely:

1. That Board of Directors do not have any authority to order a warrant or enter into a contract exceeding the revenue provided for the current year. If such warrants or contracts are issued, they do not constitute a legal claim against the district. Section 9311, R. S. Mo. 1929.
2. There is no personal liability on the part of the directors for a school warrant drawn when there is not sufficient money in the treasury to pay same if such warrants issued are not in excess of the taxes levied and other income as the directors have a right to anticipate that the revenue provided for would be collected. Jacquemin, et al. v. Andrews, 40 Mo. App. 507.
3. However Board of Directors are liable if the acts of such were not done in good faith; and with willful intention; that is, such that would be considered mal-feasance in office. Consolidated School District No. 6 v. Shawhan et al. 273 S. W. 182.
4. Board of Directors have no power to violate Section 11, Article X. and



Section 12, Article X. of the Constitution of Missouri, same being a limitation upon the annual debt creating power of a school district. In other words, the contract cannot create a debt of the school district within the intent and meaning of the Constitution aforesaid.

Referring now to your specific question and bearing in mind premises above -

1.

(a) It is our opinion that if a contract is entered into in good faith and within the constitutional provisions and revenue anticipated, then the district is liable for the full amount of the contract.

(b) The contracts are not automatically paid when funds run out.

2.

If the teachers accept government aid as part of their compensation, under their contracts with the Board and it is not sufficient to pay contract salary in full, then such may hold the ~~Board~~ <sup>DISTRICT</sup> responsible for the difference if any.

3.

(a) The teacher may bring suit against a district for salary as per contract even though the funds have run out through no fault of the Board. Tate v. School Dist. No. 11 of Gentry County, 23 S. W. (2d) 1013. (Mo. Sup.Ct.)

(b) You are correct in your assumption that salaries shall only be paid with taxes collected for the year in which they are incurred. It is the duty of the Board, at the beginning of the year, to make proper provisions for the division of the revenue; and, if taxes are not collected sufficiently to pay these items and are subsequently received, then they should be applied to the various funds pro rata.



- (c) If the taxes are never collected then there is no way in which the Board may raise money with which to pay these back warrants.
- (d) There is no way in which bonds may be voted for the payment of such.
- (e) Quoting from the fifth page of the attached opinion: "The warrants held by the teachers of your school issued during the last school year, must be paid out of such back taxes or other funds that may properly come into the treasury of the school district from the revenue provided for such school year."

4.

- (a) If the teachers have a legitimate claim against the district, then it is possible to get judgment against the district.
- (b) The teachers may not obtain judgment against the Board members if such Board members acted in good faith and within statutory law.
- (c) There is no provision in the law which could force the Board of Education, (after a judgment had been rendered against district), to devise means to pay same other than if money was in the treasury; then a mandamus action could be brought to compel payment of same out of the funds.
- (d) We do not comment upon the fact as to what good a judgment would serve the teachers if it were obtained and uncollectable.

5.

Your question No. 5 has been answered in the preceding question other than the part wherein you ask, "Should the

Board issue another warrant now that it looks as though they might not be paid?" Our answer to that question is -Yes. The Board has the right to assume that the taxes will be paid, as much so, as they have the right to assume that such will not be paid. In order to be consistent, you would have to issue the warrants.

We earnestly ask that you re-read the enclosed opinion and bear in mind the statutory duties of the Board of Directors.

In Consolidated School District No. 6 v. Shawhan, (supra), the Court said:

"Under our state law the government of a school district, as well as the handling of the finances thereof, is vested in a board of directors, duly elected by vote. Their powers and duties are prescribed by statute. A trust is reposed in them, the execution of which is frequently attended with difficulty and embarrassment. By accepting such trust each director obligates himself to perform the duties as the law directs, and if there is a misapplication of the funds, or any part thereof, the question for determination is as to whether or not the directors are personally liable and may legally be required to respond in damages therefor."

"Also in Boulicault v. Glass Co., 283 Mo. 237, 249, 223 S. W. 423, 426, it is said:

"In a sense directors of a corporation are trustees and agents of the corporation and stockholders. In a general way they are governed by the same rules as are applied to trustees and agents' \* \* \* and for a

failure to discharge their obligations as such they become liable for corporate losses resulting therefrom."

Yours very truly,

---

JAMES L. HORNOSTEL  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

JLH/afj

CITIES OF THE FOURTH CLASS. ) May provide for an Excise Commissioner under  
the Liquor Control Act.

3-22  
March 31, 1934.



Hon. David L. Millar, Mayor  
University City, Missouri

Dear Mr. Millar:

This department is in receipt of your letter of March 6, 1934, in which you request an opinion as to the following state of facts:

"The Board of Alderman of University City has before it a Bill providing for the regulation and control of the liquor business in this City.

University City falls within the category of cities in which the Legislature provides that liquor may be sold by the drink. I might also add that University City is a city of the fourth class and operating under a charter granted under the statutes pertaining to fourth class cities.

The Bill as introduced provides for an Excise Commissioner. Will you please advise us whether, in your opinion, this City has the right to make provision by ordinance for an Excise Commissioner?"

I.

A CITY OF THE FOURTH CLASS MAY  
PROVIDE FOR AN EXCISE COMMISSIONER  
UNDER THE LIQUOR CONTROL ACT.

Section 25 of the Liquor Control Act of Missouri provides:

"Section 2b. The Board of Aldermen, City Council or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers, wholesalers, and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

Section 6960 R. S. Mo. 1929, as found in Article VIII Chapter 38, with reference to Cities of the Fourth Class provides in part as follows:

"The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint." \* \* \* "

In the case of State vs. Dix, (Kansas City Court of Appeals) 141 S. W. 445, the Court had before it a statute authorizing the Boards of Aldermen of cities of the fourth class to provide by ordinance for the levy and collection of all taxes, licenses, wharfage, and other duties, and for neglect or refusal to pay the same, to fix such penalties as are or may be authorized by law or ordinance. The Court held:

"\* \* \* Undoubtedly the powers conferred by the statute gave authority to the board of aldermen to provide by ordinance for the collection of the tax." \* \* \* "

Hon. David L. Millar.

-3-

March 21, 1934.

CONCLUSION.

In view of the foregoing, it is the opinion of this Department, that under Section 25 of the Liquor Control Act of Missouri, a city of the fourth class has the power to pass an ordinance providing for an Excise Commissioner.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

JWH:MM

LIQUOR CONTROL ACT: Does not confer on cities the power to tax  
salesmen soliciting orders at wholesale  
from retailers.

3-22  
March 22, 1934.



Midwestern Wholesalers & Importers,  
428 Dwight Building,  
Kansas City, Missouri.

Attention: Mr. Jas. P. Rees

Gentlemen:

This department is in receipt of your letter of  
March 13, 1934 requesting an opinion as to the following state  
of facts:

"We find that various small towns  
and cities have ordinances asking  
for licenses from \$50.00 to \$500.00  
for the mere solicitation and se-  
curing of orders at wholesale from  
the retailers within the municipal  
limits. It is our belief that the  
imposition of such licenses is  
illegal."

I.

There is no authority granted by  
reason of the Liquor Control Act  
of Missouri for cities to license  
salesmen.

Section 25 of the Liquor Control Act of Missouri  
provides:

"The Board of Aldermen, City Council  
or other proper authorities of incor-  
porated cities may charge for licenses  
issued to manufacturers, distillers,  
brewers, wholesalers, and retailers  
of all intoxicating liquor, within  
their limits, fix the amount to be  
charged for such license, and provide  
for the collection thereof, make and  
enforce ordinances for the regulation



-2-

and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

The question here before us for determination is whether or not a mere salesman or agent is within the purview of Sec. 25 of the Liquor Control Act. "The most characteristic feature of an agent's employment, in a legal sense, is that he is employed primarily to bring about business relations between his principal and third persons." 2 C.J. 421. In other words, in the case here submitted, the wholesale liquor salesman are merely employed to bring about a sale, and the actual sale is not made until the wholesaler ships the liquor and the price is paid.

In the case of City of Albany v. Newark Shoe Stores Co., (Sup. Ct. Ga.) 110 S.E. 282, the Newark Shoe Stores Company conducted a retail shoe business in a storehouse in the city of Albany. It had paid all taxes due by it to the city for conducting that business. The corporation employed a salesman and manager to work both at its storehouse and also at intervals to go out into said city from house to house, exhibit samples of shoes, and solicit customers to visit the store and buy shoes, the samples of which he had displayed. The Court held:

"Such solicitation of trade did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute in itself a business in either the legal or commercial sense."

In the case of Lowenthal v. Underdown, (Sup. Ct. Tenn.) 179 S.W. 129, the Court held that one who merely displays samples and takes orders, which he forwards to his employer for approval, collecting no money or delivering no goods, is a mere "solicitor" and not liable for a merchants license fee.

In the case of State v. Bristow, 109 N.W. 199, the Supreme Court of Iowa held (I.c. 200):

"A vendor (vender) is one who transfers the exclusive right of possession of property, either his or that of another, for some pecuniary equivalent. A soliciting

March 22, 1934.

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agent who takes orders subject to the approval of his principal is not ordinarily regarded as a vendor. While some conflict, the weight of authority seems to support this proposition. It would doubtless be competent for the Legislature to tax and license all soliciting agents if, in its wisdom, it saw fit to do so; but the act in question does not seem to cover them."

CONCLUSION

In view of the foregoing, it is the opinion of this department that under the Liquor Control Act of Missouri cities have only the authority to license manufacturers, distillers, brewers, wholesalers and retailers of intoxicating liquor, and this authority does not confer upon cities the power to tax salesmen engaged only in the business of soliciting orders at wholesale from the retailers within the municipal limits.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

**MOTOR VEHICLES ON HIGHWAYS:** Relating to the rules of the road on passing a vehicle from the rear at the top of a hill or on a curve where the view ahead is in any way obscured.

3-28  
March 26, 1934.

Honorable J. W. Milford  
City Attorney  
Shrewsbury, Missouri



Dear Sir:

This department is in receipt of your enclosure dated February 17, 1934, and your letter dated February 21, 1934. Your letter states as follows:

"The writer is City Attorney for the City of Shrewsbury, Missouri, and has been called upon by our City Judge, Honorable Casper LeFort, to interpret Section #52 of Ordinance #304 of the City of Shrewsbury, Missouri, which Section is copied verbatim from Paragraph E of Section #7777 of the Revised Motor Vehicle Laws of the State of Missouri.

"The particular portion of Paragraph E of Section #7777 that seems confusing to Judge LeFort, myself and others, reads as follows:

'and provided further, that no operator or driver shall pass a vehicle from the rear at the top of a hill or on a curve where the view ahead is in any way obscured etc.'

"I am enclosing herewith a letter from Judge LeFort which explains his view point and his suggestion growing out of an actual case.

"My thoughts on this subject are as follows: Do the words 'when the view ahead is obscured' refer to the top of the hill or do they only refer to a curve? What is meant by 'top of a hill'? Does it mean the highest point, or peak, or does it include the adjacent territory? The common answer is that the view ahead is not, and cannot be obscured at the top of a hill unless there is a curve immediately beyond.

March 26, 1934.

"It seems to me that if this part of Paragraph E, Section #7777 read as follows: 'that no operator or driver shall pass a vehicle from the rear when the view ahead is in any way obscured etc.' there would be less ambiguity and thereby better enforcement of the law. Such wording would not only cover the situation in regard to hills and curves, but would also cover the motorist who is traveling on a straight, level highway when he starts to pass a vehicle from the rear when the latter vehicle is closely approaching a sharp decline or valley.

"In the City of Shrewsbury, we have a Highway running over a hill that is greatly used by traffic between St. Louis and Webster Groves, Missouri, and this hill top has been the scene of numerous head on collisions, so we are interested in the proper enforcement of our Ordinance, which in turn calls for a proper interpretation of Paragraph E of Section #7777 of the State Law."

Your enclosure reads in part as follows:

"For your ready reference I am copying below my opinion as rendered in Case No. 319 in which this question was the issue, the defendant being brought before me under the sworn complaint of a police officer charged with the offence of passing a vehicle from the rear at the top of a hill, in violation of Section 52 of Ordinance No. 304, etc.

" IN THE POLICE COURT  
OF THE CITY OF SHREWSBURY, MISSOURI.

City of Shrewsbury     }  
                          vs        } No. 319  
Rufus T. Stephenson    }

Opinion of the Court

The undisputed evidence adduced in the trial of this case reflects that the defendant while operating a motor vehicle did pass a vehicle from the rear near the top of a hill but not at the top thereof, and that in fact he pro-

March 26, 1934.

ceeded over the top of the said hill on the right hand side of the street, therefore it is the opinion of the Court that while the defendant was possibly guilty of carelessly operating a motor vehicle, in that when he did actually pass the vehicle he was near enough to the top of the hill to constitute a hazard to traffic approaching from the opposite direction, but as he is not charged with careless driving and further no evidence is introduced to that effect, he cannot be found guilty of the offence with which he is charged, therefore it is the order of the Court that the defendant herein be discharged from custody and this case be dismissed.

(Signed) Caspar B. LeFort  
Judge.

"It would be my suggestion that this ordinance could be amended very simply by striking out the words, 'at the top of a hill' and in lieu thereof insert, 'on a hill where the view ahead is obscured.' "

I.

Your letter of request is divisible into two questions, the first being, ~~What is meant~~ by the words "where the view ahead is obscured", do they refer to the top of the hill or do they only refer to the curve?

Section 7777, paragraph (e), R. S. Mo. 1929, dealing with the rules of the road and traffic regulations reads in part as follows:

"\* \* \* and provided further, that no operator or driver shall pass a vehicle from the rear at the top of a hill or on a curve where the view ahead is in any way obscured \* \* \* ."

Section 7788, paragraph (d), R. S. Mo. 1929, provides the penalty for violation of above section and reads as follows:

"Any person who violates any of the other provisions of this article shall, upon con-



viction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fines and imprisonment."

In the case of Ex Parte Kneedler, 147, S. W. 983, 243, No. 632, 1. c. 641, the court states as follows:

"\* \* \* Common observation and experience show that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for State regulation." Every person who operates or uses a motor vehicle must be regarded as exercising a privilege and not an unrestricted right. It being a privilege granted by the Legislature, a person enjoying such privilege must take it subject to all proper restrictions. \* \* \*"

The court in Straughan v. Meyers 187 S. W. 1159, 268 No. 580, 1. c. 587, in construing a statutory provision states as follows:

"It is true this section is not drawn with the nicety and precision which characterizes the work of a linguist, but its intent and meaning is not difficult of understanding when read with other parts. The worst that can be said of it is, that certain of its terms are ambiguous, and in that case we are at liberty to go to the title as a clue or guide to the intention of the Legislature. The title is clear, unambiguous and expressive, and, when invoked as an aid in this construction, removes all doubt as to the meaning. We have frequently said that doubtful words of a statute may be enlarged or restricted in their meaning to conform to the true intent of the law makers, when manifested by the aid of sound principles of interpretation. \* \* \*"

Sedgwick on the construction of statutes (2d. ed.) page 226, says; "A limiting clause is generally to be restrained to the last preceding antecedent." The author cites in support of

this statement, *Cushing v. Worrick*, 9 Gray 382, but omits the very important words of that decision which complete the part of the sentence wherein the rules stated is laid down, which are, "unless there is something in the subject matter which requires a different construction". (*Idem*, p. 385). But the same author (p. 225) says, "Common sense should prevail over strick grammatical rules, and punctuation should not control. (*Gyger's Estate* 65 Pa. St. 311). The punctuation of a statute is not to be considered. (*Cushing v. Worrick*, 9 Gray 382; *Hamilton v. Steamboat* 16, Ohio St. (N. S.) 428)."

A few illustrations from the many cases collated by text writers will point the rule and its exceptions. Thus:

In *Hart v. Kennedy* 15 Abb. Pr. 290 and in *Coxson v. Doland*, 2 Daly 66, a provision of the Metropolitan Police Act of New York was involved. It provided that no member of the police force "shall be liable to military or jury duty or to arrest on civil process, nor to service of subpoenas from civil courts whilst on actual duty." It was contended that the words "whilst on actual duty", referred only to its immediate antecedent "nor to service of subpoenas from civil courts", and did not apply to the other precedents in the section. But the court said: "Whatever may have been the object of this alteration, it is very plain that the substitution of the word 'or' for 'nor', and of 'nor' for 'or', has made no change in the meaning of the section, and the decision in the case of *Hart v. Kennedy*, is as applicable to it now as it was before. 'Or' is a conjunction marking distribution, an alternative, or opposition, and the conjunction 'nor' performs the same office in negative propositions. The first is properly used in connection with either and the later with neither. The use of both in this case was inadmissible and as the negative 'shall not' was placed at the beginning of the sentence, the transposition of 'or' or 'nor' from one predicate to another could in no way affect the meaning". Accordingly it was held that the words "whilst on actual duty" applied to all the precedents in the section and was not limited to the immediate antecedent.

In *Matthews v. Commonwealth* 18 Gratt. 989, two clauses in a section were transposed to make the section constitutional.

## II.

The second question in your letter is, "What is meant by the words 'top of a hill', do they mean the highest point or peak or do they include the adjacent territory?"

The rule is that penal statutes must be strictly construed, and in the case of Northern Securities Co. v. U. S., 193



March 26, 1934.

U. S. 197, 24 Supt. Ct. 436, 48 L. Ed. 679, the court defines "strictly construed" as follows:

"The rule that a criminal provision must be strictly construed means only that the court must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow technical, or forced construction of words exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the Legislature, and the duty of the court is to give effect to that intention as disclosed by the words used."

In Moore v. Tel. Co. 164, Mo. App. 1. c. cit. 171, 148 S. W. 157, the court defines "strict construction" as follows:

"By the expression 'strict construction' is meant that the scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed, and not that the language of the terms shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction, but should give effect to the plain meaning of words, and, where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment."

The word "at", when applied to the place or location of an object, is not treated as definitely locative. Webster defining the word "at" declares:

"Primarily this word expresses the relation of presence, nearness in place or time, or direction toward. \* \* \*. It is less definite than in or on. 'At the house' may be 'in' or 'near the house'."

In 3 Eggs. of Law (2d ed.) 167, it is said:

" 'At', used in reference to time or place has frequently the sense of near. A railroad was authorized by its charter to intersect

another railroad 'at Charlotte,' and it was held that an intersection a thousand yards outside Charlotte satisfied the requirement the court saying: 'The word "at", when used in reference to place, frequently means "IN" or "within", but not always. It sometimes denotes nearness or proximity. That is its primary significance, and it is less definite than "in" or "on". Its significance would generally be controlled by the context and attending circumstances, if any, denoting the precise sense in which it is used.' (Purifoy v. Richmond & Danville R. R. Co., 108 N. C. 100).

"A tract of land near the terminus of a railroad was held exempt under a statute exempting certain lands 'at' the terminus; the court considered the matter saying: 'The word "at" is somewhat indefinite; it may mean in, or within, \* \* \* or it may mean near. Its primary idea, the lexicographer says, is nearness, and it is less definite than in or on.' State v. Receiver, etc., 38 N. J. L. 299, 302; see also Rogers v. Galloway, etc., College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; Minter v. State, 104 Ga. 743, 30 S. E. 989; Bartlett v. Jenkins, 22 N. H. 53; West Chicago, etc. Co. v. Manning, 70 Ill. App. 239. Other authorities to the same effect might be cited, but it is unnecessary, as the rule announced is hardly open to question."

#### CONCLUSION.

In the light of these cases and these rules of law, we are of the opinion that the words "where the view ahead is in any way obscured, etc.", applies to the precedent "no operator or driver shall pass a vehicle from the rear at the top of a hill," and was not intended to be limited to its immediate antecedent, "or on a curve".

Neither grammatical construction, punctuation nor relative arrangement of the several parts of the section must be

March 28, 1934.

allowed to absolutely control. A common sense interpretation is the safest and surest to apply, bearing always in mind the mischiefs to be remedied and the benefits to be secured by the law.

We are also of the opinion that the word "at" has as its primary meaning nearness or proximity. It must be kept in mind that it is a relative term, the signification of which is to be determined by taking into consideration the circumstances surrounding and attending its use. Referring as it does to the phrase "top of a hill", the latter can be reasonably construed as including the adjacent territory as was stated by the court in Purifoy v. Richmond, etc. R. R. Co., supra,

We are of the further opinion that any operator or driver who shall pass a vehicle from the rear at (near or in the proximity of) the top of a hill or on a curve where the view ahead is in any way obscured shall be held to have violated Section 7777, paragraph (e) as set out above and shall be subject to penalties prescribed for such violation as provided for in Section 7786, paragraph (d), supra.

Respectfully submitted,

JAMES L. HORNBOSTEL  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.

NW:H

14-0 6  
TAXATION: City Collector entitled to two per cent commission on delinquent tax collections.

May 10, 1934.

5-14



Hon. Mollie Milroy  
City Treasurer & Collector  
Mayor's Office  
Louisiana, Missouri

My Dear Madam:

Acknowledgment is herewith made of your request for an opinion of this office dated April 11, 1934. Your communication reads as follows:

"I will appreciate if you will advise me as to whether the City of Louisiana, Missouri, should penalize delinquent taxes, as prescribed in the bill passed by the last legislature, or at the same penalty as has always been charged.\* \* \* ."

We presume that you refer to Senate Bill 94 passed by the 57th General Assembly in regular session. This act materially changed the procedure for the collection of delinquent taxes and reduced the commission allowed Collectors in certain cases from four per cent to two per cent of the amount collected. This Section, the same being 9969 Laws of Missouri 1933, p. 429, reads as follows:

"Fees shall be allowed for services rendered under the provisions of this article, as follows: To the collector, except in such cities, two per cent on all sums collected; in such cities, two per cent on all sums collected--such per cent to be taxed as cost and collected from the party redeeming. To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

It is entirely probably that the city ordinance referred to in your inquiry was enacted in conformity with the state law upon the subject, i. e. at the time the ordinance was passed the state law provided for a four per cent commission. However, the state law being changed, it would be in order to amend the city ordinance to conform to the state law. It is the recognized rule in this state that city ordinances must be consistent with the federal and state constitutions and the statutes on the subject. In the case of Wood vs. Kansas City, 162 Mo. 303, the Court considered an ordinance providing that no notary public fees should be received by any clerk in the city treasurer's office except such as were turned into the credit of the general fund of the city. The Supreme Court states the general rule, l. c. 309:

"\* \* \* But the power to enact ordinances by defendant city can only be exercised within the limits of its charter, and in harmony with the Constitution and statutes of the State. (Town of Paris v. Graham, 33 Mo. 94.) 'In this country, the courts have always declared that ordinances passed in virtue of the implied power, must be reasonably consonant with the general powers and purposes of the corporation, and not inconsistent with the laws and policy of the State.'

In this case the Court held the ordinance void and stated, l. c. 310:

"\* \* \* The ordinance provides that no fees shall be received by said notary except such as are turned into the city treasury to the credit of the general revenue fund of the city, while by express provision of the statute he is entitled to charge and receive for his services the fees therein prescribed. It, therefore, seems impossible to conceive of an ordinance which would be in its effect more directly in conflict with the statutes referred to than this one.\* \* \*"

In the later case of St. Louis vs. Dreisoerner, 243 Mo. 217, the rule is again applied, l. c. 222:

"Tower Grove Park is a benefaction of Henry Shaw. It was created and is governed by statute. (Laws 1867, pp. 172-175.) It is not under the control and supervision of the park commissioner of St. Louis. (Charter of St. Louis, art. 8, Sec. 1). To protect it from contiguous nuisances enumerated therein, an act of the Legislature has been enacted forbidding their erection within the limits of one quarter of a mile in any direction from the exterior lines of the park. (Laws, 1871, p. 189, sec. 1.) This city ordinance includes five of the callings mentioned in the legislative act and sixteen other callings not referred to in the act, and prohibits the existence of any of the occupations described in the ordinance within a radius of six hundred feet of Tower Grove Park. As far as the ordinance is inconsistent with the act it is invalid, since all ordinances of the city of St. Louis must conform to relevant state laws.\* \* \* \*

We apply this rule in this case upon the presumption that your city is not operating under any special charter granting the city the exclusive control of fees and commissions, to be paid the collector and assessed against delinquent taxpayer. If your city is operating under such a special charter the foregoing rule would not necessarily apply, as special charters are construed to be special laws and therefor exceptions to the general laws on the same subject.

It is the opinion of this office that your charter provision allowing a different rate other than that established by the state law would be in conflict therewith and should be revised so as to conform with the state law, absent special charter provisions heretofore referred to.

As to the practical operation of this law as applied to the collection of city taxes, we herewith enclose to you a portion of the opinion of this office rendered to the State Tax Commission which deals particularly with the collection of delinquent taxes in cities.



Hon. Mollie Milroy.

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May 10, 1934.

We trust that this may be of assistance to you.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

HGW:MM  
Enc.



2-287  
CIRCUIT CLERK DEPUTIES:

Governed by Senate Bill 74 Page 371, Laws of Missouri, 1933 after July 24, 1933.

5-21  
May 12, 1934.



Hon. Gladys D. Middleton  
Clerk of the Circuit Court  
Lancaster, Missouri

Dear Madam:

I acknowledge receipt of your requests for opinions of this office, portions of which read as follows:

"\* - \*What I especially want to know is whether or not a deputy Circuit Clerk and Ex-Officio Recorder of Deeds should put in full time and whether or not the salary of such deputy should be reduced as provided in the above section."

"Will you please tell me whether or not Section 11812 Laws of Missouri, 1933, is effective before January 1, 1935?"

Also please tell me whether or not this Section applies to the Circuit Clerks and Deputies where the Clerk is Ex-Officio Recorder of Deeds? \* \* \* \*

I.

SECTION 11812 LAWS OF MISSOURI  
1933 EFFECTIVE JULY 24, 1934.

Section 11812 as amended by the 57th General Assembly is found at page 371 Laws of Missouri 1933 and reads as follows:

"Every clerk of a circuit court shall be entitled to such number of deputies and assistants, to be appointed by such official with the approval of the county court, as such court shall deem necessary for the prompt and proper discharge of the duties of his office."

The County Court, in its order permitting the clerk to appoint a deputy or assistant, shall fix the compensation of such deputy or assistant which, in counties having 12,500 persons and less, shall not exceed the amount allowed deputy or assistant to the county clerk for the actual time employed and shall designate the period of time such deputy or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the county clerk. The clerk of the circuit court may at any time, discharge any deputy or assistant, and may regulate the time of his or hereemployment, and the county court may, at any time, modify or rescind its order permitting any appointment to be made, and may reduce the compensation theretofore fixed by it."

A comparison of this amended Law with Section 11812 as found in the 1929 revision indicates that there were two objectives in the amendment of this section. The first was that the approval of the appointment and the fixing of the compensation of deputy circuit clerks were transferred from the Circuit Court to the County Court; and second, the amount permitted to be paid deputy circuit clerks in counties of 12,500 inhabitants or less was limited to the amount permitted to be paid deputy county clerks of such counties. In other respects the section is identical with the 1929 revision. We direct your attention to the last sentence of the section which empowers the circuit clerk to regulate the time of the employment and to discharge the deputy at any time and empowers the county court to modify or rescind its order respecting the appointment of the deputy circuit clerk and to reduce the compensation of such clerks. No mention is made as to any term of the deputy circuit clerk and it is apparent that deputy circuit clerks hold their offices at the pleasure of the appointive power. That being the case it cannot be said that the deputy circuit clerks have any term of office in a legal sense.

As stated by Throop on Public Officers, Section 303:

"The word 'term' is uniformly used to designate a fixed and definite period of time\* \* \* and an officer who holds his office at the pleasure of another officer\* \* \* has no official term, within the meaning of a constitutional or statutory provision relating to such term' "

As stated by Judge Lamm in the case of State ex rel. vs. Gordon, 238 Mo. 168, 1. c. 181:

"It seems to us that the cited authorities directly apply to the situation thus presented; for the sum of the matter is that any one who holds office at the pleasure of the appointing power has no 'term of office.' "

It therefore appears that deputy circuit clerks are in the same position as any other employee. Such being the case, there would be no constitutional or statutory objection to the immediate application of the law upon appointments in existence on the effective date of the law.

This construction is in accord with the legislative intent as expressed in Section 11786, a proviso of which reads:

"Provided further that until the expiration of their present terms of office the persons holding the office of circuit clerks shall be paid in the same manner and to the same extent as now provided by law."

No saving provision was made in favor of deputies. The benefits of this clause are exhausted in applying it to the Circuit Clerks.

It is therefore the opinion of this office that this bill became effective July 24, 1934, except for the proviso delaying the operation of the reduction of Circuit Clerks' salaries until January 1, 1935.

## II.

SENATE BILL 74 LAWS OF MISSOURI  
1933, p. 369, APPLIES TO CIRCUIT  
CLERKS AND DEPUTIES WHERE CLERK IS  
EX OFFICIO RECORDER OF DEEDS.

An examination of Article I of Chapter 74 in the 1929 revision respecting Recorders of Deeds, and as amended by Senate Bill

75, page 380, Laws of Missouri, 1933, fails to reveal any authority for the appointment of deputies by Circuit Clerks who are ex officio recorder of deeds. In Article 1 of Chapter 77 we find the general statute Section 11880 authorizing every clerk of a Court of Record to appoint one or more deputies. However, this section is a general section and in our opinion has been superseded by Section 11812 insofar as it might apply to the appointment of deputy circuit clerks. It is a recognized rule that special statutes on a given subject supersede general statutes unless there is a clear and specific intent to the contrary. State ex rel. vs. Koeln, 61 S. W. (2d) 750. Without question it was intended that Senate Bill 74 was intended to be applied in counties where the Circuit Clerk was ex officio recorder of deeds. We refer particularly to the following clause in Section 11786:

"Provided that in any county wherein the clerk of the circuit court is ex officio recorder of deeds said offices shall be considered as one for the purpose of this section."

We have not passed on the constitutionality of this law, that being a matter proper to be placed before the courts. However, we have heretofore expressed a doubt as to the constitutionality of this law as applying to circuit clerks who are ex officio recorder of deeds. In our opinion as the law now stands it is clearly intended to govern all circuit clerks, and we conclude that Section 11812 Laws of Missouri, 1933, applies to your case.

### III.

SALARY OF DEPUTY CIRCUIT CLERK  
SHOULD BE REDUCED AS PROVIDED BY  
SECTION 11812 LAWS OF MISSOURI 1933  
PAGE 371.

In dealing with your first inquiry we have stated that the clause

"\* \* \* The compensation of such deputy\* \* \* in counties having 12,500 persons or less shall not exceed the amount allowed\* \* \* to the County Clerk for the actual time employed\* \* \*"

is to be given operative effect on July 24, 1933. That being the case your deputy circuit clerk should not be paid a greater sum than

is allowed the deputy county clerk for the actual time employed. By referring to Section 11811 p. 369, Laws of Missouri, 1933, we find the legislature has definitely stated the amount which may be retained by the County Clerk for the payment of deputy hire. A part of this Section reads as follows:

"In Counties having a population of less than 7500 persons the clerks\* \* \* shall be allowed to pay his deputies and assistants \$600.00; in counties having a population of 7,500 and less than 10,000 persons the clerks\* \* \* shall be allowed to pay for deputies and assistants \$900.00; in counties having a population of 10,000 and less than 11,500 persons the clerks shall be allowed to retain\* \* \* not to exceed \$900.00 for deputy hire; in counties having more than 11,500 persons and less than 12,500 persons the clerks\* \* \* shall be allowed to pay for deputies and assistants \$1100.00;\* \* \* and provided, further, that in counties in which the clerk of the county court is ex officio recorder, said clerk shall be allowed to pay for deputies or assistants not exceeding the sum of \$500 in addition to the amount provided in this section.\* \* \*"

This definite schedule based upon population has established the amount allowed to be paid for deputy hire by county clerks. This schedule has been adopted in Section 11812 by the clause heretofore quoted as the classification determining the amount permitted to be paid deputy circuit clerks in counties having less than 12,500 persons. The purpose of this amendment was simply to limit "the amount allowed" to be paid and is intended to operate as the maximum which the County Court may allow for deputy circuit clerk hire. Under Section 11811 the County Court of Schuyler County, being a county of less than 7,500 persons, could authorize the expenditure of \$1100.00 for deputy County Clerk hire if the County Clerk was ex officio recorder of deeds. The statute has authorized this total expense for deputy county clerk hire. We interpret the provisions of Section 11812 hereinbefore quoted as adopting this total sum as being applicable to deputy circuit clerks in the event the circuit clerk is ex officio recorder of deeds. It is apparent that it is the legislative intent to allow additional expense for clerk hire when a clerk is ex officio recorder. The logic and reason of this allowance is the same whether it be the circuit clerk or the county clerk who is ex officio recorder. The clause hereinbefore quoted



Hon. Gladys D. Middleton.

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May 12, 1934.

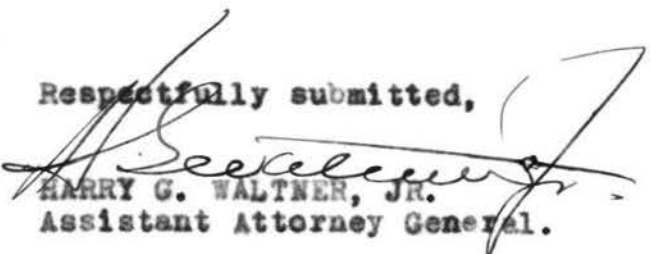
Section 11812, refers to "the amount allowed" by law and not the amount allowed in fact.

The phrase "for the actual time employed" is somewhat ambiguous. It is difficult to ascertain whether "actual time employed" refers to the deputy county clerks or the deputy circuit clerks. This section also authorizes the county court "to designate the period of time such deputy or assistant may be employed," and directs the clerk to "regulate the time of his or her employment."

It is apparent from these provisions that part time employment of deputy circuit clerks is recognized by the Legislature as being common practice. The County Court may in its order direct the period of time for which the deputy may be employed and the clerk is authorized to fix the hours of employment. It was intended that the deputy only be paid for actual time employed. The County Court in fixing its compensation could not expend in excess of the sum of \$1100.00 annually, in the instant case, as compensation to the deputy circuit clerk for time spent in performing the duties of the office.

We are therefore of the opinion that the provisions of Section 11812 Laws of Missouri, 1933, page 371, are now effective and when construed with Section 11811 authorize the County Court to allow not to exceed the sum of \$1100.00 per annum as compensation for deputies in your office.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

TAXATION: County Court may change valuation after tax is delinquent.

November 24, 1934.

Hon. Walter H. Miller  
County Assessor  
County Court House  
Kansas City, Missouri



Dear Mr. Miller:

Acknowledgment is made of your request for an opinion of this office of recent date wherein you inquire as follows:

"I beg leave to ask your opinion and ruling upon the following question:

Section 9946 of the Revised Statutes of Missouri, 1929, until amended as hereinafter stated, read as follows:

'Sec. 9946. ERRORS IN TAX BOOKS MAY BE CORRECTED WHEN.- In all cases where the county court, or assessment board, shall have assessed and levied taxed, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interest and penalties thereon, the city council of any city and the county court of any county shall have full power to correct any errors which may appear in connection therewith, whether of valuation, subject to provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation.'

This section was amended at the regular session of the Legislature, 1933, by Senate Bill 93, to read as follows:

'Section 1. AMENDING SECTION 9946, ARTICLE 9, CHAPTER 59. - That Section 9946 of Article 9 of



Chapter 59, of the Revised Statutes of Missouri, 1929, entitled 'delinquent back taxes' be and the same is hereby amended by inserting between the word 'where' and the word 'the' in line three of said section 9946 the following words 'any assessor or assessors' so that said section, as amended, shall read as follows:

'Sec. 9946. SHALL CORRECT ERRORS. - In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interest and penalties thereon, the city council of any city and the county court of any county shall have full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation.'

Many taxpayers of Jackson County have filed complaints with me as assessor concerning current and past valuations placed on real estate. It is contended by these taxpayers that the addition of the words, 'any assessor or assessors' gives full authority to the county court to correct any errors which may appear in connection with assessments, including errors made by the 'assessor or assessors', whether of valuation or otherwise, as provided for in said section 9946.

That is, these taxpayers contend that at any time before the taxes in question are paid and collected, the county court has full power to review not only its own acts but the acts of the 'assessor or assessors' in fixing assessments and that this necessarily includes any mistake which may be made by the assessor as to the valuation of property and

is not confined to mistakes in description or similar mistakes.

As this question arises frequently in the conduct of the affairs of this office, I will appreciate it if you will give me your opinion and ruling as soon as may be consistent, to the end that I may determine the proper course to follow."

Under the provisions of Section 11274 R. S. Mo. 1929, official opinions of this office are to be given at the request of certain state officials and the circuit or prosecuting attorneys of the various counties. This section reads as follows:

"When required, he shall give his opinion, in writing, without fee, to the general assembly, or to either house, and to the governor, secretary of state, auditor, treasurer, superintendent of public schools, warehouse commissioner, superintendent of insurance, the state finance commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

However, we desire to be as helpful to the various county officials as conditions will permit and we are glad to herewith transmit to you our views on this problem,

Section 9946, R. S. Mo. 1929, as amended Laws 1933, page 424, provides as follows:

"Sec. 9946. Shall Correct Errors.--In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interest and penalties thereon, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to

the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

The sole 1933 amendment was the insertion of the words "any assessor or assessors" between the words "where" and "the" in line 3 of said section.

The above quoted section gives full power to the county court to review, at any time before the taxes in question are collected or paid, not only its own acts but also the acts of the "assessor or assessors" in fixing assessments, and that this necessarily includes any errors which may be made by the assessor as to valuation of property, whether of over-valuation or under-valuation.

The 1933 legislature, feeling that such section as it then stood was possible ambiguous, sought to remedy the ambiguity by the addition of the words "any assessor or assessors", to the end that taxpayers might be more fully apprised of this alternative remedy.

Since, as we have stated, there are no Missouri cases construing Section 9946, we believe that the case of State of Missouri ex rel. Brewer v. Federal Lead Company, 265 Fed. 305 should have a strong persuasive effect. The opinion in that case was written by Judge Faris, a former member of the Supreme Court of Missouri, then sitting as District Judge for the Eastern District of Missouri. In referring to Section 11492, Revised Statutes of Missouri, 1909, which section, with the exception of the 1933 amendment, is the same section as Section 9946 above quoted, Judge Faris at page 310 stated as follows:

"There is a statute, however, which confers on the county courts of the several counties of Missouri plenary authority to either raise or lower assessed valuations on property, which lowering of valuation will have the inevitable effect to lower the amount of taxes due thereon. This section reads as follows:

'Sec. 11492. Errors in tax books may be corrected, when. --In all cases where the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interest and penalties thereon, the

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city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation.'

It will be noted that the section of the Missouri statutes above quoted confers authority upon the several county courts to raise or lower valuations and to correct errors 'subject to the provisions of the Constitution of the state.' Without going into other of the exceptions and limitations of the Missouri statutes touching matters not here relevant, it seems obvious that the power conferred on the several county courts by the section of the statutes, supra, is derived from Sec. 36 of Art. 6 of the Constitution of Missouri, which, so far as pertinent, reads thus:

'In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law.'

It is also obvious that the above constitutional provision, in conferring upon the county courts of the several counties power to transact 'all county business', has the effect of making such county courts the general agents of the counties. If this view is correct, it is clear that the above statute and the constitutional provision above quoted have a very important bearing on the issues presented in this case. For, absent some statutory inhibition, and I know of none, and subject to some provisions of the Constitution of Missouri not here relevant, the county courts are authorized to deal with all county business just as any other general agent of any individual principal might do. "

In addition, there is dictum which sheds some light on our problem in the case of *State ex rel. Teare vs. Dungan*, 265 Mo. 353. In that case, the court, after having set out the 1909 section, stated at page 373 as follows:

"If an improper valuation of defendants lands was considered in determining the rate of taxation provided in section 9280, Revised Statutes of 1899 (Sec.11420, R.S.1909), defendant should have applied to the county court as provided by law, and sought to have that tribunal correct the error, if one was made."

② (Section 9808, R. S. Mo. 1929, provides as follows:

"Sec.9808. County Court to Remedy Erroneous Assessments. -- The county court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in descriptions of lands, at any term of said court before the taxes shall be paid, on application of any person or persons who shall, by affidavit, show good cause for not having attended the county board of equalization or court of appeals for the purpose of correcting such errors or defects or mistakes; and where any lot of land or portion thereof has been erroneously assessed twice for the same year, the county court shall have the power and it is hereby made its duty, to release the owner or claimant thereof upon the payment of the proper taxes. Valuations placed on the property by the assessor or the board of equalization shall not be deemed to be erroneous assessments under this section."

It will be noticed that Section 9808 above quoted is relatively similar to Section 9946, with the exception of the last sentence of Section 9808 which we have underlined above. It seems obvious that the Legislature therefore, in omitting said sentence from Section 9946, intended Section 9808 to apply to mere clerical errors, while it intended Section 9946 to apply not only to clerical errors but also to errors of valuation with regard to the amount fixed by the assessing authority. In fact this is the only way the two sections can be reconciled without regarding one as mere surplusage, since, with the exception of the sentence above referred to, they provide substantially and in effect the same thing. It is a well recognized principal of statutory construction that in construing statutes, effect must, if possible, be given to every word, clause, sentence, paragraph and section of statute so that no part will be inoperative, superfluous or conflicting. (*Dean v. Dawes* (Mo. Sup.) 14 S. W. (2d) 990). Furthermore,



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Section 9808 appears in its identical form as Section 9197, Revised Statutes of Missouri, 1899, while 9946, then being Section 9317, R.S. Mo. 1899, applied at that time only to cities. This latter section was extended to apply to counties by an amendment in Laws 1909, page 725, the section then appearing in its present form with the exception of the 1933 amendment. We find, then, that Section 9946 in its present form was enacted subsequent to Section 9808, hence the well recognized principles of statutory construction lead us to the inevitable conclusion first, that the legislature purposely omitted the sentence in question for reasons stated above, and second, that should we assume any conflict in the sections the one subsequently enacted should prevail.) We do not, however, feel that such conflict exists, being rather of the opinion that section 9946 was enacted to give the taxpayer an additional remedy as well as to grant to the county court definite supervisory powers in accordance with the constitutional provision referred to in the opinion of Judge Paris, quoted supra.

Let us consider briefly now what possible remedies are open to the taxpayer should he consider the assessment on his property too high and seek redress. The county board of equalization has power to hear complaints and equalize valuations, but it has no power to assess. (State ex rel. v. Bethards, 9 S. W. (2d) 803). The county board's authority is limited to equalizing valuations of property within a class, and in so doing it can neither raise nor lower the aggregate valuation of a class as a whole. (State ex rel. v. Dircke, 11 S. W. (2d) 38.) The power of the state board of equalization is limited to the equalization of the valuation of each class as a whole among the respective counties of the state, said board having no power to raise or lower the valuations of specific properties within a class. (First Trust Co. vs. Wells, 23 S. W. (2d) 109). Section 9834, subsection 8, Revised Statutes of Missouri, 1929, however, gives to the state tax commission power to raise or lower assessed valuations on complaint of any individual, co-partnership, company, association or corporation, as provided in Section 9855, Revised Statutes of Missouri, 1929. This latter section provides that complaint must be made by the taxpayer after the various assessment rolls shall have been passed upon by the various boards of equalization and prior to the making and delivery of the tax rolls to the proper officers for collection.

The additional or alternative remedy which the taxpayer has in an application to the county court under Section 9946, as stated earlier in this opinion.

This latter remedy is available to the taxpayer whether the taxes are delinquent or otherwise and until said taxes are paid and collected. This remedy, for instance, would be the only one available to a taxpayer who through mistake or otherwise did not realize the overvaluation until after the taxes on the property in question were due and collectable. The opportunity of appearing before the state tax commission would, as a matter of law, be closed to him in such event. Section 9946, therefore, protects the rights of the

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taxpayer and fulfills public need. In addition the effect of the law is, by the same token, to protect the county to the fullest extent in case of an under-valuation.

(In concluding, we call your attention to the actual wording of Section 9946, i. e. "full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, etc." The section did not say that power was given to correct any errors of valuation which might appear on the books, but gave power to correct any errors "of valuation." Clearly the words "of valuation" were used by the legislature in the abstract and full sense. Had the legislature intended to refer merely to clerical errors it would clearly have employed other wording.) The provisions of the Constitution referred to, if any particular ones were intended, were doubtless Section 36, Article 6 as quoted supra in the opinion by Judge Farris, and Section 4, Article 10, which provides in part that all property subject to taxation shall be taxed in proportion to its value.

For the reasons above stated, we are of the opinion that Section 9946, quoted supra, provides an alternative method of review for the protection both of the taxpayer as well as the state and county.

Respectfully submitted,

CHARLES A. HOWELL, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General

CWH:LC



TAXATION AND REVENUE:

State Tax Commission, authority to appoint agents to investigate property omitted from assessment lists and to provide for their compensation.

February 9, 1934. 2-17-34

State Tax Commission of Missouri,  
Jefferson City, Missouri.

Attention: Andy W. Wilcox, Chairman.



Gentlemen:

Under date of January 20, 1934 a request for an opinion was received from you, such request being in the following terms:

"The State Tax Commission is asking the opinion of your Department as follows:

'Can the State Tax Commission under Section 9850 R. S. 1929, employ agents on the commission basis, said agents to be paid by the different counties where the work is to be done, or can this Department pay a nominal salary and the remainder be paid by the different County Courts of the State?'

The agents contemplated in the above paragraph are to investigate omitted intangible property from the assessment list in the counties and have same properly assessed. The compensation for doing this work as stated to be paid by the different county courts except a nominal amount from the Tax Commission."

I.

PAYMENT BY STATE TAX COMMISSION

Revised Statutes Missouri 1929, Section 9850, provides as follows:

"Sec. 9850. To appoint agents, when--salary.--For the purpose of making any investigation with regard to any matters relating to the taxation of any person, firm, company, corporation, association or public utility, the commission shall have the power to appoint, by an order in writing, an agent or agents, whose duties shall be prescribed in such order. Agents may be paid a salary, fee or commission, in the discretion of the state tax commission; if a salary, the amount paid shall not exceed three hundred dollars (\$300.00) per month; if a fee or commission, the amount paid shall be in accordance with the value of the service rendered, and must be agreed upon and approved by the state tax commission before the agent renders service under his appointment. Such claims shall be paid as all other

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claims are paid by the issuing of vouchers approved by the state tax commission, which vouchers shall be filed with the state auditor and audited and paid as other claims against the state are paid. Any expenditure authorized or incurred for payment of services rendered by any agent in excess of amount appropriated for that purpose is hereby made chargeable to the state tax commission and said commission with their bondsmen shall be held liable for any such excess."

Insofar as your request deals with your power to appoint agents for the purposes described in your request the above statute clearly gives you the necessary authority. Insofar as paying such agents is concerned, these agents could be paid on a "salary, fee or commission" basis by the express authority of the statute, and by the terms of the statute such payments are to be made from state funds appropriated for that purpose, so that to the extent of the funds available to the commission broad powers are granted to it in the employment of agents, and insofar as your request pertains to the compensation of agents from state funds appropriated for the purpose, it is our opinion that express statutory authority is given to you to employ and pay agents in the manner described in your request for opinion.

## II.

### PAYMENT BY COUNTIES

As to the payment by counties of commissions or salary of agents appointed by the State Tax Commission under Section 9850 where such payments would be from funds collected for county or other than state purposes, the State Tax Commission could not obligate counties to make such payments. We have discovered no statutory authorization for the State Tax Commission so to obligate counties. Revised Statutes Missouri 1929, Section 9858, provides as follows:

"Sec. 9858. Commission cannot fix rate of levy.--The commission shall have no power to fix the rate of levy for the state or any political or municipal subdivision thereof; nor shall the commission have any power or authority to supervise the fixing of any tax levied or to be levied. County courts, city councils, school boards, and all other bodies legally authorized to make levies, shall be and remain free to make the rate of levy for their respective local political subdivisions or municipalities at any figure not prohibited by the Constitution or laws of the state. Regardless of any assessed valuation that may be determined upon, the power to fix the amount of taxes to be raised for all political subdivisions and municipalities for any one year shall remain in the local officers charged with the duty of fixing the rate of levy."

and to allow the State Tax Commission to reduce the amount of receipts from taxes levied by and for any of the political subdivisions referred to in Section 9858 would seem to be a violation probably of the terms and certainly

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of the spirit of section 9858. Furthermore, on common law principles the State Tax Commission, an administrative body, possessing only the powers conferred upon it by statute, could not, without the consent of a county, impose a liability upon such county. If under section 9858 the rate of levy in a certain county for county purposes were fixed, to allow the State Tax Commission to diminish the rates so levied by providing that a certain percentage of the amount collected should go to an appointee or agent of the State Tax Commission, or to allow the amount of the receipts from such tax to be diminished by having a part thereof go to such appointee or agent by way of salary would be an assumption of jurisdiction by the State Tax Commission over purely local funds over which the State Tax Commission is given no jurisdiction, and the fact that such agents might discover additional property for assessment and that because of their employment the county might receive more rather than less income from taxes, would be immaterial, for no person can be subjected to an obligation to pay out his money without his consent even though there is a prospect of gain therefrom.

It is our opinion that the State Tax Commission could employ agents to investigate intangible property omitted from assessment lists in the various counties of the state, and to issue vouchers for the payment of such agents either on a commission or salary basis out of funds appropriated to the State Tax Commission, but that the State Tax Commission could not obligate any county to pay any part of the compensation of such agent without the consent of such county.

Yours very truly,

EDWARD H. MILLER

Approved:

ASSISTANT ATTORNEY GENERAL.

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ATTORNEY GENERAL.

22-11 2  
TAXATION:—Property in interstate commerce may not be taxed while in this State, but grain withdrawn from the carrier and stored for the purpose of cleaning, grading, mixing, etc. loses its interstate connection to the extent that it may be taxed in Missouri.

March 8, 1934. 3-13



State Tax Commission,  
Jefferson City, Missouri.

Gentlemen:

We are acknowledging receipt of your letter in which you inquire as follows:

"Under date of December 16 you gave this Department an opinion in regard to the assessment of grain in elevators in Missouri on the first day of June of each year.

In question No. 4 of our inquiry submitted to you, we asked, 'Is grain temporarily held in an elevator but destined for reshipment out of the State assessable to the elevator company holding same on June 1st?'

In reply to this inquiry you advised us as follows: 'We are of the opinion that grain held by an elevator company on the first day of June is assessable even though it is contemplated that such grain later may be shipped out of the State.'

We are just now in receipt of a letter dated January 31, from Robert E. Gardner, County Assessor, Buchanan County, St. Joseph, Missouri, raising several additional questions about this matter. We are enclosing herewith a copy of this letter and will ask for your opinion of the additional points raised.

If possible, please advise us for the information of the assessing authorities of the State as to just how they can distinguish what grain would be considered as in interstate commerce."

Attached to your letter is a copy of a letter from Mr. Robert E. Gardner, County Assessor, Buchanan County, St. Joseph, Missouri, which is as follows:

"State Tax Commission, Jefferson City, Missouri.

Gentlemen:

On December 28 we received a copy of ruling by the Attorney General's Office in regard to grain

held in storage in elevators.

I immediately had several copies made and mailed them to the different elevator companies in this county, and the question now has been raised regarding the grain moving from one State to another in interstate commerce.

The attorney for several of the larger elevators, Mr. Orestes Mitchell, brought up this question, and they claim that the grain in the elevators on June 1, was interstate commerce. That the grain had been purchased in Nebraska and Kansas for shipment east and was sold immediately at the time of purchase for delivery in Chicago on a fixed date or dates; that the grain was shipped to stop over in St. Joseph for State inspection and then has been unloaded at the elevator to get the exact weights and also for cleaning, and then was to move forward to Chicago to fill the contract of sale. And it is the claim of the elevators that the grain had not lost its character as interstate commerce and that it is not subject to local taxation.

Mr. Mitchell was in Jefferson City a few days ago and discussed this particular phase with Mr. Hays, who rendered the opinion, and Mr. Hays said that a request of an opinion regarding this phase of it should come through regular channels and has asked me to write you to get an opinion from the Attorney General's Office on this particular matter."

On December 16, 1933, this Department rendered an opinion to you regarding the taxation of grain in elevators. In that opinion we called your attention to the Constitution, and the statutory provisions which deal with taxation, and the exemption of property from taxation. We shall not again refer to those sections as it would be mere repetition and would have no bearing upon the particular question involved in this opinion.

In question No. 4 of your inquiry to which our opinion of December 16, 1933, was given, you asked, "Is grain temporarily held in an elevator but destined for re-shipment out of the State, assessable to the elevator company holding same on June 1st?" In reply thereto we advised you as follows: "We are of the opinion that grain held by an elevator company on the first day of June is assessable even though it is contemplated that such grain later may be shipped out of the State."

You did not advise us that you were referring to grain in interstate commerce. As we understood your inquiry,



it simply referred to grain that was found in the elevators and which was stored there temporarily, even though it might be the intention of the owner of the grain to sell and ship the grain out of the State. The mere intention, at some future date, to withdraw grain from the elevator and ship it out of the State does not bring it within interstate commerce so as to avoid taxation.

In *Bacon v. Illinois*, 227 U. S. 504, 513, the Supreme Court of the United States says:

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State."

It is evident from the foregoing quotation that the mere intention or expectation of the owner of grain stored in an elevator to ship it out of the State does not bring that grain within the protection of the commerce clause of the Federal Constitution.

This is what we had in mind when we answered your inquiry as above, and we still adhere to our first opinion upon this question. However, it now appears that some of

the grain temporarily found in the elevator on June 1st is grain shipped from other States and unloaded at St. Joseph for the purpose of weighing, cleaning, inspecting, etc., and then reshipped to other States. The question presented here is different from that which was presented in your first inquiry and deals with the question of whether or not the grain sought to be taxed was in fact in interstate commerce at the time the assessment was made.

The law determining whether such grain can be taxed or not is plain, but the difficulty arises in applying the well-settled law to the facts of each particular case. The test seems to be whether or not the property is in transit or in a continuous movement in interstate commerce. The general rule is announced in 12 C. J. 98, as follows:

"A state tax on oil, goods, live stock, or other property in transit from one state to another is void, and it is immaterial whether the tax is laid by the state of origin or the state of destination. In the one case the protection of the commerce clause has attached, and in the other such protection has not ceased. So, too, a state statute requiring all carriers doing business in the state to pay a tax on all merchandise carried, based on the weight of the merchandise, is in conflict with the commerce clause of the constitution, in so far as it relates to interstate traffic. The operation of the rule that articles in transit cannot be taxed is not affected by the fact that the owner of the property is a citizen of the state. While the proposition that property temporarily at rest within a State, for the purpose of separation and assortment or reshipment, or because of other reasons, does not acquire a situs in the state, so as to become subject to state taxation, finds some support in early cases, the weight of authority, as found in later cases, is to the effect that, to entitle an article of commerce to be exempt from state taxation, there must be a continuous movement of it in interstate commerce, and that it may be taxed by the state when it is held at storage or distributing points, with the intention of delivering it to buyers or of transshipping it to other points."

In *Bacon v. Illinois*, 227 U. S. 504, 515, the Court had before it for determination a situation practically identical with the facts in your inquiry. The case was tried on an agreed statement of facts, as set out on page 515 of



the opinion and which is as follows:

"The following facts are shown by the agreed statement: The grain has been shipped by the original owners who were residents of southern and western states, under contracts for its transportation to New York, Philadelphia and other eastern cities which reserved to the owners the right to remove it from the cars at Chicago 'for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination' thereof. While the grain was in transit it was purchased by Bacon, the plaintiff in error, who succeeded to the rights of the vendors under the contracts of shipment. He was represented at the points of destination by agents through whom he disposed of grain and other commodities on the eastern markets, and the grain in question was purchased by him solely for the purpose of being sold in this way and with the intention to forward it according to the shipping contracts; it was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved and removed it from the cars to his private elevator. This removal, it is said in the agreed statement of facts, was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination. It is added that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies and was forwarded by them to the eastern cities in accordance with the original contracts of transportation. No part of the grain was sold or consumed in Illinois. It was while it was in Bacon's elevator in Chicago that it was included in the assessment as a part of his personal property."

The Court, in holding that the grain was taxable by the State of Illinois, says as follows:

"But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois

is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination. *Woodruff v. Parham*, supra; *Brown v. Houston*, supra; *Coe v. Errol*, supra; *Pittsburgh & Southern Coal Co. v. Bates*, 156 U. S. 577; *Diamond Match Co. v. Ontonagon*, supra; *American Steel & Wire Co. v. Speed*, supra; *General Oil Co. v. Crain*, supra.

The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. *American Steel & Wire Co. v. Speed*, supra, pp. 521, 522. Thus, goods within the State may be made the subject of a non-discriminatory tax though brought from another State and held by the consignee for sale in the original packages. *Woodruff v. Parham*, supra. In *Brown v. Houston*, supra, the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the State and from which it was offered for sale. In *Pittsburgh & Southern Coal Co. v. Bates*, supra, coal had been shipped from Pittsburgh to Baton Rouge

in barges which, to accomodate the owner's business, had been moored about nine miles above the point of destination. The coal while remaining on the barges under these conditions was held subject to taxation. In *General Oil Co. v. Grain*, supra, the oil which had been brought from Pennsylvania to Memphis, a distributing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked 'Oil Already Sold in Arkansas, Louisiana and Mississippi.' The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.

In the present case the property was held within the State for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the State, his share of the expenses of the local government."

Under the foregoing decision, we conclude that where a grain dealer or an elevator man withdraws from interstate transportation, grain for the temporary purpose of cleaning, weighing, etc., with the evident intent of thereafter reloading the grain and sending it to another State to fulfill his contract, that such withdrawal of the grain takes it out of interstate commerce to the extent that the State of Missouri may levy a property tax upon the grain. That is the evident holding of the *Bacon* case above, and while many temporary interruptions of continuous movement in interstate commerce might not actually result in a withdrawal of such freight from the stream of commerce, yet in the face of the *Bacon* decision it is apparent that the withdrawal and storing of grain for the purpose of weighing, inspecting, etc., under the protection of the State law, gives the State the right to levy a general property tax upon such protection. The same doctrine is announced in *Board of Trade v. Olsen*, 67 L. Ed. 849, where the Court was passing upon the right to enjoin the enforcement of Grain Futures Act. The Court says:

"The railroads of the country accomodate themselves to the interstate functions of the

Chicago market by giving shippers from the western states bills of lading through Chicago to points in the eastern states, with the right to remove the grain at Chicago for temporary purposes of storage, inspecting, weighing, grading or mixing, and in changing the ownership, consignee or destination, and then to continue the shipment under the same contract and at a through rate. Bacon v. Illinois. 227 U. S. 504. Such a contract does not prevent the legal taxing of the grain while in Chicago, but it does not take it out of interstate commerce in such a way as to deprive Congress of the power to regulate it, as is plainly indicated in authorities cited at page 16.\*\*\*\*.

In Susquehanna Coal Co. v. South Amboy, 238 U. S. 665, 669, the Supreme Court in referring to the Bacon case, says as follows:

"In Bacon v. Illinois, the grain which was taxed had been shipped by the original owners, who were residents of southern and western states, under contracts for its transportation to New York and Philadelphia and other eastern cities, with a reservation to the owners to remove it from the cars at Chicago for certain temporary purposes 'or change the ownership, consignee or destination thereof.' The grain, while in transit, was purchased by Bacon, he succeeding to the rights of the vendors. Upon arrival of the grain at Chicago he exercised the right to remove it from the cars to his private elevator to avail himself of the privilege reserved. The privilege being exercised, he turned the grain over to the railroad companies for transportation in accordance with original contracts. After commenting upon the power he had over the grain while in Chicago, we said (p.516), 'He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination.' For this conclusion cases were cited. It was further said (p.517), 'The property was held within the State for purposes deemed by the owner to be beneficial;\*\*\*."

March 8, 1934.

There are many cases by our Supreme Court which hold upon the facts of the particular case that there was not sufficient withdrawal from the continuous movement in interstate commerce so as to make the freight taxable in the State. A citation of those cases would be of no value here for the reason that the facts in those cases are not similar to the facts involved here. The rule of law in all of these cases is plain, but it is the application of the rule to the facts in dispute that is difficult, and a slight change of facts one way or another often makes the property taxable or not taxable. In as much as the Bacon decision above deals specifically with the question confronting us, what the Supreme Court might have held in other cases involving interstate commerce is not material, because undoubtedly the Supreme Court in the Bacon case has decided that where grain has been withdrawn from the carrier and stored in Missouri under the protection of Missouri laws for the purpose of inspecting, weighing, grading, etc., and then at a later date is forwarded on to another destination, that grain is taxable in Missouri.

We are of the opinion that where a grain dealer buys grain in other states, which he has sold in foreign markets, and has the grain unloaded at St. Joseph for the purpose of inspection, weighing, grading, mixing, etc., that such grain has been withdrawn under the authority of the Bacon decision from the continuous movement in interstate commerce, and that it may be taxed under the general property tax in this State.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S



REVENUE:

Defining the term "revenue" relating to amount of money common council shall be required to appropriate for use of Police Department in Cities of the First Class.

5-21

May 14, 1934.

Honorable Orestes Mitchell,  
President, Board of Police Commrs.,  
Department of Police,  
St. Joseph, Missouri.



Dear Sir:

This department is in receipt of your letter of March 28, 1934, wherein you state as follows:

"The question has arisen between the Police Department and the City Administration as to the amount of money the Police Department is authorized to draw from the City to operate the Police Department. I call your attention to Section 6369, Revised Statutes 1929, which provides that the Board of Police are authorized to make requisitions from time to time upon the mayor, etc. for such sums as they deem necessary for executing their duties under the law. This Section of the Statutes also provides that the Common Council shall not be required to appropriate for use of the Police Department in any fiscal year an amount of money in excess of one-sixth of the 'revenue' for the year.

"The City Comptroller and City Council have taken the position that the word 'revenue' as used in this Section does not include anything but real and personal property tax. The City also has an income from occupation and merchants' taxes, tax on sales of gasoline, automobile license taxes and liquor licenses and income from other sources; practically all of which, under the ordinances, go into the general revenue



fund of the City. The gasoline tax, however, is divided; one-half to the street maintenance and repair fund and the other half to the general revenue fund of the City Treasury. It is the contention of the Board of Police Commissioners that the receipts to the general revenue fund of the City from these various sources are all revenue within the terms of the Statutes and that the Police Department should be entitled to participate therein so far as their needs require. We have been compelled to reduce our force, as well as salaries because of lack of funds.

"We, therefore, solicit your opinion as to whether or not the Police Department is entitled to participate in the revenue produced from the various miscellaneous taxes, such as above mentioned. In this connection, I call your attention to the decisions of the Supreme Court in State, ex rel Gas vs. Gordon, 266 Mo. 394, 181 SW 1016, and State, ex rel Thompson vs. Board of Regents, 305 Mo. 57, 264 SW 698."

Section 6369, R. S. Mo. 1929, provides that the Board of Police Commissioners are to ascertain the money necessary to manage the police force and further provides how the money is to be obtained. It reads as follows:

"It shall be the duty of said board, prior to the 25th day of April of each year, to estimate what sum of money will be necessary for each current fiscal year to enable them to discharge the duties hereby imposed upon them, and they shall forthwith certify the same to the common Council of such city, who are hereby required, in each monthly appropriation or ordinance of that fiscal year, to set apart and appropriate the one-twelfth part of the amount so certified, which sum shall at once be paid by the city treasurer to the treasurer of the board of police upon a warrant drawn by the president and countersigned by the comptroller: Provided, that if the said board shall be required to create an

extra police force, as provided herein, and the expense of such extra force be contemplated in their said estimate, they shall immediately certify the expense of such additional force to the common council, who are hereby required, as soon as possible, to set apart and appropriate the additional amount so required, agreeably to this section. The said board of police are hereby authorized to make requisition from time to time upon the mayor, auditor, treasurer, comptroller or other proper disbursing officer or officers of the corporation of such city for such sums as they may deem necessary for executing their duties under this article, and the sums so required shall be paid by said proper disbursing officer or officers out of any money in the city treasury not otherwise appropriated: Provided, that in no event shall a common council be required to appropriate for the use of the police board in any fiscal year an amount of money in excess of one-sixth of the revenue of such year; and provided, also, that the amount so required or drawn shall not exceed in any one year the amount certified as aforesaid to the common council for that year, including any additional amount which may have been ordered by said common council to be paid for or on account of any extra police force as hereinbefore provided; that the common council of the city shall have no power or authority to levy or collect any tax or appropriate and disburse any money for the payment of any police force other than that to be organized or employed under this article, and the power of the mayor and common council of such city to appropriate and disburse money for the payment of the police force to be organized or employed under this article shall be exercised as in this section directed, and not otherwise: Provided, further, that said police board shall not increase any salary and shall not increase the number of men on the force unless authorized so to do by the city

council; but it may reduce the number of men or officers, or both, at any time that it may think proper or necessary."

Section 655, R. S. Mo. 1929, provides additional rules for construing statutes and reads in part as follows:

"\*\*\*\*\*The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, \*\*\*\*\*."

In the case of State v. Gordon, 181 S. W. 1016, 1.c. 1021, 266 Mo. 394, the court said:

"As words when used by the people in their Constitution and by the Legislature in their statutes, are ordinarily to be construed to be used in their ordinary sense (Section 655, R. S. Mo. 1929) \*\*\*\*\* recourse must be had to the dictionaries. \*\*\*\*\*"

"From these, we find the word 'revenue' means 'the annual yield of the taxes, excises, customs, duties, rents, etc. which a nation, state or municipality collects and receives into the treasury for public use.' (Webster's International Dictionary.)

"The total current income of government, however derived, subject to appropriation for public uses." (Standard Dictionary.)

"The annual income of a state derived from the taxation, customs, excise, or other sources and appropriated to the payment of the national expenses." (Century Dictionary.)

54 Corpus Juris, 743, collates and summarizes the various definitions of "revenue" when used in the sense of "public income" in the following manner:

"\*\*\*\*\* 'Public revenue' has been variously defined as meaning public income of any kind; the annual and current income of the state, however, derived, which is subject to appropriation for general public uses; the annual income of a state derived from the taxation, customs, excise, or other sources and appropriated to the payment of the national expenses; the annual or periodical yield of taxes, excise, customs, duties, rents, etc., which a nation, state, or municipality collects and receives into the treasury for public use; the annual produce or yield of taxes, excise, customs, duties, rents, etc., which a nation, state, or municipality collects and receives into the treasury for public use; the current income of the state from whatsoever source derived which is subject to appropriation for public uses; the income of the state or nation derived from the duties, taxes and other sources for the payment of the national expenses; the income which a state collects and receives into its treasury, and is appropriated for the payment of its expenses; the total current income of a government, however, derived, subject to appropriation for public uses."

In the case of State ex rel. v. Ewing, 23 Kans. 708 1.c. 712, the Court said:

"The act of 1879 is entitled 'An act to provide revenue,' etc. Now how broad is the term 'revenue'; and what may be included in such a title? Does it mean simply funds raised by taxation, and is the levying of taxes all that may be included? Such would seem to be the views of the counsel for the state, but we cannot think them correct. One of the definitions given by Webster of the term is, 'the annual produce of taxes, excise, customs, duties, rents,

etc., which a nation or state collects and receives into the treasury for public use.' The word is broad and general, and includes all public moneys which the state collects and receives from whatever source and in whatever manner. The general funds of this state are collected from taxes, but the legislature might, in an act with such a title -- at least, so far as any question of the form of the legislation is concerned -- enact that they be collected from licenses, or from the sale of lottery tickets, or it might unite and enact that part might be collected from one source and in one manner, and the rest from another source and in a different manner."

In the case of State v. Board of Regents, 264 S.W. 698, 1.c. 700, 305 Mo. 57, the Court said:

"By revenue, whether its meaning be measured by the general or the legal lexicographer is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or State money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity is authorized to receive, the source of its authority being the Legislature. \*\*\*\*\*"

In the case of State v. Gordon, 181 S. W. 1016, 1.c. 1020, 266 Mo. 394, Ann. case 1918 B. 191, the Court said:



"Clearly the word 'revenue' is broader than and includes taxation, as well as all other sources of municipal income. Revenue may be said to be the genus, while taxation is but a species. \*\*\*\* This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use, or which is not required to be paid into the state revenue fund but into a special fund, e. g., the collateral inheritance tax, specifically collected for the support of the State University; and its departments \*\*\*\*\*; the money derived from license fees on motor vehicles; fees paid into the state treasury to the credit of the 'insurance department fund'; and others of similar sort.\*\*\*\*\*"

#### CONCLUSION.

We are of the opinion, as stated in State v. Gordon and Section 655, supra, that words and phrases used in a statute must be construed in their plain, ordinary and usual sense, and that recourse must therefore be had to the dictionaries. From these and various definitions collated and summarized in Corpus Juris, supra, we found that the word "revenue" means the annual and current yield, or income of a government, national, state or municipal, however derived or collected and which is received or appropriated into the public treasury for public uses.

As stated in State v. Ewing, supra, " \*\*\*\*\*the word is broad and general and includes all public moneys which the State collects and receives from whatever sources and in whatever manner \*\*\*\*\*."

The above case is cited, and its definition of the term "revenue" is quoted with approval in the case of State v. Gordon, supra. The latter case says, "clearly the word 'revenue' is broader than and includes taxation, as well



5/14/34

as other sources of municipal income. Revenue may be said to be the genus while taxation is said to be the species\*\*\*\*. This excludes such income as the Constitution, or any permanent existing law, may specifically devote to a special purpose, in contradistinction to a general public use or which is not required to be paid into the State Revenue Fund but into a special fund. \*\*\*\*\*

In light of the foregoing, we are of the opinion that the word "revenue" as used in Section 6369, supra, is not limited to real or personal property tax but includes all sources of municipal income which is required by ordinance or any permanent existing laws and to be paid into the general revenue fund.

As stated in State v. Board of Regents, supra, "this current income may be derived from various sources, as our numerous statutes attest, but no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money. \*\*\*\*\*"

Of course, if any income derived by the City is specifically devoted to a special purpose in contradistinction to a general public use or which is not required to be paid into the general revenue fund of the City Treasury, but into a special fund, as for example a street maintenance and repair fund, then it is not to be included as "revenue" within the meaning of Section 6369 supra; but any and all income derived by the city from occupation and merchants' taxes, taxes on sales of gasoline, automobile license and liquor license taxes, or from any other source and which by provision of ordinance is required to be paid in whole or in part into the general revenue fund of the city is to be included within the meaning of the above term.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS

Assistant Attorney-General.

ROY McKITTTRICK

Attorney-General.

MW:WOS/afj

TAXATION: senate Bill 94 does not apply to collection of levee and drainage district taxes.

September 8, 1934.



Hon. Maupin Mitchell  
Collector of Revenue  
Lincoln County  
Troy, Missouri

Dear Mr. Mitchell:

Acknowledgment is made of your recent request for an opinion of this office on the following matter:

"We have several drainage tax sales pending. The owners are very much interested in learning whether or not they might be able to redeem their farms under the new redemption law, which applies to state and county taxes."

Sales to enforce the payment of delinquent drainage district taxes are held under the provisions of Sections 10765 and 10828 R. S. Mo. 1929, depending upon whether the drainage districts are organized by a proceeding in the Circuit Court or by a proceeding in the County Court as authorized by Articles I and II of Chapter 64 R. S. Mo. 1929. Portions of these Sections read as follows:

"Sec. 10765. \* \* \* The liens established and declared in the preceding sections may and shall be enforced by an action on delinquent tax bills\* \* \* which action shall be instituted in the circuit court\* \* \* within six months after December 31st of the year for which said taxes were levied\* \* \* All sales of lands made under this section shall be by the sheriff, as is now provided under the general revenue law.  
\* \* \* \*

Sec. 10828. \* \* \* All drainage taxes provided for in this article,\* \* \* constitute a lien,\* \* \* and shall be collected, in the same manner as state, county and school taxes upon real estate are collected.\* \* \* All sales of lands made under

this section shall be by the sheriff, as is now provided under the general revenue law. All sheriffs' deeds executed and delivered, pursuant to this article, shall have the same probative force as deeds executed under judgments for delinquent general state taxes and in actions instituted under this article.\* \* \*

By the foregoing provisions the necessary parts of this general law existing at the time of the enactment of these sections were adopted by reference and although its provisions as contained in Chapter 59 may have been repealed, that repeal does not act as a repeal of these provisions as found in the foregoing quoted sections. Endlich on The Interpretation of Statutes, Section 492:

"Where the provisions of a statute are incorporated, by reference, in another; (where one statute refers to another for the powers given or rules of procedure prescribed by the former, the statute or provision referred to or incorporated becomes a part of the referring or incorporating statute; and if) the earlier statute is afterwards repealed, the provisions so incorporated, (the powers given, or rules of procedure prescribed by the incorporated statute,) obviously continue in force, so far as they form part of the second enactment.\* \* \*

This rule was adopted by the Supreme Court of this State in *Gaston vs. Lancken*, 115 Mo. 20.

We therefore see that the foregoing provisions have not been changed or modified by the enactment of Senate Bill 94 referring to the collection of delinquent state and county taxes by a summary proceeding. The manner of redemption of property under the new procedure for the collection of delinquent state and county taxes is provided in Section 9956a, page 437, Laws of Missouri 1933. This Section reads as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase

and all costs of the sale together with interest of the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

The above section is absolutely inappropriate to any proceeding or sale held under the provisions of Sections 10765 and 10828. The means of effecting the redemption do not lend themselves to proceedings by suit, judgment and sale and could not be put in operation in respect to such proceedings.

It was the evident intent of the Legislature that the proceeding set up in Senate Bill 94 was not to be adopted to the foreclosure of delinquent drainage district taxes. We refer to Senate Bill 54 of the 57th General Assembly in Extra Session, found at page 154 Laws of Missouri, Extra Session, 1933-34. This Section established a limitation of five years upon proceedings for the sale of lands and lots under the provisions of Chapter 59 R. S. Mo. 1929 and closes with this proviso:

"Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

Hon. Maupin Mitchell.

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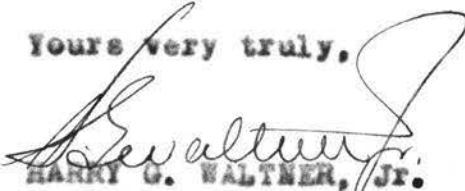
September 8, 1934.

This definitely establishes the legislative intent that delinquent drainage and levy district taxes should be continued to be collected by means of a suit brought in a Court of competent jurisdiction, and that such proceeding should not be effected or modified by Senate Bill 94.

The Attorney General in an opinion heretofore rendered to the Honorable Charles M. Hay, City Counselor of the City of St. Louis, dated September 4, 1934, has held that the foregoing Section 9961, page 154 Laws of Missouri, Extra Session, 1933-34 is in Pari Materia with Senate Bill 94.

It is therefore the opinion of this office that the provisions of Senate Bill 94 including the provisions for the redemption of land from sales held pursuant thereto are inapplicable to the collection of delinquent levee and drainage district taxes.

Yours very truly,

  
HARRY G. WALTNER, Jr.  
Assistant Attorney General

APPROVED:

C.P.H.  
(Acting)  
Attorney General

HCN:MM

TAXATION:-Board of Equalization and Board of Appeals have the inherent right to adjourn from time to time to carry out the duties imposed upon them by Statute.

September 15, 1934.

Mr. Jesse A. Mitchell,  
Tax Commissioner,  
Jefferson City, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"The following question has been submitted to us from three counties recently and we desire to have your opinion before advising them.

"The law provides that the County Board of Equalization shall meet on the first Monday in April and the Board of Appeals shall meet on the fourth Monday in April. The question is, in case the Board of Equalization is unable to complete its work between the two dates above named can the Board of Equalization adjourn court in course or adjourn to some future date and reassemble again and transact business after the Board of Appeals has passed upon the matters considered by the Board of Equalization at its first meeting and in turn adjourn the Board of Appeals to reassemble after the succeeding session of the Board of Equalization to care for matters considered at the second session of the Board of Equalization?"

We believe that the County Board of Equalization and the Board of Appeals have the inherent power to adjourn from time to time until each body has completed the business properly before it. There is a provision in the Statute, as set out in your letter, which provides when said Boards shall convene, but there is no provision in the Statute which limits the time the Boards may be in session.

In Black V. McGonigle, 103 Mo. 192, the question was raised as to the right of the County Board of Equalization to adjourn for a sufficient length of time to correct an erroneous notice. The Court at page 200 says:



"The question then arises whether the board on discovering the mistake had the power to order a new notice. The statute requires the board to meet at the office of the county clerk on the first Monday of April. The board did so meet and this is affirmatively shown by its record. The statute does not say anything about adjournments, still it must have been in the contemplation of the legislature that the board could and would hold its sessions long enough to dispose of the business before it, and in many counties this would necessitate various adjournments. That the board has the power to adjourn from time to time, we entertain no doubt whatever."

In State ex rel. Wyatt v. Vaile, 122 Mo. 33, the question of the Board's power to adjourn was also raised and the Court says at page 43:

"The statute says nothing about the power of the board to adjourn from time to time, but the want of such a provision in the law is immaterial; for the board had the inherent power to adjourn from time to time as the business before it might in its judgment demand. It follows from what has been before said that the board had the right and power to adjourn from Kansas City to Independence as it did. The fact that the board at its first meeting at Kansas City declared its intention to meet at Independence on the fourteenth when it did not meet at that place until the twenty-first is immaterial. The orders of adjournment made from day to day after the fourteenth had the effect to modify the order made on the third."

It is therefore the opinion of this Department that the Board of Equalization may adjourn to some date after the meeting of the Board of Appeals, and that the Board of Appeals may adjourn to pass upon matters which the Board of Equalization hears at its second session.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

TAXATION:  
COUNTY COLLECTORS.

County Collector not required to have seal.

11-9

November 2, 1934.



State Tax Commission  
Jefferson City, Missouri

Attention of Mr. J. A. Mitchell

Gentlemen:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

"This Commission desires an opinion from your office as to whether or not the County Collector should be required to provide himself with a seal for use in properly handling the sale of property for delinquent taxes. At the present time the County Collector has no seal.

We direct your attention to the last three lines, Page 433, Session Acts of 1933, "Such certificate shall be authenticated by the County Collector." Page 440 being a part of section 9957A. The concluding paragraph of the form of deed specified says in part "has hereunto set his hand affixed his official seal the day and year last above written."

The time is close at hand when the Collectors will be required to issue the certificates of purchase and we have request from various collectors regarding this matter, therefore, will appreciate your giving this your early attention."

A careful examination of Senate Bill 94, page 425 et seq. Laws of Missouri, 1933, reveals that there is no provision made for a county collectors seal; that no place in the tax laws is it possible to find any section establishing a seal for the office of county collector. However, it is not difficult to point to direct legislative authorities for the adoption and use of seals by such offices and boards as are authorized and directed to use seals.

follows: Section 1827 R. S. Mo. 1929, provides in part as

"Each court of record in this state shall procure and keep a seal, with such emblems and devices as the court may think proper,  
\* \* \* \* \*

follows: Section 5286 R. S. Mo. 1929, provides in part as

"The commissioner of finance shall devise and provide a seal for the department of finance which shall continue to be the seal of said department.\* \* \* \* \*

follows: Section 5677 R. S. Mo. 1929, provides in part as

"The seal now used by said department shall be the seal of the office of the superintendent of the insurance department,\* \* \* \* \*

follows: Section 8207 R. S. Mo. 1929, provides in part as

"The game and fish commissioner shall keep a seal of office, which shall be used to authenticate all papers and documents\* \* \* \* \*

follows: Section 8316 R. S. Mo. 1929, provides in part as

"\* \* \* \* the Department of Penal Institutions, by which name it shall have perpetual succession, with the right \* \* \* \* to adopt and use a common seal\* \* \* \* \*

follows: Section 9334 R. S. Mo. 1929, provides in part as

The Board (of Education) shall keep a common seal with which to attest its official acts.  
\* \* \* \* \*

follows: Section 9626 R. S. Mo. 1929, provides in part as

"The university\* \* \*shall have\* \* \*power to sue and be sued\* \* \*to make and use a common seal\* \* \*"

follows: Section 9829 R. S. Mo. 1929, provides in part as

"The commission shall have an official seal with the words "State Tax commission" arranged in a circle outside the seal of the state. All process or certificates issued\* \* \*by the commission shall be attested by said seal\* \* \*"

follows: Section 10749 R. S. Mo. 1929, provides in part as

"Such board (of supervisors of drainage districts) shall adopt a seal with a suitable device\* \* \*"

follows: Section 11397 R. S. Mo. 1929, provides in part as

"The treasurer and auditor shall each keep a seal of office, which shall be used to authenticate all writings,\* \* \*"

follows: Section 11504 R. S. Mo. 1929, provides in part as

"The board of fund commissioners shall\* \* \* provide a seal\* \* \*and the official acts of the Board shall be authenticated\* \* \*with the seal attached."

follows: Section 11561 R. S. Mo. 1929, provides in part as

"He (the Recorder of deeds) shall have a seal of office, and shall have power to take the acknowledgment of\* \* \*instruments of writing, \* \* \*and certify the same under his seal of office,\* \* \*"

Section 12365 R. S. Mo. 1929, provides in part as follows:

"The Missouri state horticultural society  
\* \* \*shall have\* \* \*power\* \* \*to make and  
use a common seal\* \* \*"

Section 13557 R. S. Mo. 1929, provides in part as follows:

"Said board\* \* \*(of Dental examiners) shall  
provide and maintain\* \* \*a seal which shall  
impress the name of said board, with the word  
'seal,' and said seal shall be affixed to all  
certificates and to copies of records of said  
dental board for the purpose of authenticating  
the same,\* \* \*"

Many other similar sections could be cited, all of which specifically authorize the adoption and use of a seal, and which when applicable, provide that the copies of the records must be authenticated by the fixing of the seal. However, no such provision is found in respect to the office of County Collector, nor is there any general requirement that he affix a seal to properly certify his records. A careful examination of Senate Bill 94 reveals that in several places the County Clerk or the County Collector is required to certify to certain things. Sections 9950, 9952, 9952B and 9962A.

It is well established in this State that to certify simply means to testify in writing. In the early case of McDonald vs. State, 8 Mo. 283, the Court considered the sufficiency of an indictment. The law required the foreman of the grand jury to "certify" that the indictment was a true bill. The foreman indorsed on the back of the indictment "a true bill" and subscribed his name. Such an indictment was held to be good. This case has been approved in the latter case of State ex inf. vs. Jones, 266 Mo. 191-200:

"\* \* \*The statute does not require the certificate to be addressed to the county clerk or any one else. Therrequires that 'the proceedings of this meeting shall be certified. . . .to the county clerk,' etc. The word 'certify' is not indispensable in a certificate (Spratt v. State, 8 Mo. 247.) 'To certify' is thus defined in 8 Cyc. 729: 'To give certain knowledge or information of; make evident; vouch for the truth of; attest; to

make a statement as to matter of fact; to testify in writing; give a certificate of; make a declaration about in writing, under hand or hand and seal; . . . to make a declaration in writing; . . . to testify to a thing in writing.'

The dictionaries and decided cases bear out these definitions. No strict and technical construction is to be put upon the statute involved, nor is a strict and technical compliance with it to be exacted of the 'plain, honest, worthy citizens, not especially learned in the law' in the performance of their duties under it. \* \* \* "

It is only necessary that the seal be affixed when the use of a seal is authorized and established by direct legislative enactment or by long custom and usage. Neither of these exist in the present case. To "certify" implies the use of a seal only when the seal has been provided for as above stated, and when no seal is provided for none is necessary for the legality of the certification. The general rule is as laid down in the case of Doherty vs. M'Dowell, 276 Fed. 7287730 applicable:

" 'The term 'to certify' as used with reference to legal documents, means to testify to a thing in writing; and in the absence of statutory provision declaring the particular form of certification, any form which affirms the fact in writing is sufficient.' "

The necessity for the use of a seal in connection with a certificate is discussed in the case of Marble Co. vs. Ragsdale, 74 Mo. A. 42. In this case a chattel mortgage was offered in evidence, indorsed

"Filed this 20th day of November, A. D. 1895,  
at 2 o'clock P.M.

'Chas. A. Greith, Recorder.' "

No other certificate was offered nor was the recorder's seal affixed. In holding that it was necessary that the recorder's seal be affixed the Court stated, l. c. 46:



November 3, 1934.

"\* \* \* But there is no competent evidence here that either was done, for there is no certificate of the recorder that either was done, nor does it appear when or in what county it was done, if done at all. The official acts of a recorder cannot be known by his official signature alone. The law requires that his official act shall be attested by his seal of office, before it will take cognizance of the act.\* \* \*"

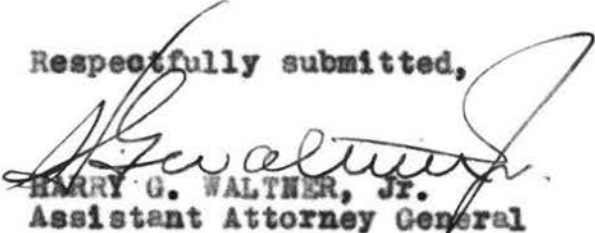
As heretofore shown on page three, Section 11561 R. S. No. 1929, provides that the Recorder of Deeds shall certify "under his seal of office." No such provision is found in respect to the official acts of the County Collector, and hence the conclusion in the foregoing case is not binding on the present issue.

CONCLUSION.

In view of the long established custom respecting the certifications of the County Collectors and the failure of the Legislature to establish a seal and to authorize and require its use in connection with a County Collector's certifications, it is our opinion that from a reading of the entire act and considering it in connection with the other enactments concerning the collection of revenue, it was not intended that a county collector be authorized or required to obtain and use a seal in connection with official certifications.

We therefore conclude that a county collector is not authorized or required to provide himself with a seal for use in handling the sale of property for delinquent taxes.

Respectfully submitted,

  
HARRY G. WALTHER, JR.  
Assistant Attorney General

APPROVED:

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ROY McKittrick  
Attorney General

HGW:MM

BANKS & BANKING:

County depositary not relieved of liability  
by vacation ex parte circuit court order.

1-22

January 13, 1934.



Hon. C. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

This Department is in receipt of your letter of January 2, 1934, with request for an opinion on the facts stated in same; which letter is as follows:

"Will you please let me have an opinion as to whether or not the Court Order under date of December 30th, in connection with a deposit of County Funds in the amount of \$12,500.00, in which the Citizens Bank of Marshfield and the Citizens State Bank of Niangua are the petitioners, copy of which is attached hereto, is sufficient to relieve the Citizens State Bank of Niangua of any liability in connection with this Deposit of County Funds in the amount of \$12,500.00."

In connection with your letter we have before us a copy of the petition of the Citizens Bank of Marshfield and the Citizens State Bank of Niangua, Petitioners, presented to Honorable C. H. Skinker, Judge of the 18th Judicial Circuit of Missouri, together with the court order of Judge Skinker.

First, it will be noted that this is an ex parte proceeding in which the two above banks involved are the petitioners. Secondly the court order was made by Judge Skinker, in Vacation of the Webster County Circuit Court.

The particular point you inquire about is whether or not this court order is sufficient to relieve the Citizens State Bank of Niangua of any liability in connection with this deposit of county funds in the amount of \$12,500. This being an ex parte proceeding, only such parties as were properly in court were bound by this court order if the court had jurisdiction on the subject matter by this ex parte vacation entry, and of course the county court not being a party was not bound by the order. This order being made in vacation, would the court have jurisdiction of the parties, that is, the two banks, the Citizens Bank of Marshfield and the Citizens State Bank of Niangua, and jurisdiction of the subject matter?

The general rule is stated in 14 Corpus Juris, 802:

"It is not within the power of litigants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement or waiver."

In the case of *In re Big Tarkio Drainage District vs. Voltmer*, 256 Mo. 152, 1. c. 162, the court said:

"The lack of jurisdiction over the person may be waived. The lack of jurisdiction over the subject matter can not be waived. It can not be conferred even by consent. (*State v. Bulling*, 100 Mo. 87; *Brown v. Woody*, 64 Mo. 547; *State ex rel. v. Nixon*, 232 Mo. 496)."

And further, in the case of *Meierhoffer v. Hansel*, 294 Mo. 1. c. 205, the same court said:

"It can not be argued that by the introduction of testimony on the motion appellant waived the question of jurisdiction, because it is academic that jurisdiction of the subject matter can not be waived or conferred even by consent. (*In re Drainage District v. Voltmer*, 256 Mo. 152, 1. c. 163, 165 S. W. 338; *St. Louis v. Glasgow*, 254 Mo.

262, 162 S. W. 596; Title Guaranty and Surety Company v. Drennon, 208 S. W. 474).

"The general rule is that all judicial business should be transacted by a court in term time, and that such business can be transacted in vacation only where there is some warrant therefor, either in a constitutional or a statutory provision."

15 Corpus Juris, 899.

"An order made in vacation is not an order of the court as there can be no such thing as a constructive session of a circuit court."

Cook v. Penrod, 111 Mo. App., 1. c. 137.

Carter v. Carter, 237, Mo. 634.

"It is a familiar principle of law that, during the interim between periods wherein courts are allowed to sit, such courts have no jurisdiction or power; and that any acts of a judicial nature, except such as may be specifically authorized by statute, done in vacation, are absolutely void."

Hale v. Kinnaid (Ala.) 76 So. 954, 1. c. 957.

In the absence of any statutory authority for a court to make an order of this kind, it is our opinion that it has no inherent right to do so and for that reason it had no jurisdiction of the subject matter. And further, if Webster County has any claim on the Citizens State Bank of Niangua by reason of the deposit of \$12,500 in question, such liability on the Citizens State Bank of Niangua was not relieved by this ex parte proceeding

in vacation in which the county was not made a party. It is, therefore, our opinion that the status of the liability of the Citizens State Bank of Niangua to Webster County was not changed by this order, and was, insofar as the County is concerned, a nullity; and the fact that said order recited that Webster County had approved and agreed to such transfer and release of liability, would not change the situation.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

CRH:EG

**BANKS & BANKING:**

Commissioner and Special Deputy Commissioner should not invest funds in interest-bearing securities, but deposit same in state banks, savings banks or trust companies as provided by Section 5331 R. S. Mo. 1929.

1-31  
January 24, 1934.



Hon. O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

We have your letter of January 24th, 1934, enclosing a letter from Mr. John C. DeWitt, Special Deputy Commissioner in charge of the affairs of The Kirksville Savings Bank, in which he requests an opinion from your Department relative to the investment of funds collected and in his hands as Special Deputy Commissioner as aforesaid. Your letter, and the pertinent part of his letter, are as follows:

"I am inclosing herein a letter received from Mr. John C. DeWitt, Special Deputy Commissioner in charge of the affairs of the Kirksville Savings Bank, and request you give me your opinion relative to the matter."

"As you will see by the report I have something near \$50,000.00 on hands, but owing to the fact that there is likely to be considerable controversy over preferred claims which are asked for, and probably some appeals from the circuit court's decision in the matter, I am wondering if there is a provision made for investment of these funds in Government Bonds or some interest bearing securities. Heretofore I have been able to get an allowance of interest amounting to 1% on daily balance from our depository here,



but I am today informed that hereafter no interest will be paid on deposits, and as it is likely to be quite a while before any disbursements can be made for the above reasons, I should like to receive some income from this amount of money."

The question is whether or not a Special Deputy Commissioner in charge of the affairs of a failed bank may invest funds he has on hands awaiting distribution in "Government Bonds or some interest bearing securities."

Section 5331 R. S. No. 1929, which is the same as when enacted in 1915, page 121, at which time all of the statutory law relative to banks, trust companies, savings banks and safe deposit institutions were amended, changed and revised, is as follows:

"The moneys collected by the commissioner shall be from time to time deposited in one or more state banks, savings banks or trust companies and, in case of the insolvency or voluntary or involuntary liquidation of the depository, such deposits shall be entitled to priority of payment on an equality with any other priority given by this chapter."

The statute makes special provision for the moneys collected by the commissioner, that same "shall be from time to time deposited in one or more state banks, savings banks or trust companies."

It is, therefore, our opinion that the commissioner and the special deputies should follow the method provided by statute for the caring for the funds in their hands awaiting distribution

January 24, 1934.

and that these funds should be deposited in the state banks, savings banks or trust companies, as set forth in the statute, and not by the commissioner or his special deputies invested in government bonds or some interest bearing securities.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

BANKS & BANKING: Judgment of Circuit Court relieving bank of liability for county funds.

DEPOSITARY, COUNTY: Relieving bank of liability for county deposits by judgment of court.

January 26, 1934.



Hon. C. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

We are in receipt of your letter of January 24, 1934, with request for an opinion; which letter is as follows:

"Will you please let me have an opinion as to whether or not the Court order, under date of January 18th, copy of which is attached hereto, is sufficient to relieve the Citizens State Bank of Niangua of any liability in connection with a deposit of County Funds in the amount of \$12,500.00.

In this connection I desire to refer you to an opinion rendered by your Department, regarding this same matter, on January 13th."

In your letter of request you refer to our opinion dated January 13th, regarding the same matter, and we reached the conclusion in that opinion that:

"In the absence of any statutory authority for a court to make an order of this kind, it is our opinion that it has no inherent right to do so and for that reason it had no jurisdiction of the subject matter. And further, if Webster County has any claim on the Citizens State Bank of Niangua by reason of the deposit of \$12,500 in question, such liability on the Citizens State Bank of Niangua was not relieved by this ex parte proceeding in vacation in which the county

was not made a part. It is, therefore, our opinion that the status of the liability of the Citizens State Bank of Niangua to Webster County was not changed by this order, and was, insofar as the County is concerned, a nullity; and the fact that said order recited that Webster County had approved and agreed to such transfer and release of liability, would not change the situation."

We now have before us, submitted with your letter of request, a copy of the petition in the cause of the Citizens State Bank of Niangua, a corporation, and Citizens Bank of Marshfield, a corporation, Plaintiffs, vs. Webster County, Missouri, Defendant, and a copy of the judgment and decree rendered in the above entitled cause in the Circuit Court of Webster County, Missouri, at the January, 1934, Term thereof, on the 18th day of January, 1934, certified to by the Circuit Clerk of Webster County, on January 20th, 1934. We are herewith setting forth in this opinion the above mentioned judgment and decree, which is as follows:

"STATE OF MISSOURI, )  
County of Webster, ) ss. January Term, 1934.

In the Circuit Court of said County, on the 18th day of January 1934, the following among other proceedings were had, viz:

Citizens State Bank of Niangua, a corporation,  
and Citizens Bank of Marshfield, a corporation,  
Plaintiffs,

vs.

Webster County, Missouri, Defendant.

Now at this day this cause coming on to be heard, plaintiffs appear by attorney, and defendant, Webster County, being represented by T. C. Dugan, L. P. Williams and R. E. Morris, Judges of the County Court of said County, and Homer G. Chaffin, Prosecuting Attorney of said Webster County, appear in court for and on behalf of said County of Webster, and enter the voluntary appearance of said defendant, Webster County, herein, and consent that this case may be tried and determined at this time.

And the cause is submitted to the court for trial, and the court after hearing the evidence, and being fully advised in the premises doth find that all of the allegations of plaintiff's petition are true, and that there is now on deposit in said Citizens Bank of Marshfield, one of the plaintiffs herein, the sum of \$12,500.00 which was deposited in said bank by the other plaintiff herein, the Citizens State Bank of Niangua, and that said sum of money belongs to Webster County, Mo., as a part of the County Funds of said County; and that said sum of \$12,500.00 was originally deposited in said Citizens State Bank of Niangua by Webster County, but was by said last named bank re-deposited in Citizens Bank of Marshfield, each of said banks having heretofore been regularly and legally designated by said County as County Depositaries for the County Funds of said Webster County.

The court further finds that Citizens Bank of Marshfield has given a good and solvent bond to said county as such depository, and is willing to accept liability to said Webster County directly for said sum of \$12,500.00, as aforesaid, and that the sureties upon the said Depository Bond of said Bank to said Webster County, have in writing consented that their liability upon said bond shall cover the aforesaid sum of \$12,500.00.

The court further finds that it would be equitable and just, and to the interest of all parties hereto, plaintiffs and defendants, that the liability and obligation of said Citizens State Bank of Niangua to said Webster County, Mo., for said sum of \$12,500.00 be cancelled and that said last named bank take credit therefor, and it is hereby ordered and adjudged that said sum of \$12,500.00 become a liability and obligation of said Citizens Bank of Marshfield, and its bond as such County Depository, direct to Webster County, Mo., and that its liability and obligation therefor to Citizens State Bank of Niangua be cancelled, and that it take credit therefor

on its books, and that said Citizens State Bank of Niangua cancel, or discharge, any liability of the said Citizens Bank of Marshfield to it for said sum of \$12,500.00.

It is therefore ordered, adjudged and decreed by the court that said defendant, Webster County, so correct its books and records so as to comply with the findings and decree of this court in this cause, and to credit the Citizens State Bank of Niangua to the extent of the \$12,500.00 aforesaid of said county funds, and to charge against the Citizens Bank of Marshfield the said sum of \$12,500.00, and that the costs hereof be paid by the plaintiffs herein."

The court having had jurisdiction of the subject matter and of the parties to the suit the doctrine of res judicata would apply to this case and would be binding on all parties thereto, including the defendant Webster County, Missouri, and in support of same we cite the following authorities:

- "(1) The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal.  
(2) Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not."

34 C. J. p. 743.

And further, it is said in 34 C. J., at page 750:

"A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or



their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled."

And in 34 C. J., page 990, it is said:

"As a general rule a valid and final judgment is binding and conclusive on all the parties of record in the action or proceeding in which the judgment was rendered."

In the case of Fiene v. Kirchoff, 176 Mo. 516, 1. c. 525, the Missouri Supreme Court said:

"In Hope v. Blair, 105 Mo. 1. c. 93, Macfarlane, J., aptly stated the law as follows: 'When the court has cognizance of the controversy, as it appears from the pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the "soundest principles of public policy." "It is one," says the court of Virginia, "which has been adopted in the interest of the peace of society, and the permanent security of titles."'"

In the case of Chouteau v. Gibson, 76 Mo. 38, 1. c. 51, Judge Norton said, quoting from the case of Sturgis v. Rodgers, 26 Ind. 1:

"A judgment of a court of nisi prius rendered under such circumstances could never be called in question collaterally before the same or any other court. It must be so, also, as to the judgment of the court of last resort when it has jurisdiction, though it mistake the law and err in its judgment. The rule is as essential in the one case as in the other to the repose of society and the stability of private rights. To say that a

judgment of affirmance here, within the power of the court to render, when the parties are before the court and the case is brought within its lawful jurisdiction, is not a final end of that litigation, would be a startling doctrine, asserting that a cause can never have a final termination."

In the case of *Brake v. Kansas City Public Service Company*, 41 S. W. (2d) 1067, the court said:

"It is not necessary to cite authorities to support the proposition that a judgment, legal upon its face, rendered by a court of competent jurisdiction, is binding and conclusive upon the parties to it. Citing *Piene v. Kirchoff*, 176 Mo. 516; 34 C. J. 990."

It is our opinion that this court having jurisdiction of the parties to the suit and of the subject matter and no timely motion for new trial having been filed and no appeal taken, so we are informed, therefore, said judgment became a binding judgment of said court upon all of the parties hereto and they are bound by said decree and judgment, which judgment, in our opinion, relieves the Citizens State Bank of Niangua, a corporation, of any liability by reason of the deposit of said \$12,500, mentioned in said decree and judgment.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

CRH:EG

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

BANKS AND BANKING:

Commissioner of Finance has right to  
fix fees of attorneys of failed banks.

2-16  
February 10, 1934.



Honorable O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

We are in receipt of your letter of January 29th, enclosing two letters - one from Mr. A. F. Murrell, Attorney at Law, of January 27th, and the other from Mr. E. C. Hilbert, Attorney at Law, of January 26th. We are setting forth your request for an opinion and the two letters from Mr. Murrell and Mr. Hilbert respectively, so that we may have a full explanation of the matter and the answer of both letters in one opinion:

"I am inclosing herein two letters, from attorneys representing this Department in liquidations of closed banks, and request that you furnish us with an interpretation of Sections 5323 and 5324, R. S. Mo., 1929, relative to those portions which have to do with attorney's fees.

O. H. MOBERLY,  
Commissioner of Finance."

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"RE: NOVINGER BANK, NOVINGER, MO.

Mr. Alex Nimmo, formerly attorney representing the department in connection with the liquidation of the above named bank, has filed a petition in the Circuit Court of Adair County asking that his attorney fees be fixed by the court in the amount of \$500.

"You will recall that Mr. Nimmo has heretofore submitted his statement to the department setting out various items of services performed for which he claimed fees amounting to that sum. You, as Commissioner, did not approve the same, but fixed his fees at the total of \$250.00. Mr. Nimmo resigned as attorney for the department sometime in December.

The question is now presented as to whether the court under the authority of Sections 5323-24 of Revised Statutes of Missouri, 1929, can increase the compensation of such attorney. I think there is no question but that under the law the court could refuse to approve any salary or attorney fees that he might deem to be exorbitant, and could set a less fee or salary, but there is no provision as to increasing fees approved by the department. I am not able to find any cases on this proposition, and I believe that the matter should be presented to the Attorney-General for an opinion. It may be that the Attorney-General has heretofore given you an opinion on this matter. If not, I shall appreciate it if you will ask for one. I am making this request at the instance of Hon. H. S. Rouse, Judge of the First Judicial Circuit to whom the matter will be presented.

W. F. MURRELL."

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"Charles E. Rendlen, formerly attorney representing the Commissioner of Finance in charge of the liquidation of the Bank of Canton, Canton, Missouri, has filed his petition in the Circuit Court of Lewis County, at Monticello, Missouri, setting out therein that he has performed many and diverse matters for the commissioner and Special Deputy Commissioner in charge of said bank; that he has heretofore been paid the sum of \$1,000.00; that his services were reasonably worth \$1,500.00 and asks for an additional allowance of \$500.00.

"This petition for an additional allowance does not bear your approval, neither does it appear to have been presented to you for approval, and I have and am taking the position the court can not in the first instance fix fees of counsel etc., but it is the duty of the Commissioner to fix the fees in the first instance and must be approved by the court before the payment thereof; that the court may reduce the amount so fixed by the commissioner, but is without authority to increase the fees fixed by the commissioner or allow fees without first being fixed by the commissioner, however, Sections 5323 and 5324 do not appear to have been construed by our court on this particular point and in as much as our Court would like to be advised in the matter before this matter comes on for hearing on February 19th., I would appreciate very much if you would request an opinion on this matter from the office of the Attorney General that I may have same prior to Feb. 19th.

W. A. Mussetter, has filed a like petition, asking for an additional allowance of \$600.00 as attorney fees in connection with the liquidation of the same bank.

E. C. HILBERT."

I.

The question is whether or not the circuit court, or judge thereof in vacation, may increase the fee of an attorney for a failed bank in liquidation over that fixed by the Commissioner of Finance.

Section 5323, R. S. Mo. 1929, provides that the Commissioner of Finance may appoint one or more special deputy commissioners of finance to assist in liquidating the affairs of failed banks, in the following language:

"He may employ such expert assistants and counsel, \* \* \* \* as he may deem necessary in the liquidation and distribution of the assets of such corporation or banker."

And it is further provided by said section:

"Provided, however, that no salaries or attorney's fees shall be paid unless approved by the circuit court, or judge thereof in vacation, which circuit court, or judge thereof in vacation, may refuse to approve any salaries or attorney's fees that he may deem exorbitant, and set a less fee or salary, which less fee or salary shall be the amount paid."

And Section 5324, R. S. Mo. 1929, provides as follows:

"The commissioner shall pay out of the funds in his hands, of such corporation or private banker, all expenses of liquidation, subject to the approval of the circuit court, or judge thereof in vacation, in the county or city in which the principal office of such corporation or banker is located, and upon notice of the application for such approval to such corporation or banker. He shall, in like manner, fix and pay the compensation of special deputy commissioners, assistants, counsel and other employees appointed to assist him in such liquidation pursuant to the provisions of this article. But a special deputy who, as examiner acting under commission from the commissioner, has previously examined the books, papers and affairs of such corporation, or banker, shall not receive compensation as such special deputy which exceeds by more than five (\$5.00) dollars a day the per diem compensation received by him as examiner at the time of making such examination."



The Banking Laws of the State of Missouri were revised and almost completely changed at the 1915 Session of the Legislature and found at pages 102 to 193, inclusive, in Session Acts of 1915; and we find that Section 36 thereof is exactly the same as Section 5324, R. S. Mo. 1929, with the exception that at page 213, Acts of 1927, this section was amended by adding thereto "or judge thereof in vacation." Since 1915, the statute has provided that the Commissioner of Finance shall fix and pay the compensation of special deputy commissioners, assistants, counsel and other employees appointed, etc.

For a long period of time, it has been the custom and policy of the Commissioner of Finance to fix the compensation of special deputy commissioners, assistants, counsel and other employees appointed to assist in the liquidation of failed banks, and pay same out of the funds in his hands of the corporation, or private banker, in liquidation.

It was said in the case of State ex rel. Barrett v. First National Bank of St. Louis, 249 S. W. 619, l. c. 623:

"\* \* it is a well-established rule of construction that a long-continued interpretation of a statute by public officers charged with its execution, while not controlling upon the courts, is entitled to special consideration. McAllister v. Cupples Station, 283 Mo. 115, 223 S. W. 75; State ex rel. Chick v. Davis, 273 Mo. 660, 201 S. W. 529; State ex rel. Kinloch Tel. Co. v. Roach, 269 Mo. 437, 190 S. W. 862; Ewing v. Vernon Co., 216 Mo. loc. cit. 689, 116 S. W. 518."

And further, in the case of State ex rel. v. Baker, 316 Mo. 853, l. c. 863; 293 S. W. 399, l. c. 404:

"The executive construction thus placed on this statute is also entitled to great consideration. The doctrine is thus stated in 36 Cyc., pages 1140, 1141:

'The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration,

especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous."

## II.

In the case of Farmers and Merchants Bank v. Coleman, 9 S. W. (2d) 549, in the Springfield Court of Appeals, it was said in construing Section 11707, R. S. Mo. 1919 (now Section 5324 R. S. Mo. 1929):

"Section 11707, R. S. 1919, before change in 1927 (Laws 1927, p. 213), relating to expenses of liquidation of a failed bank, provided that the bank commissioner 'shall pay out of the funds in his hands \* \* \* all expenses of liquidation, subject to the approval of the circuit court,' etc. This section further provided that, in case of a special deputy commissioner appointed to assist in the liquidation of a failed bank, the commissioner 'shall fix the pay or compensation' of such special deputy. By the only change made in section 11707 by the act of 1927, the words 'or judge thereof in vacation' were added after the words 'circuit court.'

Appellant in the first instance did not have his compensation fixed by the commissioner of finance, as the statute requires, but asked the court to fix it. Appellant's able counsel concedes that the circuit court was without jurisdiction to fix the compensation in the first instance. There can be no doubt that such is the case. If the circuit court had no jurisdiction to fix the compensation in the first instance, certainly we have no jurisdiction to review the matter on appeal."

Webster's Dictionary defines "fix":

"To give a permanent form to; to make definite and settled; to make firm;"

Feb. 10, 1934.

And in "Words and Phrases" (3d ed.), at page 692, "fixed" means:

"of established, unchanged, permanent character; settled; lasting."

II.

It is, therefore, our opinion that under Section 5324, R. S. Mo. 1929, the Commissioner of Finance has the right to fix the compensation of the special deputy commissioner of finance in charge of failed bank, and has the right to fix the compensation of the attorneys for failed banks, subject to the approval of the circuit court, or the judge thereof in vacation, having jurisdiction over the failed bank; and the Circuit Court, or the judge thereof in vacation, may refuse to approve any salaries or attorney's fees he may deem exorbitant and set a less fee or salary, which less fee or salary shall be the amount paid; but the circuit court, or the judge thereof in vacation, may not set a higher fee for the special deputy commissioner of finance and the attorneys, than that fixed or approved by the Commissioner of Finance.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

RELATING TO CLAIMANTS TO LAND BY ADVERSE POSSESSION AGAINST PUBLIC  
SCHOOL DISTRICTS.

RELATING TO THE POWER AND AUTHORITY OF SCHOOL BOARDS TO EMPLOY  
TEACHERS OR SUPERINTENDENTS BEYOND THE TERM OF THEIR OFFICE.

February 16, 1934. 2-17-34



Hon. Morgan M. Boulder  
Prosecuting Attorney  
Camden County  
Camden, Missouri

Dear Sir:

We acknowledge receipt of your letter of date of  
February 7, 1934, in which you state an inquiry as follows:

"I have been requested by the  
Montreal School District of Camden  
County to ask your opinion on the  
following questions:

The School District of Montreal  
was the grantee in a warranty deed  
to about five acres of land, said  
deed being dated and delivered about  
forty years ago. For more than thirty  
years they have had possession of only  
about two acres of said tract, the re-  
maining three acres having never been  
under the possession or control of  
said School District, but under the  
possession and control of other parties  
who have been deeding the same for the  
past thirty years or more. Does the  
property which has been held adversely  
for a period of more than thirty years  
by private parties belong to the School  
District or to the private parties?  
Does adverse possession apply to and  
run against public property?

The Board of Trustees of the Camden-  
ton Consolidated School District met

prior to the annual school election during the year 1933 and the members of the Board entered into a contract with the superintendent of school, employing that person to teach school and superintend the school for a period of three years. Camden County has a population of about 12,000 people and the Town of Camden has a population of about 600 people. Can the School Board of such a School District employ a teacher or a superintendent of schools for a period longer than one year? Would the contract entered into be void or not? Public sentiment is against the superintendent and we all desire to be rid of him if possible. We do not believe that the contract which he influenced the Board at that time to make with him is good and have every reason to believe that it is void, especially in view of the fact that an entire new school board has been elected since the signing of the contract and the new board does not desire to continue his employment.

I would very much appreciate your opinion in this matter, as the School Board is at a loss to know what they should do."

#### I.

No title resting upon adverse holding can be created against the lands of the public school district acquired by grant in fee.

Section 859, R. S. Mo. 1929 provides as follows:

"Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state."

C. J. 2, p. 224, paragraph 471 F, says:

"While title by adverse possession cannot be acquired to school lands against a county where the organic or statutory law of the state, or both, contain express provisions to the contrary, \*\*\*\*. On the other hand title by adverse possession to school lands cannot be acquired in jurisdictions where lands appropriated to a public or charitable use cannot be so acquired."

In State ex rel. Public Schools v. Crumb, 157 Mo., 1. c. 564, the court said in part as follows:

"It is only necessary to add that the plaintiff's rights are not barred by limitation. (Section 6772, R. S. 1889)

In the case of The City of St. Louis v. The Mo. Pac. Ry. Co., 114 Mo. 1. c. 24, the court said in part as follows:



"The force of that statute (section 6772 R. S. 1889) renders it unnecessary to remark upon any of the earlier decisions on this topic. As the law now stands we entertain no doubt that in respect of such property as is here in view, so held by the city for public use as a highway, the lapse of time in asserting the public right to possession constitutes no bar to the present action.

The fact that the street has not been graded, paved or otherwise improved by the city does not affect the principle asserted. The time when such improvements shall be begun rests in the discretion of the municipal authorities, and the circumstance that they have not seen fit yet to exercise that discretion does not impair the city's standing as owner."

In the case of *People ex rel. v. Ricketts*, 94 N. E., 71, the court said in part as follows:

"A public use may be limited to the inhabitants of a small locality; but the use must be in common and on the same terms, however few the number who avail themselves thereof, and a "public use", whether for all men or a class, is one not confined to privileged persons."

In the case of *Trustees of Caledonia County Grammar School v. S. Blanche Kent*, 86 Vt., 1. c. 166, the court said in part as follows:

\*\*\*\*\*It was held in this case (84 Vt. 1), that by statute the Statute of Limitations cannot extend to lands given, granted, sequestered, or appropriated to a public, pious, or charitable use; and, referring to what was there held, we have said in the foregoing opinion, that it being established that the land in question was granted for a public use, the Statute of Limitations does not apply."

In the case of Howard v. Groville School District, 22 Cal. A., 1. c. 551, the court said in part as follows:

"In our opinion there is no reason for not applying the same rule to property which is dedicated or reserved to a public use when the title is held by the municipality as is applicable when it is held by the state. The same principles which prevent an adverse possession from ripening into a title when the title to the property belongs to the public and is held for public use apply in the one case as in the other. It is immaterial where the title, that is the record title, is held, whether by the state at large or by a county, or by some municipal department or other official body. There can be no adverse holding of such land which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations."

It is, therefore, the opinion of this department in view of our statutory law and the construction of said law by our courts, as well as similar statutes in other jurisdictions,

that no title resting on adverse holding can be created against a public school district in a grant to them in fee, for they hold the same for a public use within the meaning of the law.

II.

There is nothing in our statutes that impliedly prohibits the members of a school board from making a contract in good faith without fraud or collusion for a reasonable length of time beyond the term of office of the members of the board.

We assume that the school district of Camdenon is organized under Article IV, Chapter 57, R. S. Mo. 1929 relating to schools.

Section 9327 R. S. Mo. 1929 relates to school districts in cities, towns and consolidated districts and provides as follows:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected and qualified \*\*\*\*"

Section 9328 R. S. Mo. 1929 provides:

"The qualified voters of the district shall, annually, on the first Tuesday of April, elect two directors, who are citizens of the United States resi-

dent taxpayers of the district \*\*\*  
who shall hold their office for three  
years \*\*\*\*

Section 9329 R. S. Mo. 1929, among other things, provides:

"A majority of the board shall constitute a quorum for the transaction of business, but no contract shall be let, teacher employed, bill approved or warrant ordered unless a majority of the whole board shall vote therefor \*\*\*\*

We are assuming that a majority of the board voted for the contract of employment of the school superintendent.

Section 9333 R. S. Mo. 1929 provides in part as follows:

"The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of the state.\*\*\*\*

We are assuming that the Camdenton Consolidated School is a district of the third class as defined under Section 9194 R. S. Mo. 1929.

Under the provisions of Section 9333 (supra), the Board of Education of a town, city, or consolidated district, has the same power to perform the same duties except wherein it is otherwise specifically provided, as the boards of other school districts acting under the school laws applicable to all classes of schools. Therefore, we must resort to Article 2 of Chapter 57, which embraces

the law applicable to all classes of schools for authority of school boards of the class of schools under discussion to employ teachers and superintendents, as no other provisions under Article 4 of said chapter are found, and Section 9209 R. S. Mo. 1929 provides specifically the method of employment, and applying the provisions of Section 9333 (supra), we find that said section, 9209, (supra) would apply to the employing of teachers and superintendents of schools of that class here under discussion. Section 9209 R. S. Mo. 1929 provides as follows:

"The board shall have power, at a regular or special meeting, to contract with and employ legally qualified teachers for and in the name of the district;\*\*\* The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made.\*\*\*"

Now referring to Section 9201, R. S. Mo. 1929, we find the contract referred to and provided for in said section, 9209, (supra) is construed in said section as follows:

"The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby. Neither party shall suspend or dismiss

a school under said contract without the consent of the other party. The board shall have no power to dismiss a teacher; but should the teacher's certificate be revoked, said contract is thereby annulled. The faithful execution of the rules and regulations furnished by the board shall be considered as part of said contract; Provided, said rules and regulations are furnished to the teacher by the board when the contract is made. \*\*\*"

In so far as we can discover, there is no specific limitation fixed by the statute upon the term or time for which a legally organized school board may employ a teacher or superintendent of schools, but of course this general rule would apply to-wit; that the time must not be an unreasonable one under all the circumstances.

We do not find any case in Missouri where the contract has been made and sustained for a period in excess of the school term for the following ensuing year after the making of the contract, but I do find a case decided recently wherein a common school district in December made a contract to employ a teacher for a term of eight months beginning the succeeding August. The members of the School Board employing this teacher went out of office in the following April and the new board employed another teacher for the term beginning in August and notified the teacher with whom the written contract had been made in December that her services were not needed and would not be accepted.

This teacher with the December contract went to the school house in August and undertook to teach the school and was prevented from doing so; she then sued the district upon the contract and alleged that she had been unable to secure other employment, and the Supreme Court, Division No. 1, on December 31, 1929, sustained the contract and affirmed the decision of the lower court, wherein upon a jury trial she was awarded the full amount



of her contract for the eight months school at \$90.00 per month.

The defendant school board set up, among other things, the defense that the school board in December, which went out of office in April next ensuing, had no authority to make a contract or to employ a teacher beyond the term of the board, because one member of the board's term expired in April (and it subsequently developed the other two resigned), and this was one of the questions the court passed upon, and upon this question the court in

Tate v. School District No. 11 of Centry County,  
25 S. W. (2d) 1020-1021-1022

said:

"The foregoing statutes reflect the clear and unmistakable intention of the General Assembly, which is the law-enacting authority of our state, that the government and control of each of the common school districts in the state shall be vested in a board of directors composed of three members, whose terms of office shall not expire concurrently, but that the term of office of only one of the three members composing said board shall expire during each school year, thereby reflecting the intention of the General Assembly that such governing board of directors of a common school district shall be a continuous body or entity, of which a majority of the members composing the board shall continue in office during the next succeeding school year. While provision is made in the statutes for a change in the personnel of the membership of the board of directors by the vote of the qualified electors of the school district at each annual meeting of the

school district, yet the intention of the Legislature is clearly reflected in statutes that the board of directors of a common school district is a continuous body or entity, and that transactions had, and contracts made, with the board, are the transactions and contracts of the board, as a continuous legal entity, and not of the individual members.

Section 11137 R. S. 1919, provides, in-teralia: "The board shall have power, at a regular or special meeting, to contract with and employ legally qualified teachers for and in the name of the district; all special meeting shall be called by the president and each member notified of the time, place, and purpose of the meeting. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with said clerk, who shall return the certificate to the teacher at the expiration of the term."

The legislative grant of power to the board of directors of a school district to employ, and to contract with, legally qualified teachers, is made general by the statute. No express limitation is made upon the grant of power by any language of the statute; nor is any limitation upon the power granted to be reasonably implied from the language and context of the statute. The statute does not limit, or undertake to limit, either expressly or impliedly

the period of employment of a teacher to the single and particular school year in which the contract of employment is made by the school district board of directors.

In support of its contention and insistence that the board of directors of the defendant school district had no lawful power of authority to make the contract of employment with plaintiff for her services as teacher for the next ensuing school year, appellant has placed reliance upon the rulings made in *Loomis v. Coleman*, 51 Mo. 21, *Crabb v. School Dist.* 93 Mo. App. 254; and *Burkhead v. Independent School District*, 107 Ia. 29, 77 N. W. 491. All of the cited cases are clearly distinguishable from the case at bar. The *Loomis* case, *supra*, involved the construction of the Public School Act of March 19, 1870 (Laws of Mo. 1870, pp. 138-158). That act (Sec. 2 *Id.* p. 140) provided for a board of directors for each school district in the state, composed of three directors, all of whom were elected annually, by ballot, by the qualified voters of each school district, and "who shall hold their office for the period of one year, and until their successors are elected and qualified." Under said act, the board of directors of a school district was not made a continuous body, such as is provided by the present and existing statute. In the *Loomis* Case, it appeared that the three members of the new board of directors of the school district were elected on Saturday and qualified on the next succeeding Monday,

before the contract of employment was signed by and between the plaintiff, Loomis, and the old board of directors. Hence, it was properly ruled by this court in the cited case that "it is clear that the old directors were then out of office and that their assumed action was wholly ultra vires." In the Crabb case, supra, it was contended that the contract of employment of plaintiff as teacher of a district school was void for uncertainty and indefiniteness, in that the contract specified no time at which plaintiff's employment was to begin. It was ruled by the Kansas City Court of Appeals in that case that the law implies that the services of the teacher are to be rendered within the ensuing school year and that the contract of employment was referable to the time when defendant's board of directors should fix the beginning of the school term within the ensuing school year. The power of the board of directors of the defendant school district to make the contract of employment was not involved in the cited case, and was not a question or issue for decision in that case. In the Burkhead case, supra, a contract of employment whereby plaintiff was employed as superintendent and teacher of the schools of defendant's school district for the period of five years, was held to have been made in violation of certain statutes of the State of Iowa, which by implication were deemed to reflect the intention of the Legislature of that state that such contracts of employment shall be limited in duration to the single and ensuing school year, as determined by the board of directors of the school district. In ruling such

case, however, the Supreme Court of Iowa said (77 N. W. loc. cit. 492): "By section 2743 of the Code, the school district is a body politic and as such may sue and be sued. The board of directors represents the district from a legal standpoint, is the district. It is a continuous body. The officers change but the corporation continued unchanged. The contracts are of the corporation, and not of the members of the board individually. It is not essential, then that contracts be limited to the terms of office of the individuals making up the board." -- citing numerous authorities in support of the rule so announced.

The prevailing weight of judicial authority on the subject is thus stated in 35 Cyc. 1079, 1080: "In the absence of a statutory provision limiting, either expressly or by implication the time for which a contract for employment of a school teacher may be made to a period within the contracting school board's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion and for a reasonable period of time; and the succeeding board or officers cannot ignore such contract because of mere formal and technical defects, or abrogate it without a valid reason therefor."

The prevailing rule is thus stated in 24 R. ca. L. 579: "In the absence of an expressed or implied statutory limitation a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract, if made in good faith, and without fraud and collusion, binds the succeeding board. It has even been held that, under the proper circumstances a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole. The fact that the purpose of the contract is to forestall the action of the succeeding board may not of itself render the contract void, but a hiring for an unusual time is strong evidence of fraud and collusion, which, if present, would invalidate the contract. Of course, any statutory implication that the powers of the board are limited to the current term would invalidate contracts for a term extending beyond that of the board."

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The prevailing rule is sound and, is grounded upon good sense and reason. The contract of employment between plaintiff and defendant school dis-



trict, here in controversy, cannot be held to be void or illegal, for any lack of power or authority in the then board of directors of defendant school district to make such contract on December 18, 1924. The eight-month period of plaintiff's employment prescribed by said contract occurring within the next ensuing school year, cannot be well said, as a matter of law, to be such an unreasonable or unusual period of employment as to bespeak, or to indicate fraud in the making of the contract. The trial court rightly overruled the demurrer to plaintiff's petition, and rightly refused the preemptory instructions requested by defendant. The assignments of error respecting the aforesaid actions of the trial court must be denied \*\*\*\*\*

Section 11137 R. S. of Mo., 1919 corresponds to and appears as Section 9209 R. S. of Mo., 1929. It will be seen from the foregoing opinion that the court holds the school districts of Missouri are a continuous body or entity of which a majority of the members composing the board continue in office during the next ensuing year. The court also holds that the weight of authority is in the absence of a statutory provision limiting expressly or by implication the time for which a contract for employment of a school teacher may be made to a period within the contracting school board's term of office; such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office or for the term of school succeeding their term of office, providing such contract is made in good faith, without fraud or collusion and for a reasonable length of time.

It seems to be an established rule according to our court that in the absence of an expressed or implied statutory limitation a school board may enter into a contract to employ a teacher for a term extending beyond that of the board itself,

and if such contract is made in good faith and without fraudulent collusion, it binds the succeeding board, but a hiring for an unusual time, the courts hold is strong evidence of fraud and collusion, which if present, would invalidate the contract. Of course, any statutory implication that the powers of the board are limited to one current term would invalidate contracts extending beyond the term of the board.

According to the decisions a three year contract might be said by our court as a matter of law to be such an unreasonable or unusual period as to bespeak or indicate fraud in the making of the contract, but I have been unable to find any contract for three years that has been so declared to be legal or illegal in this state. In the case referred to, State v. School District, supra, in the course of the opinion, the court said:

"The eight months period of plaintiff's employment prescribed by said contract occurring within the next ensuing school year cannot well be said as a matter of law to be such an unreasonable or unusual period of employment as to bespeak or indicate fraud in the making of the contract."

We see, therefore, that this Missouri decision we have referred to does not decide the identical question as to whether or not a three year contract would be such an unreasonable period of time as to void the contract or even to indicate fraud in the making of it.

In what we have said, of course, we have assumed that no facts surrounding the making of the contract or in connection therewith show any fraud or collusion and that the fraud or collusion, if found at all, would have to arise from the mere fact of the contract being made for three years.

The court in the Missouri decision referred to does say, however, that there is nothing in the Missouri statutes that impliedly prohibits the members of a school board from making a con-

Hon. Morgan M. Moulder

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February 16, 1934

tract in good faith, without fraud or collusion for a reasonable length of time beyond the term of office of the members of the board.

Yours very truly,

W. W. BARNES  
Assistant Attorney General

APPROVED:

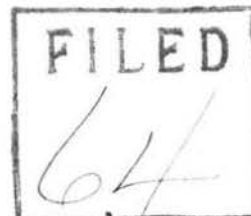
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ROY McKITTRICK  
Attorney General

WEB:FE

COUNTY BUDGET: Classification of boarding prisoners.

35  
March 3, 1934.



Hon. M.E. Montgomery,  
Prosecuting Attorney,  
Scott County,  
Benton, Missouri.

Dear Sir:

Your letter of January 19 addressed to Attorney General McKittrick has been handed to me for reply, same being as follows:

"I have just received a copy of an opinion from your office, holding that boarding of prisoners could not be classified under Class 1, 2, 3 or 4 under the County Budget Law, but would be classed as a 'contingent expense' under Class 5. In so holding, it appears to me that you have overlooked a number of statutory provisions.

Sec. 8526 provides that the sheriff shall be the county jailer, and shall have charge of the prisoners. Secs. 8527, 3426, 3440, 3443, 3476, 3487, 3716 and 3726 provide that the sheriff, as jailer, shall receive and safely keep all prisoners committed to jail by lawful authority. Secs. 8533 and 11794, mentioned in your opinion, provide that the sheriff shall feed and maintain these prisoners. Sec. 3827 and 3825 and a number of other sections provide that this expense shall be paid by the county where not recoverable against the defendant or chargeable to the State.

By these statutory enactments the Sheriff is specifically required to incur the expense of boarding these prisoners, and it appears to me that this unquestionably is an expense 'necessary for the conduct of the office' of sheriff, within the meaning of the provisions of the Budget Law, specifying items properly chargeable under Class 4. Consequently, it is

March 3, 1934.

my idea that boarding of prisoners, chargeable against the county, should be classified under Class 4 rather than under Class 5."

We assume that you refer to an opinion rendered by the writer to the Honorable Elbert L. Ford, Prosecuting Attorney, Kennett, Mo. wherein the expense of boarding prisoners was interpreted as being in Class 5 of the new County Budget Law. At the time the opinion was rendered the statutes mentioned in your letter were taken into consideration.

It seems that we are agreed that the only two classes of the County Budget Law in which the expense of boarding prisoners might be put are classes 4 or 5. We cannot, however, place the same construction on the phrase "necessary for the conduct of the office" as you do in so far as it relates to a sheriff. It is our opinion that the Budget Law refers to the items which are to be included in the phrase "necessary for the conduct of the office". We do not believe that it is comprehensive enough to include the expense of boarding prisoners.

Further, under our definition of "contingent expense" and "emergency expense", as contained in the opinion, which you seem to be familiar with, we are unable to classify the boarding of prisoners other than under these two terms. Neither can we comprehend how a county court could determine the amount to set aside for the boarding of prisoners. The amount would be variable; a sheriff may have two prisoners or he may have fifty during the course of the year, and he should have the right to look to the county for the cost of boarding them.

We appreciate your interest in the matter and want you to feel at liberty to write us any time when an opinion from this department does not meet with your approval, as we are always open to suggestions.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

**BANKS & BANKING:** Restricted deposits, permitted to be withdrawn under Commissioner of Finance's regulations, not preferred claim in event bank closes.

4-9

March 26, 1934.



Hon. O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

Your letter of March 5th received, requesting an opinion on a question submitted by Mr. Chas. W. Dickey, whose letter is as follows:

"In re: Liquidation Queen City Bank

You will remember that on our recent visit to Jefferson City Richard Johnson, Liquidator of the above bank, and I took up with you the matter of the status of deposits made in said bank prior to the moratorium and not withdrawn after the bank was placed on a restricted basis. You asked us to advise you what instructions had been given the bank by your department at the time it was allowed to open. We herewith comply with your request.

In a letter of March 13, 1933, addressed to the Queen City Bank, in Paragraph 1, you instruct as follows:

1. Depositors, including demand, savings and time, may for a period of six months, beginning with the date of opening, withdraw not to exceed five percent of their deposits as at the close of business



March 3, 1933, provided that, if conditions justify, additional withdrawals may be permitted upon prior written consent from the Commissioner of Finance. In the case of time deposits, not exceeding five percent may be paid upon maturity but not before maturity if maturity comes within the six months' period mentioned above. No time deposits are to be paid before maturity and the balance of ninety-five percent may be renewed on the basis as heretofore, but, if the holders of time deposits do not wish to renew, they may deposit same as demand deposits, without interest, subject to restrictions for withdrawals as provided above.'

Again in said letter, in Paragraph 8, you advise as follows:

'These restrictions and regulations are made in accordance with the provisions of Senate Bill No. 293, of the General Assembly of the State of Missouri of 1933. Penalties provided in said Bill shall apply if any of the regulations or requirements therein set out are violated.'

The facts, as we understand them, are as follows:

The Queen City Bank was closed, under the General Moratorium, March 3, 1933. At that time there were, of course, a number of deposits, demand, savings and time deposits. On March 13, 1933 you allowed the bank to open under certain restrictions, one of which was that depositors, 'including demand, savings and time, may, for a period of six months, beginning with the date of opening, withdraw not to exceed five percent of their deposits as at the close of business March 3, 1933.'

The bank operated under these restrictions until January 29, 1934, when the directors turned the bank over to you for liquidation. During that time some of the depositors had withdrawn their five percent, as permitted to do so under your restricting. Others had not done so. The question confronting us is whether or not the depositors who did not draw out their five percent have the right to do so now, that is, whether a trust fund was established of five percent of the deposits, which, in any event, should be paid to the respective depositors, or whether, when the bank was finally closed, all the old deposits made prior to the moratorium became assets of the bank to be equally divided among all creditors and depositors.

This question has been discussed to a considerable extent among several lawyers here in Springfield, and their opinion is, as I get it, that there was no trust fund created, and that the depositors who either neglected to withdraw their five percent or who thought best not to withdraw their five percent, lost their right to do so when the bank was finally closed.

This opinion is based on the fact that the bank was operated, and the restricting order was made under S. B. 293 (Laws of Missouri 1933, Page 402), in which bill the Commissioner of Finance is given 'authority to restrict and to regulate the right of any bank \*\*\*\*\* to withdraw assets, pay checks or other orders drawn against deposits, for such time, to such extent and in such manner, as shall to him \*\*\*\*\* appear necessary for the protection of the depositors and other creditors.'

No place in the bill does it appear that a trust fund is established, nor that depositors who fail to withdraw their deposits, in accordance with the regulations and restrictions, shall have any special interest in the deposits.

We call your attention to C. S. H. B. 91 (Laws of Missouri 1933, Page 404), which deals with the closing of banks. This bill authorizes a bank, when unusual withdrawals are made to suspend payment of checks of depositors and any and all withdrawals of assets of said bank for a period of 6 banking days, and authorizes the Finance Commissioner thereafter to take charge of the bank and supervise the receipt of deposits and payment of checks and withdrawals for a period of sixty days thereafter.

Section 2 of said bill provides that the Finance Commissioner shall have the power to limit 'upon a basis of equality' all withdrawals of deposits or assets. Section 3 of said bill says that 'All depositors and creditors of the same class shall be treated alike.' Section 5 of said bill provides that 'deposits may be received \*\*\*\*\* as special deposits or trust funds,' and that no part of the funds deposited during said period of 60 days shall be an asset of such bank.'

The very fact that under S. B. 293, the bill controlling the situation of the Queen City Bank, no mention is made of trust funds, or that the deposits shall be special deposits and not assets of the bank, whereas in C. S. H. B. 91 those terms are expressly used, leads lawyers to give the statutes this interpretation, and leads us to believe that in the present case the deposits made prior to the moratorium, and not withdrawn, do not constitute a trust fund, and no part of them constitute a trust fund, and even the five

percent not withdrawn does not constitute a trust fund.

Your instruction in your letter of March 13, stating that the depositors 'may, for a period of six months \*\*\* withdraw not to exceed five percent of their deposits,' leads to the same conclusion.

A number of the deposits are for very small amounts. The five percent of these various deposits would, in many cases, amount to only a few cents, and would entail a great deal more work on the part of the liquidator.

Mr. Johnson, of course, is anxious to comply with all your instructions and wishes. He has, therefore, asked me to write you this letter.

Will you please give us the benefit of your advice in this matter? It may be that you have already obtained an opinion from the Attorney General or from some other legal source. It may be that you do not care to do so, but have already convinced yourself of the law pertaining to the matter."

The question submitted in Mr. Dickey's letter is, whether or not persons having deposits in restricted banks, closed under the banking moratorium of March 3, 1933, and reopened as a restricted bank whereby depositors were permitted, under regulations governing banks under restrictions issued by the Commissioner of Finance, to withdraw five percent of their deposits, and failed to do so before the bank was placed in the hands of the Commissioner of Finance for liquidation, are entitled to have said five per cent, so authorized to be withdrawn, treated as a trust fund and thereby entitled to a preference.

Under the authority of the Laws of 1933, page 402 (Senate Bill No. 293), the Governor of the State of Missouri, or the Commissioner of Finance, with the approval of the Governor:

"are hereby authorized and empowered whenever in his or their judgment the circumstances warrant the regulation, promotion and preservation of the public health, welfare and property rights of the people of the State of Missouri, in addition to all other powers vested in them by any law, to restrict and to regulate the right of any of the banks or trust companies or other institutions doing a banking business in the State of Missouri, to withdraw assets or to pay checks or other orders drawn upon or against deposits for such time, to such extent and in such manner as shall to him or them appear necessary for the protection of depositors and other creditors;"

The fact that the Commissioner of Finance, under the authority of the Laws of 1933, supra, and the regulations issued thereunder by the Commissioner of Finance, permitted the depositors to withdraw five percent of their respective deposits while the bank was under restrictions, and the depositor failed to exercise that privilege before the bank went into liquidation, does not thereby change the character of that portion of the original deposit, to-wit, the five per cent, and make it a trust fund, thereby becoming a preferred claim. There is no place in the act above or the regulations issued thereunder which designate said five per cent as a trust fund, or that, in the event it is not withdrawn, it thereby becomes a special deposit and entitled to preference. The depositor, failing to exercise his privilege of withdrawal before the bank is placed in the hands of the Commissioner of Finance for purpose of liquidation, thereby waives his right to withdraw the five per cent, or any part thereof, and thereby becomes a common depositor as to that amount, together with the balance of his deposit. However, if the original deposit as made was

entitled to a preference, the fact that the depositor did not withdraw the five per cent, or any part thereof, while the bank was under restrictions, did not change the status of the original deposit and he did not thereby lose his right of preference.

It is, therefore, our opinion that the depositor who has not withdrawn his five per cent, or any part thereof, before the bank passes into the hands of the Commissioner of Finance to be liquidated, is not entitled to a preferred claim as to any part of said five per cent.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

CRH:EG



2  
100-100-100  
PUBLIC ADMINISTRATOR - Appointment by the Governor to fill vacancy is to be filled at the first general election held after such appointment.

April 2, 1934  
4-9



Honorable R. A. Mooneyham  
Public Administrator  
Carthage, Missouri

Dear Sir:

Your request of March 29, 1934 for an opinion as to the duration of a person appointed Public Administrator August 22, 1933, under an appointment made by the Governor of Missouri, has been received.

An examination of the Constitution of Missouri at once reveals that the Public Administrator is a statutory office, as distinguished from "constitutional office". It was created by an act of the Legislature under and by virtue of the authority of Section 14, Article IX of the Missouri Constitution, which provides as follows:

"Except as otherwise directed by this Constitution, the General Assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require; and their terms of office and duties shall be prescribed by law; but no term of office shall exceed four years."

Section 296 R. S. Mo. 1929 provides that a Public Administrator shall be elected in every county in this state in the year 1890 and every four years thereafter. This statute places the regular election of Public Administrator in the presidential election years.

A vacancy has occurred in the office of Public Administrator of Jasper County, and was filled by appointment of the Governor under Article V, Section 11 of the Mis-

#2 - Honorable R. A. Mooneyham

souri Constitution, and by the provisions of Section 10216 R. S. No. 1929, which in part provides as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, \* such vacancy shall be filled by appointment by the governor; and the person so appointed shall, \* continue in such office until the first Monday in January next following the first ensuing general election - at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, \* "

In construing the above statute, we must bear in mind that "the prime effort of all judicial interpretation is to ascertain what the Legislature really intended in using the particular language".- State ex rel. v. Insurance Company, 224 Mo. 84, 1. c. 92. This rule of law prevails as to the duration of an appointment to fill a constitutional office. - State ex. inf. v. Dabbs, 182 Mo. 359 (1904); State ex rel. v. Roach, 269 Mo. 300 (1916).

With reference to a county office, a person appointed to fill a vacancy, holds until the time fixed for the termination of such appointment, and the statute which provides that the appointment of the county officer shall continue until the first Monday in January following the general election, is valid and constitutional. State ex inf. v. Herring, 208 Mo. 708 (1907).

It is, therefore, the opinion of this office that your appointment as Public Administrator of Jasper County for a term ending the first Monday in January, 1935, is limited to that time, and is fully covered by the provisions of Section

#3 - Honorable R. A. Mooneyham

10216 R. S. No. 1929, and that the Public Administrator of Jasper County must be elected at the coming general election for the remaining two years of the unexpired term.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

ELECTIONS:

Absentee ballots may be voted in a special election to be held May 15; persons who will be out of the State of Missouri may vote absentee ballots providing they are marked before officers who are authorized to administer oaths in the State of Missouri.

4-11

April 10, 1934



Honorable W. M. Morris  
Clerk of County Court  
Grundy County  
Trenton, Missouri

Dear Mr. Morris:

This is to acknowledge your request for an opinion on the following questions:

1. May absentee ballots be voted in the special bond election to be held May 15, 1934?
2. Is a voter who will be absent from the State of Missouri on election day entitled to vote an absentee ballot?

Laws of Missouri 1933-34 extra session, page 174, provides for the following:

"At the general election to be held on the Tuesday next following the first Monday in November, 1934, or at a special election to be called by the Governor, in his discretion, prior to such general election, there shall be submitted to the electors of this State, for their approval or rejection, an amendment to the Constitution of the State of Missouri, adding to Article IV thereof, between Section 44c and Section 45, a new section to be known as Section 44d, to read as follows: "

This was a joint and concurrent Resolution, the purpose of same being to vote a Constitutional amendment of \$10,000,000.00 in bonds. The Governor by a proclamation has

April 10, 1934

set May 15, 1934 as the date for said election.

I.

In 1933 the Legislature at regular session repealed and amended the law regarding the casting of absentee ballots. Laws of 1933, page 218-225 inclusive, provides the method for casting ballots by persons absent from the county in which they are duly qualified voters, and Section 1 provides the following:

"That Sections 10181, 10182, 10183, 10184, 10185, 10186, 10187 and 10188, of Chapter 61, Revised Statutes of Missouri, 1929, relating to 'elections,' be, and the same are hereby repealed and twelve new sections relating to the same subject are hereby enacted in lieu thereof, to be known as Sections 10181, 10182, 10183, 10184, 10185, 10186, 10187, 10188, 10188a, 10188b, 10188c and 10188d, and to read as follows: "

Section 10181 of the above Act reads:

"Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as herein-after provided."

It will be noted that the above section provides that in order for one to vote an absentee ballot that

1. He must be a qualified elector of the State of Missouri,
2. Absent from the county on the day of holding the election, and

3. That it must be a special, general or primary election.

As stated above this is a special election called by the Governor, the purpose of it being to bond the State of Missouri for \$10,000,000.00 by Constitutional amendment.

Section 10181 says the following:

"\*\* or at which questions of public policy are submitted, \* \* \* \* \*

We hold that the election to be held on May 15 will be a special election and is one at which questions of public policy are submitted, namely, that of bonding the State.

In answer to your first question it is our opinion that absentee ballots may be voted in the special bond election to be held May 15, 1934.

## II.

Section 10182 Laws Missouri 1933, provides the following:

"Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, to the county clerk or, where existing, to the board or election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

Section 10183 provides a form of affidavit to be signed by the applicant. It will be noted that the voter makes oath that he is entitled to vote and will be absent from his county. Said section further provides that the officials



April 10, 1934

charged with the duty of furnishing such ballots shall send them by registered mail, postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at the election. We thus summarize the above provision:

1. That a person must be a qualified elector of the State of Missouri,

2. That he must be absent on election day from the county in which he is qualified to vote,

3. That not more than thirty nor less than five days prior to the date of such election he must, in person, apply to the county clerk or officer whose duty it is to furnish ballots for such election in his voting precinct for an official ballot,

4. That he must make an affidavit that he will among other things, be absent from the county on the day the election is held,

5. The election officials after the ballots have been printed must send same by registered mail to those applying and not possessing them.

Section 10184 of the same Act provides that the voter must take his absentee ballot before some person authorized to administer oaths in the State of Missouri and there swear to be true the facts stated therein, among other things being that he is entitled to vote and that he will be absent from his county of residence on the date of said election, and further,

"I further swear that I marked the inclosed ballot in secret, and that I have not voted and will not vote elsewhere, or otherwise than by this ballot at this election."

The officer that administers the oath likewise certifies to the above facts, namely, that the voter exhibited the ballot unmarked and then in his presence but not in such manner that he could see how such person voted, and that the ballot was marked and sealed in the envelope.

April 10, 1934

Section 10185 of the same Act provides in part the following:

"\* \* \* and the envelope shall be by such voter sent by mail, postage prepaid, to the officer issuing the ballot, or, if more convenient, it may be delivered in person and such official issue his written receipt therefor, but in any event it must be returned into the hands of the issuing official not later than 6 o'clock p. m. of the next succeeding the day of such election. "

Section 10186 provides in part as follows:

"Provided, however, that no ballot shall be counted by said judges which has not been received and filed by the issuing official or officials within the time by this act required."

Section 10188b provides in part as follows:

"Whenever it shall be made to appear by due proof that any absent voter, who has returned his vote as provided in this act, has died prior to the opening of the polls on the date of the election, then the ballot of such deceased person shall be rejected by the judges appointed to open, count and determine the votes of absent voters, but the casting of the ballot of a deceased voter shall not operate of itself to invalidate the election."

From the above it is seen that in order for one to vote his absentee ballot that he must have obtained the ballot; that he must have appeared before some officer authorized to administer oaths in the State of Missouri; that one might have his ballot marked before the day of election; however, if one marks his ballot before the day of election he must make an affidavit that he will not be in the county where he is entitled to vote on that day; thus he would be swearing to a fact he knew would exist, otherwise he would be violating Section 10188c which provides a penalty for making false affidavits.

April 10, 1934

Section 10188b, supra, bears out the contention one does not have to mark the ballot on the day of the election but may do so beforehand; also the fact that it must be in the hands of the issuing official not later than six o'clock of the day next succeeding the election.

Therefore it is our opinion that one could mark his ballot before the day of election and be out of the State on election day yet his vote could be counted. However, in order to mark the absentee ballot the person must mark same before an officer authorized to administer oaths in this state. Thus every ballot that is voted is in truth and in fact voted while the person is in the State of Missouri.

Section 10188d provides:

"This act shall be deemed to provide a method of voting by voters absent from their county on the day of election and is in addition to the method now provided by statute in cases where the voter is present in the county where such voter resides on the day of such election and to such extent is amendatory of and supplemental to existing statutes, not herein expressly repealed."

Yours very truly,

James L. Horn Bostel  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

JLH:LC

BANKS & BANKING; Claims of United States have preference over other claims against failed banks.

5-21  
May 15, 1934.



Hon. O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

This Department acknowledges receipt of your letter of May 11th, 1934, with request for an opinion; which letter is as follows:

"According to Section 3466, R. S. of the United States, the Government holds that its claims against closed state banks and trust companies are entitled to preference over all other preferred claims and should be paid first. We would appreciate your ruling on this matter."

In addition to the letter of request we note from the correspondence accompanying said request that the United States of America, through its agents, is demanding of your Special Deputy Commissioner of Finance in charge of the affairs of the Bank of Liberal, the sum of \$645.02, postal funds, and \$197.17, funds of the Secretary of Agriculture, of the Seed Loan Department, which had been deposited in the above bank before it closed its doors.

The question asked by you is: Whether the United States of America has a preference claim superior to other preferred claims allowed against the failed bank in question.

R. S. Section 3466, U. S. Compiled Statutes 6372, Section 191, 31 USCA, provides as follows:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

And R. S. Section 3467, U. S. Compiled Statutes 6373, Section 192, 31 USCA, provides as follows:

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

In order to give the priority specified in the above statute there must be a showing of insolvency of the debtor, and the fact that the bank was adjudged insolvent and taken over by the Commissioner of Finance of the State of Missouri for the purposes of liquidation is sufficient showing of such insolvency.

It was held by the Federal District Court in the case of United States v. First State Bank, 14 Fed. (2d) 543 (So. Dak.), that where postal funds belonging to the United States had been deposited in a bank which had been taken over by the Superintendent of Banks of South Dakota under laws of that state because of insolvency, for the purpose of liquidating its assets, in which many cases were reviewed by the court, that this was sufficient to show insolvency of the bank, and in that event the United States was entitled to priority under Section R. S. 3466, supra.

The Supreme Court of Nebraska in the case of State ex rel. Sorensen v. Thurston State Bank, 237 N. W. 293, 1. c. 297, said the following:

"While a state bank may not be put in bankruptcy under the federal act, yet it may commit an act of bankruptcy so as to subject it to the priorities in favor of claims of the United States, as provided in section 3466, Revised Statutes of the United States. That section is to be liberally construed in favor of the United States. *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U. S. 483, 46 S. Ct. 176, 70 L. Ed. 368; *United States v. Bliss* (D. C.) 40 F. (2d) 935; *Bliss v. United States* (C.C.A.) 44 F. (2d) 909. The right to priority in favor of the United States attaches when the conditions specified in section 3466 come into existence; this right cannot be impaired or superseded by a state law. *United States v. State of Oklahoma*, 261 U. S. 253, 43 S. Ct. 295, 67 L. Ed. 638. So we are of the opinion that the district court was right in allowing the claim of the United States for its unpaid deposit as a preferred claim."

The above statute giving priority to the United States is a statutory right and not a common law right which the government has exercised by reason of its sovereign powers. The person who becomes invested with the title to the assets of the bank is made trustee for the United States and first bound to pay its debts out of the debtor's property. *Beaston v. Farmers Bank*,



12 Pet. 102, 103-135, 9 Law. Ed. 1017, 1029, 1030; U. S. v. State of Oklahoma, 67 L. Ed. 638; 43 Supreme Ct. 295; 261 U. S. 253.

In the case of United States v. Brock, State Bank Commissioner of Louisiana et al, 5 Fed. (2d) 265, the court held that cashier's checks purchased by a postmistress with funds belonging to the government have a priority of payment, although the claim is filed by and allowed to her and afterwards assigned to the government; in which the court said:

"My conclusion is that the plaintiff should have judgment for the amount claimed and should be recognized as a privileged creditor to be paid by preference out of the funds in the hands of defendants as required by section 3466 of the Revised Statutes. United States v. Bank of North Carolina, 6 Pet. 29, 8 L. Ed. 12; Bramwell v. United States (C. C. A.) 299 F. 705; Allen et al. v. United States (C. C. A.) 285 F. 678; Beaston v. Farmers' Bank, 12 Pet. 104, 9 L. Ed. 1017."

It was also held in the case of Bliss v. United States, 44 Fed. (2d) 908, by the District Court that postal funds deposited in Nebraska State Bank of Humbolt constituted a preferred claim under R. S. Section 3466, supra, 31 USCA, Section 191, and the Federal Court in 24 Fed. (2d) 709, said:

"In suit by the United States to recover deposit by postmaster of postal funds in an insolvent bank, bankruptcy of bank was shown where state officer was in possession administering its affairs by virtue of affirmative action on part of governing body of institution, or with acquiescence of board of directors and stockholders, within meaning of Rev. St. Section 3466 (31 USCA, Sec. 191), entitling United States to priority as to deposit therein; formal assignment of estate of bank to state officer authorized to liquidate insolvent banking institutions being unnecessary."

May 15, 1934.

The Federal District Court in the case of United States v. Adams, 9 Fed. (2d) 624, held that, under R. S. Section 3466 (Compiled Statutes 6372), giving preference to debts due the United States applies to the liquidation of insolvent state banks.

There are many other citations of authority which could be given to sustain the position that debts due the United States where the debtor is insolvent under Section 3466, R. S., supra, are preferred, but we deem the foregoing to be sufficient.

#### CONCLUSION.

It is, therefore, our opinion that the two claims filed by the United States are, under R. S. Section 3466, supra, preferred and are superior to other preferred claims against this bank and should be first paid. And it is our further opinion that, in the event your Special Deputy Commissioner of Finance did not pay them first, he might become individually liable therefor.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

CRH:EG

BANKS AND BANKING: Re withdrawal of securities by trust companies under  
Section 5463.

5-31  
May 29, 1934.



Mr. O. H. Moberly,  
Commissioner of Finance,  
Jefferson City,  
Missouri.

Dear Mr. Moberly:

This department is in receipt of your letter of May 28, 1934,  
which letter is as follows:

"The attached letter written by Mr. Herbert W.  
Ziercher, addressed to you and dated May 23rd,  
is self-explanatory.

I shall appreciate an opinion from you, set-  
ting out whether or not I am authorized to per-  
mit the withdrawal of the securities referred  
to and, if so, the requirements to be met by  
the trust company and the procedure to be fol-  
lowed by me."

Said request for an opinion is based on a letter from Herbert W.  
Ziercher, attorney for the Trust Company of St. Louis County, of Clayton,  
Missouri, directed to Roy McKittrick, Attorney General of Missouri, a copy  
of which is hereto attached, which letter calls for a construction and in-  
terpretation of Section 5463 R. S. 1929.

The question submitted is whether or not the Trust Company of St. Louis  
County has a right and may withdraw \$200,000 of securities heretofore deposit-  
ed with the Commissioner of Finance of the State of Missouri, under provisions  
of Section 5463, supra.

Section 5463, R. S. 1929, is found in Article 3 of the Revised Stat-  
utes, under the title of Trust Companies, provides in part as follows:

"Any company now doing business in this state or  
which may hereafter be organized under the provisions  
of this article to do business in this state, which  
shall make with the finance commissioner a deposit of  
two hundred thousand dollars, consisting of cash, or  
United States, state, county, municipal or other bond,  
or bonds, notes, or debentures secured by first mort-  
gages or deeds of trust on unencumbered real estate  
in the state of Missouri, worth at least double the  
amount loaned thereon, or such other first-class se-  
curities as the said commissioner may approve, said

bonds or securities not to be received or held at a rate above par, but if their market value is less than par, they shall not be held above their actual market value, and which shall satisfy said commissioner of its solvency, and shall have received the certificate of said commissioner that such company has made said deposit and has satisfied him of its solvency, it being hereby made the duty of said commissioner to issue such certificate in accordance with the facts, shall be permitted to qualify as guardian, curator, executor, administrator, assignee, receiver, trustee, or in any other fiduciary capacity, by appointment of any court, or under will, or depository of money in court, without giving bond as such, and become sole guarantor or surety in or upon any bond required by law to be given in any proceeding in law or equity in any of the courts of this state or other states or of the United States, any other statute to the contrary notwithstanding; and whenever such company shall exhibit to the court, judge, clerk or other officer, making such appointment, or whose duty it is to approve such bond, the certificate of the finance commissioner of the state of Missouri that such company has complied with the provisions of this section with respect to said deposit and proof of solvency, the court, or officer making such appointment, or whose duty it is to approve such bond, may appoint such company to such office or trust, and permit it to qualify as such without giving any bond, and permit such company to become sole guarantor or surety upon any such bond, without requiring any other surety therefor. \* \* \* "

Under the provisions of this section, a trust company, when it has satisfied the Commissioner of Finance of its solvency and deposited with the Commissioner of Finance \$200,000, consisting of cash, or United States, state, county, municipal or other bond, or bonds, notes, or debentures, secured by first mortgages or deeds of trust on unencumbered real estate in the state of Missouri, worth at least double the amount loaned thereon, or such other first class securities as the said Commissioner may approve, said bonds or securities not to be received or held at a rate above par, and said Trust Company shall have received the certificate of said Commissioner that it has made said deposit, it shall then be permitted to qualify as guardian, curator, executor, administrator, assignee, receiver, trustee, or in any other fiduciary capacity, by appointment of any court, or under will, or depository of money in court, without giving bond as such, and become sole guarantor or surety upon any such bond required by law to be given in any proceeding in law or in equity in any courts of this state, or other states, or of the United States.

When such Trust Companies are appointed and selected, as aforesaid, they may exhibit to the court, judge, clerk, or other officer making such appointment, or whose duty it is to approve such bond, the certificate of the Finance Commissioner of the state of Missouri that such trust company has complied with the provisions of this section, with respect to said deposit and of its solvency, and the court may make such appointment to such office or trust and permit it to qualify as such without giving any bond.

It is our opinion that a Trust Company desiring to withdraw such securities must first apply to the courts making such appointment, and under whose jurisdiction it is acting in its trust capacity, and substitute for the security so deposited with the Commissioner of Finance, and which is primarily liable for the obligations of such company as such, and then execute bond which should be approved by the respective courts having jurisdiction of the particular trust involved.

The Trust Company then should furnish satisfactory evidence to the Commissioner of Finance that each of the courts having jurisdiction of the particular trust has accepted said bond, in lieu of the deposit made with the Commissioner of Finance, and same have been substituted instead of the \$200,000 worth of securities deposited with the Commissioner of Finance; and that said Trust Company is not guarantor or surety in or upon any bond in any proceeding in law or in equity in any of the courts of this state, or other states, or of the United States, who are protected by such deposit, and when the Trust Company has so satisfied the Commissioner of Finance, it may be permitted to withdraw the \$200,000 so deposited as aforesaid.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General

CRH/LD

REVENUE: Section 9868 R. S. Mo. 1929 limited by Section 11, Article 10, Missouri Constitution.

6-5  
May 29, 1934.



Hon. Morgan M. Moulder  
Prosecuting Attorney  
Camden County  
Camdenton, Missouri

Dear Mr. Moulder:

Acknowledgment is herewith made of your letter of May 14, 1934, requesting an opinion of this office. Your letter reads as follows:

"The County Court of Camden County, under the provisions of Sec. 9868 R. S. Mo. 1929, requested me to present a petition to the Circuit Court in Vacation, setting forth the facts and reasons for an additional special tax for the purpose of paying a past indebtedness. I hereto attach a copy of the order of the County Court and a copy of the petition which I, as prosecuting attorney, prepared and which was presented to the judge of our Circuit Court in Vacation, which order and petition are self-explanatory.

I also send to you a copy of the opinion of C. H. Skinker, Judge of the 18th Judicial Circuit, wherein he holds that whereas the valuation of Camden County is about \$7,000,000.00 and the Constitution and Sec. 9873 provides that the maximum levy is 40¢ on each \$100 valuation, an additional levy as provided for by Sec. 9868, over and above the said 40¢ levy, would be in conflict with Sec. 9873 and also in conflict with the provisions of the Constitution.

I find several Supreme Court decisions which hold that the provisions of Sec. 9868 have no relation to the provisions of Sec. 9873. It is our theory that 9873, which limits the maximum levy to 40¢ on each \$100 valuation, is a maximum levy for the purpose of paying the current and general expenses of the county for the year for which the levy is made, and that Sec. 9868 is not controlled by the limit placed by the Constitution and said Sec. 9873 because the additional levy, as provided in 9868, is for another and separate purpose, to-wit, for the purpose of paying a past indebtedness.



I am informed by the Presiding Judge of our County Court that he has talked to the State Auditor and that the State Auditor has advised him to proceed under Sec. 9868, and if we are allowed to make the additional levy up to 50¢ which has always been the levy in Camden County but due to the increase in valuation the levy that can be placed by the County Court is now 40¢, which gives us less revenue than a 50¢ levy on a valuation of less than \$6,000,000, it would be a great benefit to our county and would permit us to pay off the past indebtedness and the burden of outstanding warrants and would also permit us to come within the budget provisions of the statute and live within our revenue hereafter.

The County Court of Camden County, at its May Term, 1934, made the annual and maximum levy as provided for in Sec. 9873, of 40¢ on each \$100 valuation, for current general expenses for the year 1934. Can the Circuit Judge order an additional and special levy of 10¢ on each \$100 valuation for the purposes of paying past indebtedness, as provided for in Sec. 9868, even though the valuation of Camden County, is \$7,000,000. "

Section 11 of Article X of the Constitution provides a limitation upon the power of the County and other subdivisions to levy taxes upon inhabitants and property of such subdivision, part of this provision provides:

"Taxes for county\* \* \* purposes may be levied upon all subjects and objects of taxation\* \* \*. For County purposes the annual rate on property\* \* \* in counties having six million dollars and under ten million dollars, said rate shall not exceed 40¢ on the hundred dollars valuation\* \* \*. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes,\* \* \* said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness:\* \* \*"

This constitutional provision has been declared to be self-enforcing. State ex rel. vs. Weinrich, 291 Mo. 461. Section 9873 R. S. Mo. 1929 is simply declaratory of this constitutional provision:

"For county purposes the annual tax on property not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof shall not in any county in this state exceed the rates herein specified: \* \* \* in counties having over six million dollars and less than ten million dollars said rate shall not exceed forty cents on the one hundred dollars valuation; \* \* \* "

The foregoing are maximum rates which may be levied in said counties. This portion of this Section of the statutes has been on our books for over fifty years and although the law has been amended on numerous occasions it has never been changed with an intent to lessen the protection afforded by the constitutional provision. All amendments have in fact been aimed at strengthening this protection. One amendment to this Section added this proviso:

"Provided, however, the county court shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any county court or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year." \* \* \* "

We quote this foregoing proviso for the reason that it has a very definite place in explaining what portions of this Section are applicable and which are inapplicable to Section 9868. This section is the statutory authorization for a levy by the County Court to levy a tax for the specified purpose of paying past due indebtedness. Section 9867 authorizes the levy and collection of taxes for current expenditures and provides:

"The following named taxes shall hereafter be assessed levied and collected in the several counties in this state, and only in the manner, and not to ex-

ceed the rates prescribed by the Constitution and laws of this state, viz: The state tax and the tax necessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

It is apparent that all that is authorized by the foregoing Section so far as it pertains to your inquiry is a levy for current county purposes, in other words, the levy of a tax to pay the operating expenditures of the County for the current year. There is no authorization in this Section for the levying of a tax to pay past indebtedness. Such a levy can only be made under the provisions of Section 9868. This Section provides in part as follows:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes, \* \* \*"

From a reading of the foregoing Section and an examination of the cases where it has been construed, it is well settled that the tax authorized by this Section is a special tax collected for a special purpose and may only be used for that purpose. It is in addition to the taxes which may be collected for the ordinary county purposes, which in the past have been divided into five specific classes.

We shall now consider the problem presented in your request as to whether or not the constitutional limitation of 40¢ on One Hundred valuation bars an additional levy for this purpose under this Section. This Section requires the circuit judge before making the order to find "that the assessment, levy and collection" of the additional tax "will not be in conflict with the constitution and laws of this State." This indicates a legislative intent to avoid any conflict with the constitutional provision respecting the assessment, levy and collection of taxes. This intent has been recognized and we find that the Supreme Court in the case of State ex rel. Hill vs. Wabash Railroad Company, 169 Mo. 583, has construed this Section and the constitutional provision herein considered. In this case the special levy for past indebtedness resulted in the assessment of a tax in excess of the constitutional limitation. Section 7654 R. S. Mo. 1889 considered in this opinion was the predecessor of the present Section 9868. The Court at page 576 considered the plaintiff's contention that the constitutional provision limiting the tax levy did not apply to a levy under this Section and stated:

" \* \* Plaintiff, however, contends that this may be done, as in this case, by proceeding under Section 7654, Revised Statutes 1889. That this section of the statute is not in conflict with the Constitution of the State is admitted, but its position is, that it does not, except as provided by section 12, supra, authorize the levy of a tax upon property exceeding forty cents on the one hundred dollars for any purpose." \* \* \* \* \*

that a proceeding in conformity with section 7654 supra, was the proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but it was not held in any of those cases that such a levy in excess of the constitutional limit would be valid, but it seems to have been taken for granted that it would be. Now, if under such circumstances, the county court had the power to make a special levy of twenty cents on the hundred dollars valuation of property in the county

in addition to the levy of forty cents, the constitutional limit, it could of course upon the same theory and by the same authority levy fifty or one hundred per cent and thus ignore those wholesome provisions of our Constitution which were intended to protect the property rights of the people, and to prevent its confiscation by an evasion of that instrument. That no such purpose was contemplated by the statute is indisputable, but what was meant thereby was that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness of the county provided it, including the general levy, or the levy for general purposes, does not exceed the constitutional limit.\* \* \* \*

In view of this case it is the settled law of this State that no levy can be made under Section 9868 R. S. Mo. 1929 which, when taken with the rate of levy for general county purposes, will exceed the constitutional limitation setout in Section 11 of Article X of the Constitution.

So that there may be no confusion in your mind respecting the

"Supreme Court decisions which hold that the provisions of Section 9868 have no relation to the provisions of Section 9873"

we take the privilege of calling your attention to the case of State ex rel. Philpott vs. St. Louis--San Francisco Ry. Co., reported at 247 S. W. 182. In this case the total assessed valuation in Webster County for 1920 was approximately \$7,400,000.00. That year a 40¢ levy on a Hundred Dollar valuation was made for county purposes to produce \$29,600 in revenue. In 1921 the assessed valuation rose to \$11,500,000.00. The levy for county purposes at 30¢ on the Hundred Dollar valuation produced \$34,600 in revenue. In that year an additional levy of 10¢ on the Hundred Dollar valuation was ordered by the Judge of the Circuit Court, who happened to be your own able jurist Judge Skinner. This increased the total revenue in 1921 to \$46,000.00. The railroad defended with the proposition that the proviso of Section 9873 hereinbefore quoted (providing that no levy may be made which will produce more than 10% in excess of the revenue collected for the previous year) prohibits any levy either for current purposes or for the purpose of paying past indebtedness which will produce in excess 10% more than the previous years revenue. The Court in Banc determined that this proviso of Section 9873 had no application to the levy to pay past indebtedness provided for in Section 9868, and stated l. c. 184:



May 29, 1934

"\* \* \* Respondent contends that section 12865, as amended by the act of 1921, places the limit on the tax that may be levied by the county court for county purposes in any one year. This section as amended has no relation to the special additional levy that may be ordered by the circuit court or judge in vacation under the authority of section 12860. These sections have different objects and purposes; that of one is to raise revenue to pay current expenses, that of the other is to pay past indebtedness. One is a general, the other a special, statute ingrafting an exception on the former. 'To the extent of any necessary repugnancy between them, the special will prevail over the general statute.' Statutes in pari materia must be read together and, although seemingly in conflict, should be harmonized and force and effect given to each, as it will not be presumed the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms or by necessary implication. 38 Cyc. 1148, 1151. The two sections are not in conflict. Judgment was properly rendered against the defendant for the sum produced by the additional levy of 10 cents.\* \* \*

While it is clear that the proviso of Section 9873 respecting the 10% increased levy has no application to the levy provided for in Section 9868, we are unable to find any decisions which indicate that the other provisos of Section 9873, which are simply declaratory of Section 11 of Article 10 of the Constitution, do not apply to and govern and control levies made by virtue of the provisions of Section 9868.

In accordance with your request I herewith return the copy of the order of the County Court, the copy of the petition presented by you as Prosecuting Attorney and the opinion of Judge Skinner.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.



NEPOTISM:-The violation of Section 13 of Article XIV of the Constitution does not automatically remove director; proper proceedings must be brought for that purpose.

6-8

June 5, 1934.



Mr. Merrill E. Montgomery,  
Prosecuting Attorney,  
Milan, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I have been confronted with numerous questions concerning relationship within the prohibitive degree of the Nepotism section of the Missouri Constitution. I have considered your opinions addressed to Miss Marjorie Neff Hoy, County Superintendent of Schools, Marshall, Mo., on October 31, 1933; and also your opinion to William J. Sherwood, Assistant Prosecuting Attorney at St. Joseph, Mo., dated March 31, 1934, and your opinion to Hon. Orin J. Adams, Prosecuting Attorney at Kingston, Mo., dated August 25, 1933.

My specific question is: What is the immediate effect of the act of a school board member violating the provisions of the Nepotism section, e.g. where he votes for a teacher within the prohibited degree? Is he automatically disqualified from acting as a director, or, must there be a legal proceeding brought and have the fact adjudicated before his position as director is considered vacant? The question becomes important because the other directors on the board and the County Superintendent of Schools do not know whether to proceed to fill the vacancy or to wait for some legal action against the member of the board who has violated his oath of office."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision

thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The above section of the Constitution imposes a penalty for appointing to office anyone within the prohibited degree. While the section is self-enforcing and does not require any statutory enactment to make it effective, yet it is necessary, in our opinion, to bring a proceeding in a court of competent jurisdiction to remove any person who violates the provision. While the section lays the foundation for the removal in that it prohibits the appointment of persons related within the fourth degree, the section does not automatically remove the offender from office. Any person accused of violating this section of the Constitution would be entitled to his day in court and a hearing before a proper tribunal to determine whether or not as a matter of fact as well as of law he is guilty of violating the provision.

We are of the opinion therefore that a director is not automatically disqualified from acting as a director by the violation of the Statute. Until a proceeding is brought in which the violation of the Constitution is established the director is entitled to remain upon the board. In other words, it takes a finding or a decree of a court of competent jurisdiction to determine whether or not the Constitution has been violated. There has to be, as in all other cases of violation of the Constitution and criminal laws, a court which determines whether or not such Constitution and laws have been violated, and while it may appear on the face of things that there is no defense to a proceeding to remove this director, yet he is entitled to have his case tried in court and until some proceedings are brought to remove him he is still a member of the board. As we view the Constitution it simply creates the offense and lays the foundation for the removal. The removal must be had by proper legal proceedings.

It is therefore the opinion of this Department that a proceeding should be brought to remove the offending director and until such proceedings are brought and he is removed the board has no right to elect another member.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

SCHOOL DISTRICTS:-School district desiring to be annexed to a city or town district may do so by complying with the provisions of Section 9342, R. S. Mo. 1929.

June 11, 1934.

FI.  
6-1264

Mr. Morgan M. Moulder,  
Prosecuting Attorney,  
Linn Creek, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"We have a consolidated School District in Camden County, the school building being located in the Town of Camdenton. The Consolidated School District included about seven school districts within its boundaries when organized. The Town of Camdenton was not incorporated at the time of the organization and the same was organized under the provision of Section 9345, R. S. of Missouri, 1929. Since that time the Town of Camdenton has been incorporated and is now an incorporated Town.

There is a common school district, known as District Number \_\_\_\_\_ which adjoins the consolidated school district, known as Consolidated School District No. \_\_\_\_\_, of Camden County, Missouri, and taxpayers and citizens of said common school district and of said consolidated school district propose and desire that all of said common school district be annexed to and become a part of the consolidated district, and the school children be transported to school in Camdenton as are all other school children now in the consolidated district.

Can the common school district be annexed to the consolidated school district, and if so, how and under what statute or statutes would the taxpayers or school boards proceed? Would appreciate your opinion and instructions as to procedure. Such annexation, if possible, would have to be taken up at once to be successful

for coming school year, and I would appreciate your opinion as soon as possible."

Section 9342, R. S. Mo. 1929, provides as follows:

"Whenever an entire school district, or a part of a district adjoining any city, town or village school district, desires to be attached thereto for school purposes, upon the reception of a petition setting forth such fact and signed by ten qualified voters of such district, the board of directors thereof shall order a special meeting for said purpose by giving notice as required by section 9283. Should a majority of the votes cast favor such annexation, the secretary shall certify the fact, with a copy of the record, to the board of said district and to the board of said city, town or village school district; whereupon the board of such city, town or village district shall meet to consider the advisability of receiving such territory, and should a majority of all the members of said board favor such annexation, the boundary lines of such city or townschool district shall from that date be changed so as to include said territory, and said board shall immediately notify the clerk of said district which has been annexed, in whole or in part, of its action. In case of an entire district being thus annexed, all property and money on hand thereto belonging shall immediately pass into the possession of the board of said city, or town school district; but should only a part of a district be annexed thereto, said part shall relinquish all claim and title to any part of the school property and money on hand belonging to said original district, and that portion of the district remaining must contain within its limits thirty children and thirty thousand dollars assessed valuation, or thirty children and nine square miles of territory. The voting at said special school meeting shall be by ballot, as provided for in section 9326, and the ballots shall be 'for annexation' and 'against annexation,' when the whole district is to be annexed, but if only a part is to be annexed, the ballots shall read 'for release' and 'against release!'"

June 11, 1934.

In view of the foregoing section we are of the opinion that the common school district which adjoins a consolidated city, town or village district may be annexed to such city or town district. The foregoing section sets out the proceedings.

In State ex inf. Otto v. School District of Lathrop, 285 S. W. 135, 137, the court in discussing various sections of the school statute says about Section 11252, R. S. Mo. 1919, which is now Section 9342, R. S. Mo. 1929, as follows:

"Section 11252, in the article relating to common schools, provides a method by which common school districts, adjoining a city or a town, may be attached for school purposes to the city or town district. This was pointed out by the court in the Scott Case."

In the case of State ex inf. Thompson v. Scott, 264 S. W. 369, 371, the court, in discussing the same section, says:

"Under the provisions of section 11252, relating to annexation to town or city school districts of the whole or part of an adjoining district, the proceedings must be initiated by such adjoining district. There the province of the board of directors of the town or city school district is merely to accept or reject such proposed annexation, after the special meeting of the adjoining district has taken action favoring such annexation."

In view of the foregoing statute and decisions we believe that if the common school district desires to be annexed to the consolidated school district No. \_\_\_\_\_ of Camden County it may do so by following out the provisions of Section 9342, R. S. Mo. 1929. It is very necessary, however, that the requirements of the section and the sections to which it refers be expressly carried out.

Very truly yours,

APPROVED:

FRANK W. HAYES  
Assistant Attorney General.

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ROY McKITTRICK,  
Attorney General.

AUTOMOBILES ) Theft of battery is larceny and not tampering  
LARCENY ) with motor vehicle.

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August 23, 1934



Honorable Morgan M. Moulder  
Prosecuting Attorney  
Camden County  
Camdenton, Missouri

Dear Sir:

We have your request of August 14, 1934 for  
an opinion upon the following proposition:

"We have a statute making it a  
felony to tamper with a motor vehicle.  
If a person should steal a battery,  
a part of the car, from a motor ve-  
hicle, would such person be guilty  
of tampering as provided by the  
statute, or would such person be  
guilty of petit larceny, the bat-  
tery being worth only seven dol-  
lars."

In this connection, we call your attention to  
the provisions of Section 7786 (b) R. S. Mo. 1929, which  
in part reads as follows:

"Any person who shall be convicted  
of stealing, taking or carrying  
away any motor vehicle tire or any  
part or equipment of a motor ve-  
hicle under the value of \$30.00  
shall be punished by imprisonment  
in the county jail not exceeding  
one year or by fine not exceeding one  
hundred dollars (\$100.00) or by both  
such fine and imprisonment."



#2 - Honorable Morgan M. Moulder

Section 7782 R. S. Mo. 1929 refers to tampering with an automobile. It would appear that the tampering under such statute refers to some use to which the automobile is put or attempted to be put. State v. Anderson, 281 S. W. 1070; State v. Ryan, 289 S. W. 13. From these cases it would appear that the use or attempted use of an automobile is covered by the statute, making it a criminal offense to tamper with an automobile.

It is, therefore, the opinion of this office that upon the facts submitted, the person stealing a battery from a car should be charged with larceny, as provided in Section 7786 (b) and not under Section 7782 R. S. Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

5  
STOCK LAW - May be submitted to voters for purpose of  
terminating or continuing enforcement.

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August 23, 1934.



Honorable Morgan M. Moulder  
Prosecuting Attorney  
Camden County  
Camdenton, Missouri

Dear Sir:

We have your request of August 14, 1934  
for an opinion upon the following facts:

"Camden County adopted the Stock Law, as provided by statute, several years ago, and due to the drought and the public demand for its repeal or change back as was before adoption I have been requested to write you as to whether or not the provisions of the Stock Law once adopted can be repealed by a vote of the people, and if possible what procedure should be followed?"

We call your attention to the provisions of Section 12797 to Section 12817 inclusive, being commonly known as the "Stock Law". The only question left for submission to the voters in your county is whether or not this law is to be enforced in your county. In this connection we call your attention to that part of Section 12805 which reads as follows:

"The county court of any county in this state, upon the petition of one hundred householders of

#2 - Honorable Morgan M. Moulder

such county, at a general election,  
\* \* cause to be submitted to the  
qualified voters of such county the  
question of enforcing, in such county,  
the provisions of this article. \* \* "

Said section also provides that the petition above referred to shall state what species of domestic animals enumerated in Section 12797 the law is to be enforced against. Further provision is made for the publication of notice and the printing of the ballots.

From a close reading of the above section, it is apparent that there may be submitted to the voters at any general election, upon proper petition of one hundred or more householders of the county, the question of whether the stock law is to be enforced in that county. If the majority of voters, voting in that election, cast their ballots against enforcement of the law, then that eliminates the stock law from enforcement in that county until it is again submitted and receives a favorable vote. In the present case it would appear that a petition as required in Section 12805 should be presented to the county court, and the same question submitted to the voters as was submitted to them when they adopted the stock law, so that the voters will have the right to say whether or not the stock law under present conditions shall be enforced.

It is, therefore, the opinion of this office that adequate provision is made under Section 12805 for submitting to the voters of your county a question of the enforcement of the present stock law. The result of such election will determine whether or not it is to be enforced in your county.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN  
Assistant Attorney General

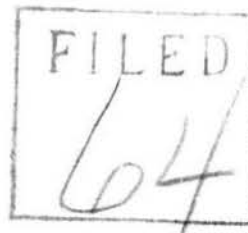
ROY McKITTRICK  
Assistant Attorney General

FER:FE

**BANKS & BANKING:** Records and files in possession of Commissioner of Finance for defunct banks, open for inspection of interested parties.

11-1

October 24, 1934.



Hon. O. H. Moberly  
Commissioner of Finance  
Jefferson City, Missouri

Dear Mr. Moberly:

We acknowledge receipt of your letter of recent date with request for an opinion, which letter is as follows:

"This Department from time to time has numerous requests, particularly from attorneys representing depositors, to inspect the files of this Department in connection with the various closed banks and trust companies in our hands for liquidation. Will you please advise us if, immediately upon being placed in liquidation, the files of this office regarding that particular bank become public and open to inspection by the public."

Section 5291, R. S. Mo. 1929, provides as follows:

"The commissioner of finance, his deputies, clerk, stenographer, each examiner and every employe shall be bound, under oath, to keep secret all facts and information obtained in the course of all examinations, except so far as the public duty of such officer requires to report upon or take special action regarding the affairs of any bank, private banker, savings and safe deposit company or trust company, and except when he is called as a witness in any proceeding in a court of

"justice. If any commissioner of finance, deputy, clerk, stenographer or examiner shall disclose the name of any debtor of any bank, private banker, savings and safe deposit company or trust company, or anything relative to the private accounts, affairs or transactions of such bank, private banker, savings and safe deposit company or trust company, or shall disclose any facts obtained in the course of his or their examination of any such bank, private banker, savings and safe deposit company or trust company, except as herein provided, he shall be deemed guilty of misdemeanor and upon conviction thereof shall be subject to a forfeiture of his office and the payment of a fine of not more than one thousand (\$1,000.00) dollars; provided however, that the commissioner of finance, his deputies and each examiner may exchange information with the federal reserve board, the federal reserve banks, or with examiners duly appointed by the federal reserve board, or by the federal reserve banks, the comptroller of currency of the United States, or with examiners duly appointed by him, the bank clearing house in the state of Missouri and examiners duly appointed by them, when the department of finance, the federal reserve board, the federal reserve banks, the comptroller of currency of the United States, and for the bank clearing houses in the state of Missouri have participated jointly in making an examination of the affairs of any bank, private banker, savings and safe deposit company or trust company, and such exchange of information is necessary to enable each agency participating in said examination to obtain and secure a complete report of said examination; and provided further, that the bank commissioner, his deputies and examiners shall, with respect to all banks, trust companies and savings companies in which state

"funds are on deposit, furnish to the state treasurer access to reports of all examinations made, of such institutions, and shall upon request from the state treasurer, disclose to him any information or facts with reference to the condition of the affairs of any such bank, trust company or savings company, obtained in the course of any such examination, which the state treasurer may desire to know; and the state treasurer, his deputies, clerks and stenographers shall be under the same obligation to keep secret all facts and information thus obtained as is by this section imposed upon the bank commissioner, his deputies, clerks, stenographers and examiners, and for a violation of such duty they shall be deemed guilty of a misdemeanor and subject to the penalty herein provided; and provided further, that reports shall be made of the condition of the affairs of a bank, private banker, savings and safe deposit company or trust company, ascertained from such examination to the officers and directors of the bank, private banker, savings and safe deposit company or trust company, examined, and to the bank commissioner."

The Supreme Court of this State in the case of *Millsbaugh v. Kesterson*, 270 S. W. 110, 1. c. 112, in discussing this section said the following:

"Taking the whole act of which this particular section forms a part, it must be concluded that the secrecy imposed was for the protection of banking interests and their patrons. This petitioner has in his possession books and papers belonging to a defunct bank, the assets of which were absorbed by the plaintiff bank in the circuit court case. The purpose of the law was not to hide legitimate evidence when the same is required by the courts in the disposition of even and exact justice as between litigants. We do



"not believe that it was the intent of the lawmakers, by the language used, to preclude the use of such facts as the commissioner of finance might possess in the disposition of justice in a court having on trial a civil case."

Also, in the case of Ex Parte French, 315 Mo. 75, 285 S. W. 513, 1. c. 516, the Supreme Court decided that the Commissioner of Finance was required to produce in court, upon proper subpoena, the records and files of his office pertaining to certain failed banks in his possession for purposes of liquidation, and the court said, speaking through Judge White, the following:

"The only theory upon which the commissioner can be restrained from divulging what he learns in his examination of banks, and from producing in court the records in his custody, is on the ground of public policy; that some public interest may be adversely affected by the revelations which would ensue. We are unable to conceive of any reason why general knowledge of the affairs of a defunct bank discovered in a trial in court would injuriously affect the public morals, public health, or public safety. What public interest can be served by concealing the methods by which banks are guided to destruction by those intrusted with their control? Ordinarily, we would say the public is entitled to know all about the inside jobs which cause banks to fail, because through such knowledge the people's representatives may apply a remedy for the conditions revealed. So far as appears on the surface, the only persons served by concealment of such condition would be those concerned in bringing it about."

We are, therefore, of the opinion that the files and records in your Department pertaining to failed banks and trust

Hon. O. H. Moberly

-5-

Oct. 24, 1934.

companies in your hands for purposes of liquidation, may be inspected by litigants and other parties at reasonable times.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

CRH:EG

**OPINION: COUNTY COURT: PRIVATE**  
**CAR TAX**  
**FUND :**

What disposition is to be made of money in County Treasury to the credit of said fund under Sections 10052-10063 R. S. Mo. 1929.

February 15, 1934. 2-17-34



Honorable Robert L. Murphy  
Prosecuting Attorney  
Putnam County  
Unionville, Missouri.

Dear Sir:

We have your request of January 18, 1934,  
for an opinion upon the following state of facts:

"What disposition should a County Court make of money it has in the County Treasury to the credit of the Private Car Tax Fund, under the provisions of Sections 10052-10063 Revised Statutes of Missouri 1929, where the County does not construct any hard surfaced roads, and there no hard surfaced roads in the County at all except those that the State Highway Department construct and maintain. The County has a small amount of money in this fund, but not enough to do much good if it is distributed to the road overseers of the various Townships. There would not be more than \$40. to give to each Township.

"Under this set of facts would it be a violation for the County Court to transfer the money in this fund to the regular Road and Bridge Fund to take care of a deficiency there, or to transfer this money to any other fund to pay off old warrants.

"Since the County does not have any hard

surfaced roads upon which to spend this money, and since there is not enough to justify starting building a system of County hard surfaced roads, the result is that this money is lying idle."

I call your attention to Section 10062, R. S. Mo. 1929, which provides:

"\* \* \* \* The said county courts  
\* \* \* \* shall \* \* \* \* hold the  
amount due in each township and  
ward as a separate fund for the  
use of said township in the per-  
manent construction of roads."

Section 10063, R. S. Mo. 1929, provides that this money shall be used exclusively by the various townships and provides that the expenditure of this money shall be by contract let to the lowest and best bidder for road building. It provides that,

"in counties where gravel or  
stone is not to be had, roads  
may be constructed with such  
other material as can be ob-  
tained for such purposes."

Section 10058, R. S. Mo. 1929, authorizing collection of the private car tax, provides that such tax was levied for county and other purposes.

It therefore appears from the above statutes, unaided in their construction by any Appellate Court decisions that the private car tax money belonging to your county can only be expended in accordance with

Hon. Robert L. Murphy

-3-

2/15/34

the above statutory provisions, and that the county court has no authority to transfer that money to some other fund.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK  
Attorney-General.

FER/j

COUNTY BUDGET LAW: County court cannot reduce the salary of any officer which is fixed by statute in order to balance the budget; can reduce the salary of appointive officers.

March 8, 1934. 3-13



Hon. C.E. Murfin,  
County Judge,  
Texas County,  
Hartshorn, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of some time ago relating to the County Budget Law. Your letter is as follows:

"I'm writing you in regard to Sec. 3, page 342, Laws of Missouri 1933, which says: 'If for any year there should not be sufficient funds for the Co. Court to pay all the approved estimates under Class 4, after having provided for the prior classes, the Co. Court shall apportion and appropriate to each office the available funds on hand and anticipated in the proportion that the approved estimates of each office bears to the total approved estimate for Class 4.'

Also, Sec. 8 says the court may alter or change any estimate as public interest may require and to balance the budget. The question is, does the two sections in question give the Co. court a right to change the salary of the county officers and balance the budget?

If the county court cannot change the salary of the officers it will be impossible for the county court to balance the budget in Texas County by levying and staying in the bound of the Constitution."



Sec. 3, page 342, Laws of Missouri 1933, mentioned in your letter, provides as follows:

"It is hereby made the express duty of every officer claiming any payment for salary or supplies to furnish to the clerk of the county court, on or before the fifteenth day of January of each year an itemized statement of the estimated amount required for the payment of all salaries or any other expense for personal service of whatever kind during the current year and the section or sections of law under which he claims his office is entitled to the amount requested, also, he shall submit an itemized statement of the supplies he will require for his office, separating those which are payable under class 4 and class 6. Officers who are paid in whole or in part other than out of the ordinary revenue, whether paid by fees or otherwise, shall submit an estimate for supplies in the same manner as officers who are paid a salary out of ordinary revenue. No officer shall receive any salary or allowance for supplies until all the information required by this section shall have been furnished. The clerk of the county court shall prepare and file an estimate for his office; also for the expense of the judges of the county court. If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

Section 8 of the County Budget Law, page 345, Laws of Mo. 1933 provides as follows:

"It is hereby made the first duty of the county court at its regular February term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard but the county

shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimate on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.

Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

#### CONCLUSION

It is the opinion of this department that the county court cannot reduce the salaries of the county officers which are fixed by the statutes. As to the salaries of appointive officers wherein the

March 8, 1934.

appointment is made by the county court and the amount of the salary is discretionary with the court, it is the opinion of this department that the county court has the authority to reduce such salaries.

Respectfully submitted,

OWN:AH

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General.

LIQUOR CONTROL ACT: County courts not authorized to license  
wholesale dealers, distillers, manufacturers  
or brewers.

3-16

March 15, 1934.



Hon. Lee Mullins,  
Prosecuting Attorney,  
Atchison County,  
Rock Port, Missouri.

Dear Sir:

This department is in receipt of your letter of March  
14, 1934 in which you request an opinion as to the following  
state of facts:

"Our County Court have asked me to write  
you for information concerning the matter  
of its right to levy a license fee upon  
any person engaged in the 'wholesale  
liquor business' in this county. It ap-  
pears from Section 24 of the Act as passed  
that a county may only make charges for  
licenses issued retail dealers; and it  
appears to me to be very plain, and as  
far as I can see, the county cannot charge  
a license fee against any other dealers  
than the retailers; and also, I cannot see  
wherein a wholesaler can qualify as a  
retailer under the law as both retailer  
and wholesaler.

"I hope I have made plain to you just what  
the court wants. However, I will state it  
another way: they want something from you  
on the question of the wholesale dealer  
being required to pay a county license.\*\*\*\*\*"

I.

County courts are not authorized  
to license wholesale dealers,  
distillers, manufacturers or brewers.

Section 24 of the Liquor Control Act of the State of  
Missouri provides:

March 15, 1934.

"The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

It will be noticed that the County Court is authorized only to license retail dealers and there is no power granted by the Liquor Control Act whatsoever authorizing the County Court to license wholesalers, distillers, manufacturers or brewers.

The license fee for retail dealers is to be determined by the County Court, but this charge shall in no event exceed the amount provided for in Section 22 of this Act for State purposes.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

SCHOOLS:-Under Section 17, Laws of Missouri 1931, page 344, board may increase the levy in excess of twenty cents and reject the equalization fee or minimum guarantee.

4-9

April 5, 1934.



Mr. Robert L. Murphy,  
Prosecuting Attorney,  
Unionville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am writing you for an opinion on the following question which deals with the construction of Section 17 of the Laws of Missouri 1931, page 344. My question is as follows:

Does a school board have the right to make a levy in excess of twenty cents on the one hundred dollars assessed valuation after a proposed increase in levy has been voted down by the taxpayers at an election; that is, can they increase the levy and reject the equalization money?

We have a school board up here which has attempted to do this, and they have requested me to get the opinion of your Department on this matter."

Section 17, Laws of Missouri 1931, page 344, provides as follows:

"If any district obtaining the minimum guarantee as provided for herein levies in excess of twenty cents on the one hundred dollars assessed valuation for school purposes (teachers' wages and incidental expenses), without such levy in excess of twenty cents on the one hundred dollars assessed valuation for school purposes (teachers' wages and incidental expenses) be authorized by a majority of the voters who are tax payers of the district voting thereon, such district shall not be entitled to receive state aid for minimum educational program under the provisions of this act. This provision shall not apply to districts



containing cities now or hereafter having a population of fifty thousand or more according to the last decennial United States census."

As we construe the above section, if the board of directors increases the levy in excess of twenty cents on the one hundred dollars assessed valuation without first having such levy authorized by a majority of the voters who are tax payers of the district, then the district will lose the minimum guarantee, as provided for in the preceding section. We do not construe the section to mean that the board cannot in any event levy in excess of twenty cents on the one hundred dollars valuation. If the majority of the voters consent, then they may levy more than twenty cents and still obtain the minimum guarantee as provided therein. However, if the majority of the voters do not consent and the levy is increased in excess of twenty cents, then that district forfeits the minimum guarantee provided for. We construe this section to mean that they may increase the levy and reject the equalization money or the minimum guarantee.

Section 11 of Article X of the Constitution, among other things, provides as follows:

"\*\*\*For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase.\*\*\*"

We believe that the construction given to Section 17 by us is the proper one if we are to give effect to the above constitutional provision. Under the above constitutional provision the levy is fixed at sixty cents in certain cities and forty cents on the one hundred dollars assessed valuation elsewhere. These limitations are fixed without considering a vote of the tax payers. Those rates may be increased by a vote of the tax payers. If Section 17 be construed so that a twenty per cent levy would be the maximum amount which the board could levy, then it appears to us that such provision would be in conflict with the above constitutional provision. therefore, adopt the view that, not only to reconcile the

April 5, 1934.

statute with the constitution, but from the wording of the statute it was intended not to limit the levy to a maximum of twenty cents, but rather to compel a forfeiture of the minimum guarantee, as provided for therein, if a levy in excess of twenty cents was made without the authorization of a majority of the voters.

It is therefore the opinion of this Department that under Section 17, Laws of Missouri 1931, page 344, the board may make a levy in excess of twenty cents per one hundred dollars valuation, but if they do so without the authority of a majority of the voters who are tax payers voting in favor of such levy, then the district will forfeit the minimum guarantee provided for in the preceding section.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

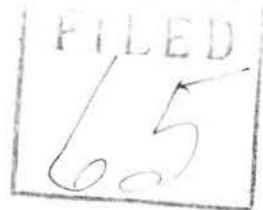
FWH:S

County School Fund:

County Court having foreclosed a mortgage on property on which they have loaned money belonging to the County School Fund and having bid the property in at the foreclosure sale, cannot allow the mortgagor to redeem property by accepting bonds of the Home Owner's Loan Corporation.

4-11

April 6, 1934.



Mr. Robert L. Murphy,  
Prosecuting Attorney,  
Unionville, Missouri.

Dear Mr. Murphy:-

We have your letter of December 20, 1933, in which was contained a request for an opinion as follows:

"I am writing you for an opinion on the following matter, namely: to see if it is legal for a County Court after they have foreclosed a mortgage on property on which they have loaned money belonging to the County School Fund and have bid the property in at the foreclosure sale, to allow the mortgagor to redeem the property by accepting Government Bonds furnished by The Home Owner's Loan Corporation. I note that under Section 9256 Revised Statutes of Missouri, 1929, that the County Court may become the purchaser at a foreclosure sale of this kind, and may hold and manage this property, but that said Section 9256 also requires that 'as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as such court may deem best for the interest of said school or schools, etc.'. It seems from this that it is the intent of the law to allow the court some discretion in the disposition of this property after they bid it in at the foreclosure sale, and if that be true why should they not also have some discretion in allowing the mortgagor to redeem provided it is for the best interests of the school fund.

"It would seem that it would be a good solution of part of the difficulty to allow the mortgagor to redeem and allow the county court to accept Government Bonds as I mentioned above. This is more to be desired than ever at a time like the present when it is very difficult to realize anything like the true value of land.

"I received a letter a few days ago concerning this matter from Hon. Guy P. Allen, District Appraiser for the Home Owner's Loan Corporation, and he stated that he had discussed this matter with you, and that if I would write you you would render me an opinion as to the legality of this proposal."

April 6, 1934.

Section 9256, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 9256. Authority to repossess property by purchase.--\* \* \* \* The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

In our minds the information sought in your letter presents a basic question on which we have already ruled although in this instance the matter is approached from a slightly different angle. We attach herewith a copy of our former opinion.

The discretion of the court mentioned in the pertinent portion of the above quoted section pertains only to the manner in which such land shall be handled or to the manner in which such land shall be sold. The question of medium of payment in case of a sale is quite another matter. As will be noted, in the last few lines of the section, set off by a semi-colon, and apart from the discretion provision, we find the language "and the money realized on such sale", which language clearly shows the legislature to have intended money as the medium of payment. We assume that the term "money" as used therein means "currency", the circulating medium, cash, etc." as defined in Black's Law Dictionary; but even should the term be taken in its broad generic sense as a mere representative of value in effecting exchanges, we could not bring such a transaction as the one proposed in your letter within the purview of the law in question.

The main objection to the proposed transaction lies in another direction. In our earlier opinion, a copy of which is attached hereto, we held that the county court had no right to accept bonds of the Home Owner's Loan Corporation in payment of mortgage indebtedness on loans made out of the County School Fund. The basis of said opinion was that such a procedure was in effect, or actually, an investing of said fund in said bonds and that by the terms of the School Law, and particularly by the terms of the Constitution of Missouri, an investment of such fund in such bonds was forbidden.

Mr. Robert L. Murphy

-3-

April 6, 1934.

For the purposes of this opinion we quote Article XI Section 10 of the Constitution of Missouri, as follows:

"All county school funds shall be loaned only upon unencumbered real estate security of double the value of the loan, with personal security in addition thereto". (Underlining ours)

In our opinion the identical situation arises here. The investment feature remains the same whether it occurs before foreclosure or after; it is the exchanging of one asset of the fund for some other asset, and the Constitution as well as the statutory sections provide what such latter asset shall be.

We note in your letter you state that at this time it is very difficult to realize anything like the true value of land. This is, of course, true, but under the statutory section above quoted the land need not be sold until such is practicable, and in the interim may be leased or managed by the agent of the court.

The acceptance by the county court of the bonds in question as proposed may seem a desirable solution, but under our Constitution and statutes we are bound to the opinion that it cannot be accomplished.

Very truly yours,

CMHJr:C

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

Approved:

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Attorney General.



TAXATION: BOARDS OF EQUALIZATION: Must give effect to Senate Bill 34, page 419, laws of Mo. 1933 in setting valuations for 1934 taxes.

4.25  
April 23, 1934



State Tax Commission  
Jefferson City, Missouri

Hon. A. J. Murphy, Chairman

Gentlemen:

We acknowledge receipt of your request for an opinion of this office reading as follows:

"Senate Bill 34, passed at the '33 Session that has to do with the valuation of lands in drainage or levee districts, imposes on the State Tax Commission the duty of taking into consideration certain facts in arriving at the valuation of assessed lands. This law was passed without an emergency clause and became effective on July 24, 1933.

This Department would like a ruling as to whether or not this act will have any effect on the assessment made as of June 1, 1933."

Senate Bill 34, referred to above, is found at page 419, Laws of Mo. 1933. This Act consists of two sections, portions of which read as follows:

SECTION 1. That in determining the assessed valuation of lands \* \* \* on which benefit assessments have been levied \* \* \* the county assessors \* \* \* state tax commission, the state and county boards of equalization and appeals, shall ascertain and determine the amount \* \* \* of then existing benefits assessed \* \* \* and for which \* \* \* no levy \* \* \* for principal has been paid, exclusive of delinquent levies \* \* \* and take into consideration the amount thereof in determining the



value of such lands \* \* \* for assessment for taxation for general purposes, and the difference, \* \* \* between the value of such lands \* \* \* taking into consideration the drainage or levee improvements and amount of the \* \* \* benefits assessed \* \* \* and for which \* \* \* no levy \* \* \* for principal has been paid, exclusive of delinquent levies \* \* \* shall be and become the assessed valuation \* \* \* which such lands \* \* \* shall be taxable for all general purposes \* \* \*.

\* \* \* And it shall be the duty of the county  
\* \* \* assessors and the county board of  
equalization and appeals \* \* \* in assessing  
equalizing and adjusting the value of such  
lands \* \* \* to conform to the provisions of  
this act.

SECTION 2. It is hereby made the duty of the clerks of the county courts to ascertain \* \* \* the aggregate amount \* \* \* of the portion of \* \* \* benefits assessed \* \* \* against lands \* \* \* within \* \* \* drainage or levee districts \* \* \* in their respective counties and for which \* \* \* no levy \* \* \* for principal has been paid, exclusive of delinquent levies \* \* \* and shall also certify the aggregate amount \* \* \* of then existing benefits \* \* \* for which \* \* \* no levy \* \* \* for principal has been paid, exclusive of delinquent levies \* \* \*, together with any other information that may be necessary or required in order that the provisions of this act may become effective and the equalizing of the valuation of lands \* \* \* within drainage or levee districts \* \* \* for taxation for general purposes may be expedited, and to \* \* \* make out and forward \* \* \* the information above referred to, to the state auditor to be laid before the state board of equalization. It is hereby made the \* \* \* duty of the \* \* \* clerks \* \* \* to retain a copy of the information, matters and things \* \* \* to be laid before and for the use of  
the county boards of equalization and appeals."

## I.

THE PRIMARY DUTY OF BOARDS OF EQUALIZATION TO EFFECT PROVISIONS OF ACT.

The sections of this act as quoted have been deleted so as to make more evident the portions of the act applicable to your inquiry and for the purpose of emphasizing the fact that the foregoing sections lay an initial or primary duty upon the boards of equalization, as well as upon the county assessors, to give full force and effect to the provisions of this enactment. In fact, the wording of the Act itself would be conclusive as to the legislative intent. Not only are the boards of equalization considered along with the assessors in the same phrase of the first section, but under Sec. 2 it is made the duty of the clerk of the county court to obtain full information as to the amount of unpaid levies, exclusive of delinquencies against the land in drainage or levee districts in his county, and requires that the clerk make a copy of all such information and lay it before the county board of equalization. Peculiarly enough, the county clerk is not required to furnish this information to the county assessor. While a duty is laid upon the county assessor in the first section, it is interesting to note that the means by which the result can be accurately and uniformly accomplished are provided for the use and benefit of the county boards of equalization rather than for the use and benefit of the assessor.

## II.

GENERAL DUTIES OF ASSESSOR AND COUNTY BOARD OF EQUALIZATION.

The foregoing enactment, which was not effective until July 24, 1933, must be considered as a statute concerning and applying to the duties of the assessor and the boards of equalization. So as to have clearly before us the duties of the assessors and the boards of equalization in the performance of their duties respecting the valuation of property, we direct attention to certain other statutes, portions of which read as follows:

"Sec. 9792, R. S. 1929. The assessor shall value and assess all property on the assessor's books according to its true value in money at the time of the assessment; \* \* \*. Each tract of land and town lots should be assessed and valued separately. \* \* \*"

Section 9812 R. S. 1929 reads in part as follows:

"Said board shall have power to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, and, having each taken an oath, to be administered by the clerk, fairly and impartially to equalize the valuation of all the taxable property in such county, shall immediately proceed to equalize the valuation and assessment of all such property, both real and personal, within their counties respectively, so that each tract of land shall be entered on the tax book at its true value; \* \* \*."

### III.

#### SENATE BILL NO. 34 APPLICABLE TO ASSESSMENT FOR 1934 TAXES.

A careful study of Senate Bill No. 34 reveals it to be the legislative direction to the county assessor and the boards of equalization as to the manner in which they shall arrive at the assessed valuation of tracts of land situated in drainage and levee districts. There can be little doubt as to the power of the Legislature to so direct the various state agencies in the performance of their duties. Judge Burgess in the case of Ward v. Board of Equalization, 135 Mo. 309, l.c. 324 has stated:

"To the state belongs the sovereign power of taxation, and in the exercise of this power it has the right to provide by proper legislation means for arriving at the values of all taxable property, and for assessing and collecting the revenues, subject only to the limitations and restrictions provided for by the constitution, \* \* \*"

This Act, although directed entirely to the method by which the assessors and the boards of equalization shall arrive at the taxable value of such land is still to be classified as a procedural statute and may be considered as similar to Sec. 9813 R. S. 1929 laying down by legislative enactment the order in which

the county boards of equalization shall proceed to equalize the valuations of the property under their jurisdiction to-wit, that they shall first raise all valuations which in their opinion have been under-assessed, and shall, second, lower all valuations which in their opinion have been returned above their true value. There can be little doubt but that the boards of equalization act in a judicial capacity in performing these functions. This was established in the early cases of this state, one of which was that of Railroad Co. v. McGuire, reported at 49 Mo. 482. In this case Judge Wagner stated, l.c. 483:

"In the case of The St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 462, it was held that the action of the assessor and of the board of appeals, or County Court, in the matter of taxation, was judicial; and where it appeared from the tax-list that the assessor had jurisdiction over the property, i.e., that it was liable to be taxed in any form, though irregularly assessed, the collector would not be liable to the tax-payer for the amount collected."

This case and the ruling therein has been frequently and repeatedly cited by our Supreme Court, one of the more recent rulings being in the case of State ex rel. v. Board of Equalization, 256, Mo. 463. In respect to this judicial power or function, Judge Black in the case of Black v. McNigle, 103 Mo. 192, l.c. 198, stated:

"In performing these duties the board acts judicially; this has been often held, and the very nature of the duty to be performed makes it a judicial one. St. Louis Mutual Life Ins. Co. v. Charles, 47 Mo. 462; Railroad v. McGuire, 49 Mo. 482; Cooley on Taxation (1 Ed.) 291. The board has jurisdiction over all the lands in the county, and generally in practice its actions will be confined to raising and decreasing the assessed value of particular parcels, so as to bring all the lands in the county to a uniform value. The law, however, clearly contemplates that all property shall be assessed at its true value (sec. 6711), and if, in the opinion of the board, this has not been done, then the assessment may be increased so as to comply with the spirit and intention of the law."

At this point may it be stated that in view of the fact that we conclude Senate Bill No. 34 to be a procedural statute and in view of the consistent ruling that the boards of equalization perform judicial functions, it appears that it is immaterial whether or not the assessment for 1934 taxes is made on the basis of the valuations of property as of June 1, 1933 (almost two months before the effective date of Senate Bill 34) or whether said valuations are to be made as of the date of assessment; Senate Bill 34 being a remedial, procedural statute, there is no presumption that it is not to act retrospectively. There is no presumption that it is not to act upon assessments partially made, or in the process.

Viewing this Act from another angle, we conclude that it is certainly to be classed as a remedial law. It is common knowledge that many thousands of acres of lands in drainage and levee districts have been forfeited because of the inability of the owners to pay the taxes and assessments levied against the land.

It is clear that it was the intention of the Legislature to correct a supposed inequality existing between land in drainage and levee districts and those without such districts. Whether or not such inequality exists in fact is not here discussed, nor do we pass upon the constitutionality of the act. The Act being intended to correct a supposed inequitable condition, the law must be considered remedial. That being the case, we believe the case of *Clark v. Railroad*, 219 Mo. 524, is applicable. At page 533 we find the following:

"No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions -- those which have accrued or are pending, and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings."

and at page 534, the following remarks are made:

"The doctrine thus announced seems well-bedded in principle. We think it applies to the statute in hand, which, in its essence, is purely a remedial one, hence

no presumption lies that it was intended to operate prospectively only. Being highly remedial it should be most liberally construed to further its life in advancing the remedy and striking down the mischief aimed at -- the need and occasion of the law, the mischief felt and the object and remedy in view being cardinal elements in statutory interpretation."

We further refer to the case of *McManus v. Park*, 267 Mo. 109. The contention of the defendant is found on page 113, where the following is stated:

"The defendant herein asserts that the petition states no cause of action, because it shows that the Act of 1911, providing for annual accounting of a trustee appointed by the circuit court, was passed subsequent to his appointment, and the vesting of the trust estate in him."

The Act of 1911, as you can see by the foregoing extract, required all trustees appointed by the circuit court to make a full accounting and report annually respecting their trust. The court stated, l.c. 115:

"This argument proceeds upon the theory that if it is made to apply to existing trusts and trustees it is retrospective in operation. Appellant cites cases stating the rule of statutory construction that, unless a different intent in the statute is evident, its provisions are to be considered as prospective only and not retrospective. (*State ex rel. v. Wright*, 261 Mo. 325, l.c. 344, and cases cited.) This, however, applies only to statutes which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; \* \* \*"



and held, l.c. 118:

"The Act of 1911, under the authorities cited, requiring trustees appointed by the court in any trust estate to make an annual report only applies to procedure, is entirely remedial in operation, and affects nobody's existing right."

The court also considered the presumptive rule in respect to retroactive operation of statute, and held the general rule, to-wit, that statutes were presumed to act prospectively only, not to apply to remedial and procedural statutes, l.c. 119:

"Where a new statute deals with procedure only, prima-facie it applies to all actions -- those which have accrued or are pending, and future actions. . . General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent and this may be greatly influenced by considerations of convenience, reasonableness and justice."

It appears that our holding in this instance is consistent with similar rulings in other statutes. In the case of *Maine v. Board of Commissioners*, 24 N.E. 80, the Supreme Court of Indiana considered this problem as applied to the levy and assessment of land in connection with the purchase of a toll road. It appears that on the 2nd of March, 1884, the proceedings were instituted under the then existing law. Proceedings were not completed until after the 4th of June, 1885; in the meantime, the Act of April 13, 1885 had become effective, changing the procedure in such cases. The following remarks are found in the Court's opinion, l.c. 81:

"It may be conceded, when one or more sections of a statute are amended in the mode prescribed by the constitution, that the amended sections cease to exist, and the sections as amended are, in effect, incorporated into the original act; but when the new law is a substantial re-enactment of the old, merely changing modes of procedure, but not changing the tribunal or the basis of the right, and

when it takes effect simultaneously with the repeal of the old act, it will be presumed, even without an express saving clause, that the legislature intended that proceedings instituted under the old law should be carried to completion under the new. . . . . The amendment of April 13, 1885, continues in force the same power in the respective county boards, but makes some changes in the mode of procedure; and, within the principles above enunciated, the jurisdiction of the board over pending proceedings was in no wise affected by the amendment. It was only necessary, in so far as the mode of procedure was changed by the new act, that the proceedings should thereafter conform to that law."

In the case of *Railroad Company v. Oglesby et al*, 76 N.E. 165, the same court considered the effect of a change in the law pending proceedings for the improvement of a street. We find the following remarks, 1.e. 166:

"The method of apportioning and assessing, and also of collecting the costs of such improvements, was changed by the new act.

Appellant insists that the averment of facts in the complaint is insufficient to show that a statutory lien was perfected against its property, because the proceedings were all had in accordance with the provisions of the Barrett law, notwithstanding its repeal, and were not made to conform to the new law after it went into effect. . . . . The general rule is that statutes granting authority to levy special assessments against private property must be strictly construed, and the mode of procedure prescribed must be closely followed in all essential details. The new statute required the costs of the improvement to be first apportioned by the city commissioners in proportion to the benefits received; but the assessment sued upon was made by the common council upon the engineer's report, without reference to the city commissioners.

This was a material and substantial departure from the method prescribed by the law in force at the time the assessment was made, and sufficient to invalidate the lien declared upon in the complaint."

CONCLUSION.

From the foregoing authorities we conclude that Senate Bill No. 34 p. 419 laws of Missouri 1933 is to be given due consideration by the boards of equalization in the equalizing and adjusting 1934 taxes.

Respectfully submitted,

HARRY G. WALTHER, JR.,  
Assistant Attorney General

HGW:SW

APPROVED:

\_\_\_\_\_  
ROY McKITTERICK  
Attorney General

1212  
TAXATION: REVENUE: -- ASSESSOR HAS THE AUTHORITY TO REQUIRE TAXPAYERS TO MAKE AN ITEMIZED LIST OF THE PROPERTY, AS COVERED BY CLASSES 7, 8, and 9 OF SECTION 9756, R. S. MO. 1929; AND ALL PROPERTY MUST BE RETURNED FOR ASSESSMENT AT ITS TRUE VALUE, AND ANY NOTE OR INSTRUMENT IS SOLVENT UP TO ITS TRUE VALUE IN MONEY, WHETHER THAT MEANS FACE VALUE OR NOT.

May 17, 1934. 5-19

State Tax Commission,  
Jefferson City,  
Missouri.

Attention: Mr. A. J. Murphy  
Commissioner.

Gentlemen:

This department is in receipt of your letter wherein you state in part as follows:

"The wording of the paragraph in question is 'eight, an aggregate statement of all solvent notes secured by mortgage or deed of trust.'

"The literal definition of solvent is, of course, a note payable at its face value, or a note that will be paid at its face value, or worth its face value.

"Mr. Teasdale is evidently leading up to the argument that a note that is only worth 50 or 60% of its face value is not a "solvent" note; therefore, would not have to be returned on the assessment list.

"We can not accept this interpretation. It is our thought that all property must be returned for assessment at its true value and that any note or other instrument is solvent up to its true value in money, whether that would mean face value or not.

FILED  
65

"We would, however, like to have an official ruling on this point at your earliest convenience.

"In this connection we would also like to have your opinion on the interpretation of the word 'aggregate' in this same section in regard to the 7th, 8th, and 9th classes of property to be listed. The wording of the section rather implies that the tax payer is only required to report on his assessment list the total combined value of all his property in each class.

"This Commission has been considering the desirability of asking the Assessor, when assessment lists are turned in by the tax payer, to require of the said tax payer an itemized list of property covered by the 7th, 8th and 9th classes mentioned on assessment lists.

"We feel that we have full authority under Section 9854 R. S. 1939 to require the Assessor to ask for this information. We doubt, however, the Assessor's authority to require the tax payers to make this character of return.

"It is almost an absolute necessity that we have this itemized information if we are to arrive at any fair idea of the value of property reported in classes 7, 8 and 9.

"When this Section 9756 was written all such property as notes, stocks and bonds were worth 100 cents on the dollar and there was no other value thought of, but in these times when the values vary from 10 cents on the dollar to 100 cents on the dollar it is almost necessary we have this detailed statement if we are to arrive at a fair value of the property for assessment.

"We also believe that if we can require the tax payer to furnish this itemized statement to the Assessor of their property, with the face value, and market value,

that we would be able to place on the assessment lists vast quantities of this intangible property that is not now assessed at all.\*\*\*\*\*

Section 4, Article X, of the Missouri Constitution provides in part as follows:

"All property subject to taxation shall be taxed in proportion to its value: \*\*\*\*\*"

Section 9752, R. S. Mo. 1929, provides that every assessor shall take an oath that he will faithfully and impartially discharge the duties of his office, and that he will assess all the property in the county in which he assesses at what he believes to be its actual cash value.

Section 9792, R. S. Mo. 1929, dealing with the valuation to be placed on property reads in part as follows:

"The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation. \*\*\*\*\*"

In the case of State v. Stamm, 65 S. W. 242, 1.c. 243, 185 Mo. 73, the Court said:

"Section 7564 (now Section 9792, R. S. Mo., 1929) provides that 'the assessor shall value and assess all the property on the assessor's book according to its true value in money at the time of the assessment.' This manifestly includes personal as well as real property, notwithstanding the provision requiring that 'all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation, '\*\*\*\*\*.'"



Section 9756, R. S. Mo. 1929, provides what the lists shall contain and reads in part as follows:

"The assessor \*\*\*\* shall \*\*\*\* proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property and shall require such persons to make a correct statement of all taxable property owned by such person, \*\*\*\* and the person listing the property shall enter a true and correct statement of such property \*\*\*\*. Such lists shall contain, \*\*\*\*

"seventh, an aggregate statement of solvent notes unsecured by mortgage or deed of trust;

"eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust;

"ninth, an aggregate statement of all solvent bonds, \*\*\*\*."

Section 9813, R. S. Mo. 1929, fixes definite rules for the county boards of equalization to observe and provides in part as follows:

"The following rules should be observed by county boards of equalization:

"First, they shall raise the valuation of all such tracts or parcels of land and any personal property such as in their opinion have been returned below their real value, according to the rule prescribed by this chapter for such valuation; \*\*\*\*\*.

"Second, they shall reduce the valuation of such tract or parcels of land or any personal property which, in

their opinion, has been returned above its true value \*\*\*\*."

It is to be noted that the true value basis for assessment runs all through the Missouri revenue laws as set out in the above sections of the Revised Statutes of Missouri, 1929.

It would not be amiss at this point to define a few of the words with which we will deal in our discussion of the problem.

In the case of Samosa v. Lopez, 143 Pac. 927, 19 New Mexico, 312, the Court said:

\*\*\*\*\*'True value' as used in laws providing that property shall be assessed for taxation according to its true value, has been defined to mean the value which it has in exchange for money. \*\*\*\*

"'Actual cash value' of real or personal property has been defined to be the price it would sell for in the ordinary course of business free from incumbrance and not at forced sale \*\*\*\*. It thus appears that the terms are practically synonymous. \*\*\*\*\*"

Bouvier's Law Dictionary defines the term "aggregate" in the following manner: "Consisting of particular persons or items formed into one body, a combined whole."

Cooley on "Taxation", Vol. II, paragraph 575, page 1240, in discussing the term "credits" in general, states as follows: "'Property' as the term is used in a statute authorizing the imposition of taxes will be held without further specification to include solvent credits and generally credits are embraced within the scope of the property made taxable by statute. They are 'personal property' within a statute authorizing taxation of such

property \*\*\*\*. Credits within the meaning of this rule include promissory notes, bonds issued for the payment of money, mortgages, etc. \*\*\*\*\*.

In the case of Kingsley v. The City of Merrill, 99 N. W. 1044, l.c. 1045, 122 Wisc. 185, the Court said:

"Undoubtedly as stated by the Tax Commission and urged by counsel, that which gives a credit 'value' and which the present assessment laws recognize \*\*\*\* consists not in the written instruments or other evidences of the creditors' rights or security, but in the right itself -- the creditor's right to receive and enforce payment of his demand."

On page 1046 of the same opinion, the Court said:

\*\*\*\*\* In the case of such intangible species of property, the thing that is valuable is the right of the creditor to receive property or money, and to enforce such right by action in court \*\*\*\*\*."

In the case of Kennedy v. Burr, 101 Washington 61, 171 Pac. 1022, l.c. 1024, the Court said:

"Solvency has a well defined meaning in law; it means an excess of assets over liabilities; the power to pay debts in due course \*\*\*\*\*."

In the case of Flowers v. American Agricultural Chemical Company, et al., 154 S. E. 736, l.c. 737, the Court held that an instruction defining the terms "solvent" and "insolvent" as meaning able or unable to pay debts correct. The Court said:

"Solvency or insolvency depends upon whether the entire assets of a person equal the value of his total indebtedness. If the entire assets of a person equals or exceeds his entire debts, he is solvent. If his entire assets are less than his entire indebtedness, he is insolvent."

Again, in the case of Stillman v. Lynch, 56 Utah, 540; 196 Pac. 272, the Court said:

"Defendant's argument that only solvent credits must be placed on tax books is unassailable. The word 'solvent' as applied to 'credits' must be taken in its ordinary meaning. Those credits in order to be assessable must be worth their fixed value and be collectible, not by suit or on execution, but in ordinary course of business and by usual business methods. In other words, they are what are called 'good accounts'. In one of the briefs submitted to us, it is said that conditional sales agreements are not solvent credits per se. That is true. A title-retaining note or a conditional sale agreement or a contract for sale of real estate may or may not be a solvent credit but those are problems for the Assessor and must be left to his good judgment and sound discretion."

The assessor is obligated by law to employ every power at his disposal to uncover and list property. Section 9760, R. S. Mo. 1929, authorizes the assessor to make any examination or search upon the property and examine any person upon oath touching the same. Section 9760, supra, states as follows:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

The Supreme Court has held that Section 9760, supra, is binding even when the assessor makes the assessment in

a lump sum on the best information he can obtain, and if no appeal is taken therefrom the taxpayer cannot be heard to complain even if the tax payer has refused to give a list of his property as shown in the case of State ex rel. v. Cummings, 151 Mo. 49, 1.c. 59, wherein the Court said:

\*\*\*\*\* If after receiving the blank list and notice, he failed to make out his own list, or refused peremptorily to do so, as is shown by his evidence, then the law authorized the assessor \*\*\*\* to make out the list on his own view, or 'on the best information he could obtain.' \*\*\*\* His contention that, because the district collector did not itemize the various pieces and kinds of personal property, he had no jurisdiction to assess him on any sum whatever, is not sound. \*\*\*\* By a simple compliance with a just and reasonable law, he could have avoided the very thing of which he complains \*\*\*\*."

Section 655, R. S. Mo. 1929, provides additional rules for construing statutes, and reads in part as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, \*\*\*\*."

In the case of State v. Carr, 77 S. W. 543, 1.c. 544, 178 Mo. 229, the Court said:

"It is one of the cardinal rules for the construction of statutes, that the spirit and purpose of the enactment is an invaluable guide to the meaning thereof, for the letter of the law, often killeth, while its spirit maketh alive. The sole pur-

pose of the law in requiring the tax payer to make out and return to the assessor a list of his property is to aid the assessor in discovering all of the taxable property, to the end that it may be assessed and made to bear its proper proportion of the expenses of government. \*\*\*\*\*

On page 546, in the same opinion this Court quotes with approval the following statement which appears in the case of the Supreme Court of Maine in the case of Rockland v. Ulmer, 84 Me. 503, 24 Atl. 949, wherein it was said:

\*\*\*\*\* All taxation is a burden, yet it is the duty of every citizen to bear his portion of the burden, and no tax payer should be permitted to escape doing so upon a mere technicality which in no way materially affects his rights. \*\*\*\*\*

In the case of In Re: Ryan's Estate, 156 S. W. 759, 1, c. 760, 174 Mo. App. 202, the Court said:

\*\*\*\*\* It is the duty of the court in construing statutes to interpret particular words by reference to the context so as to effectuate the intention of the law-makers as reflected by the entire enactment, if such may be fairly ascertained, rather than to declare the precise meaning of the word standing alone. \*\*\*\*\*

#### CONCLUSION.

It is our opinion the assessor has the authority to require tax payers to make an itemized list of the property covered by the seventh, eighth and ninth classes mentioned on assessment list as set out in Section 9756, R. S. Mo. 1929, supra.

We are of the further opinion that the term "aggregate" as used in Section 9756, supra, means the same as the term "whole". The former term is defined in Bouvier's Law Dictionary as "consisting of particular persons or



items formed into one body, a combined whole." Thus Section 9756, *supra*, may be read in part as follows:

"\*\*\*\* seventh, an aggregate (or whole - made up of particular items) statement of solvent notes unsecured by mortgage or deed of trust;

"eight, an aggregate (or whole - made up of particular items) statement of all solvent notes secured by mortgage or deed of trust;

"ninth, an aggregate (or whole - made up of particular items) statement of all solvent bonds, \*\*\*\*."

Since the term "aggregate" consists of "particular items", we are of the opinion that in order to carry out the intentions of the Legislature, it is necessary and within the meaning and scope of the statutes that the assessment lists as turned in by the tax payer contain an itemized or detailed account of the property covered by the seventh, eighth and ninth classes mentioned on the assessment lists.

We are cognizant of the fact that Section 655, R. S. Mo. 1929, commands that in the construction of all statutes, words - other than those of technical import - should be taken in their plain or ordinary and usual sense. And the wording of Section 9756, *supra*, upon a cursory examination rather implies that the tax payer is only required to report on his assessment list the total combined value of all his property in each class, and that might be the interpretation of the term "aggregate" if it should be taken in its plain, ordinary and usual sense. It is true that the section of the statute referred to so reads, but its command is conditioned as follows in express words: "Unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute."

From this it appears that we are not required to accord the word "aggregate" its usual meaning if such meaning be plainly repugnant to the intent of the Legislature or of the context of the same statute, and we are of the opinion that it is. Bearing in mind that the court

so well stated in the case of State v. Carr, supra, "the sole purpose of the law in requiring the tax payer to make out and return to the assessor a list of his property is to aid the assessor in discovering all of the taxable property, to the end that it may be assessed and made to bear its proper proportion of the expense of government. \*\*\*\*\*".

It is almost an absolute necessity that the assessor have this itemized information if he is to arrive at any fair idea of the value of the property reported in classes seven, eight, and nine, and as the Court stated in the above mentioned case, "All taxation is a burden, yet it is the duty of every citizen to bear his portion of the burden, and no tax payer should be permitted to escape doing so upon a mere technicality which in no way materially affects his rights.\*\*\*\*\*"

The assessor is obligated by law (Section 9760, supra) to employ every power at his disposal to uncover and list property, and we are of the opinion that in the light of the foregoing sections, it is clearly within the power and duty of the assessor to require the tax payers to make this character of return, and that whenever a tax payer refuses to set out the particular items that go to make up the whole or aggregate statement of his property as provided for in classes seven, eight and nine of Section 9756, supra, then it shall be the same as if no list had been given and shall come within the provisions and penalties of Sections 9760 and 9761, supra. To hold otherwise, in our opinion, the tax payer and not the assessor would be the sole judge of the true value in money of property as set out in classes seven, eight and nine of Section 9756, supra.

## II.

All property must be returned for assessment at its true value, and any note or other instrument is solvent up to its true value in money whether that means face value or not.

We are of the opinion that the assessor must value and assess all property, both real and personal, on the assessor's books according to its true value in money, and as stated in the case of State v. Stamm, supra, this is true notwithstanding the provision in Section 9793, R. S. No. 1929, supra, which provides that "\*\*\*\*\*all other personal

property shall be valued at the cash price of such property at the time and place of listing the same for taxation. \*\*\*\*\* Again, in the case of Samosa v. Lopez, supra, the Court held that the terms as used in Section 9792, supra, "true value" and "actual value" were practically synonymous.

It has been inferred that a note that is only worth 50 or 60% of its face value is not a "solvent" note or bond, as the case may be, and therefore such would not have to be returned on the assessment list for taxation. We are of the opinion that such a conclusion is incorrect, and that a note or bond that is worth only a portion of its face value is solvent up to that amount, and that the tax payer must list the face value and market value thereof.

As the court stated in the case of Kingsley v. City of Merrill \*\*\*\*\* in the case of such intangible species of property, the thing that is valuable is the right of the creditor to receive property or money, and to enforce such action in court." The creditor has such a right even though the property may be worth 50 or 60% on the dollar and should therefore return it for its face and/or market value.

It might be argued that in light of such cases as Kennedy v. Burr, and Flowers v. American Agricultural Chemical Co., et al., supra, which defined the term "solvency" or "solvent" as meaning an excess of assets over liabilities; and the case of Stillman v. Lynch, supra, to the effect that "defendants' argument that "only solvent credits must be placed on the tax books \*\*\*\* and that the word "solvent" as applied to credits must be taken in its ordinary meaning, \*\*\*\*\* and, in order to be assessable, must be worth their face value; that a note or instrument for example only worth 40 or 45% on the dollar was insolvent according to the meaning of Section 9756, supra, and therefore that the taxpayer would not have to return them on the assessment list.

We cannot accept such an interpretation. True as we stated in our first conclusion, "words and phrases must be taken in their plain or ordinary and usual sense", but such statement is conditioned upon the following ex-

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press words: "Unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute."

We are of the opinion that we are not required to accord the word "solvent" its usual meaning since such meaning is plainly repugnant to the Constitution, the intent of the Legislature, and the context of the statutes; and that all property must be returned for assessment at its true value and that any instrument is solvent up to its true value in money whether that would mean par value or not.

In summing up, we again cite the case of State v. Carr, supra, wherein the Court said: "All taxation is a burden, yet it is the duty of every citizen to bear his portion of the burden, and no tax payer should be permitted to escape doing so upon a mere technicality which in no way materially affects his rights."

Respectfully submitted,

JAMES L. HORNOSTEL  
Assistant Attorney-General.

APPROVED:

ROY McKittrick  
Attorney-General.

MW. JLN/afj

SCHOOLS - Board of Directors authorized to withdraw estimate  
TAXATION - found insufficient to pay interest and principal  
on bonds, and to submit in lieu thereof a new and  
sufficient estimate.

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June 7th, 1934.

6-8

Honorable Lee Mullins  
Prosecuting Attorney  
Atchison County  
Rock Port, Missouri



Dear Sir:

We have your request of June 2nd, 1934 for  
an opinion upon the following facts:

"In the year 1929 "Fairfax School  
Dist." voted, issued and sold bonds,  
(I don't know exact amt.) to Com-  
merce Trust Co. of K. C. Missouri.  
The amount of levy, as limited by  
Section 9203, 1929 St's, owing to the  
reduced valuation of property for the  
district, will not produce sufficient  
money to meet the principal and in-  
terest, which will fall due and be pay-  
able from the next year's collections.  
The letter herewith, which was received  
from the Trust Company's attorneys, will  
help you materially to understand the  
reason this request for your opinion  
(or advice) in the matter. The levy  
made by the board on Education of said  
school, having certified to the County  
Clerk the amount of their levy, and  
the clerk having already entered the  
same on his records, makes the situa-  
tion rather perplexing, and to the Clerk  
aggravating; what the Board wants to  
know from your office is, "Can the Board  
now increase their levy to an amount  
sufficiently large to meet the interest  
and principal which will become due as



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above mentioned and have the clerk re-arrange his books for the collection thereof?"

Article X, Section 12 of the Missouri Constitution, in part, provides as follows:

" \* any county, city, town, township, school district or other political corporation \* incurring any indebtedness requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years \*"

The above constitutional provision is self-enforcing. State ex rel. v. Hackmann, 229 S. W. 1082, l.c. 1085. It places upon the local authorities of the various political subdivisions named therein duties mandatory in nature, which cannot be avoided by failure to make a levy or to levy an insufficient amount to pay the interest and principal. In State ex rel. v. Gordon, (1909) 217 Mo. 103, l.c. 119, the Supreme Court points out that a political subdivision (including a school district) named in the above constitutional provision which fails in its duty to provide sufficient funds to pay the interest and principal due may be,

" \*compelled by mandamus at any time to make such levy en masse for all principal and interest past due."

Under Section 9204, Revised Statute of Missouri, 1929, the Board of Directors of a school district are authorized to make an estimate for the levy of a tax,



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" \*to be sufficient in amount to pay the annual interest on all bonds\* "

Section 9203, Revised Statutes of Missouri, 1929, authorizes the Board of Directors of a school district to make an estimate for the levy of a tax,

" \*the money arising from said tax shall constitute a sinking fund, and shall be used only for the redemption of any outstanding bonds of such district: \* "

Under Section 9214, Revised Statutes of Missouri, 1929:

"The board of directors of each district shall, on or before the fifteenth day of May of each year forward to the county clerk an estimate of the amount of funds necessary to \* or meeting bonded indebtedness, and interest on same, \* "

It appears that this particular provision has never been passed upon by the courts of this state as to whether it is mandatory or merely directory. However, we are inclined to the belief that it is merely directory. Within the following general state of law taken from 56 C.J., Sec. 679, Section 800,

"On the other hand, it has been held that a provision, requiring the action of the school board or body in determining upon or voting a tax to be certified, within a specified time, to the authorities whose duty it is to assess the tax or extend it on the tax books, is merely directory, as to time, \* "

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At the most, the filing of an estimate after the date fixed in the above statute would be an irregularity, and in view of the provision of Section 9979, Revised Statutes of Missouri, 1929, dealing with taxation and revenue in general which provides that no irregularity of any kind shall invalidate the tax, it would seem that the provisions of Section 9214, supra, would be construed as directory.

Section 9261, Revised Statutes of Missouri, 1929 provides that the county clerk, upon receiving the estimates of the various school districts, shall proceed to assess the amount so returned for building purposes,

" \*for sinking fund, forty cents on the one hundred dollars' valuation, and a sufficient amount to pay interest on bonded indebtedness; all of which shall be extended by the county clerk upon the general tax books of the county for said year \* "

In view of the vicissitudes of such valuations, it is impossible to fix a levy to produce the exact amount of money needed to pay principal and interest on such bond, and for this reason the Board of Directors is to make an estimate sufficient to pay interest and principal. It has heretofore been held that even though the estimate produced money greatly in excess of such needs, the courts will not revise the estimate. Lyons v. School District (1925), 311 Mo. 349.

Heretofore, directors have been allowed to withdraw their estimate and file a new one. In 56 C. J. p. 692, Sec. 796, it is said:

"An estimate furnished may be withdrawn before it is acted upon, and another substituted in its stead, \* "

The same general rule has been adopted by the courts of this state. State ex rel. v. Phipps (1898) 148 Mo. 31,

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l.c. 37; Pope v. Lockhart (1923) 252 S. W. 375.

CONCLUSION.

It is, therefore, the opinion of this office that the school directors of the Fairfax school district may immediately make out a new estimate of a tax levy in an amount sufficient to meet the maturing principal and interest due on bonds of that district and certify the same to the county clerk, whose duty it will be to insert the new levy in figures upon the proper books. The original levy should be withdrawn.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

LIQUOR CONTROL ACT: County Court has no authority to grant a license unless Sec. 27 of the Liquor Control Act be complied with.

August 24, 1934.



Honorable Lee Mullins,  
Prosecuting Attorney,  
Atchison County,  
Rockport, Missouri.

Dear Mr. Mullins:

This department is in receipt of your request for an opinion as to the following state of facts:

\*\*\*\*\*Gilkerson made application to the superintendent of Liquor Control and secured the necessary license for sale of liquor in the original package in said building and has made application to the County Court of this county for a county license, in which, of course, he certified in said application that he was a citizen of the United States and a qualified, legal voter and tax-paying citizen of Atchison County, Missouri, and that he was of good moral character and so forth. In the meantime, the court learned that said Gilkerson was neither a citizen of Atchison County, legal voter nor taxpayer, but he was such in Buchanan County, Missouri, whereupon the county license was refused.

\*\*\*\*\*The court would really like to have such license fees as they may be entitled and in view of the fact that 'bootleggers' are still in business up in this section, they would really grant a license to this man were it not for the apparent in-surmountable obstacles in the language of this statute."

Section 27 of the Liquor Control Act of Missouri provides in part:

"No person shall be granted a license hereunder, unless such person is of good moral character and a native born or naturalized citizen of the United States of America, and

a qualified voter and taxpaying citizen of the county, town, city or village wherein such person seeks a license hereunder; \*\*\*\*\*

The question now under consideration is whether or not the requirements of this section of the law are mandatory or whether or not they are directory only. It should be remembered, as was held in the case of Higgins v. Talty, 157 Mo. 280, that a dramshop license is a mere permit--not a contract between the State and the licensee in which the latter has no vested rights, but is subject at all times to the police power, and it is revocable at any time the State may see proper to do so for any violation of law, whether the license so provides or not.

Judge Burgess, in the case of State v. Seebold, 192 Mo. 727, said:

"It is fundamental that no one has the natural right to sell intoxicating liquor because the tendency of its use is to deprave public morals, and to do so without a license from proper authority is unlawful."

Fortunately, a statute similar to the one now under consideration was passed upon by the courts of this state during the period of the existence of the "dramshop law". Judge Walker, in the case of State ex inf. v. Missouri Athletic and St. Louis Clubs, 261 Mo. 576, in discussing the requisites necessary to obtaining a permit under the old dramshop law, said:

"This is an individual privilege which can only be granted to 'a law abiding, assessed, taxpaying male citizen over twenty-one years of age.'"

In the case of State ex rel. v. County Court, 66 Mo. 96, Judge Ellison said (l.c. 99-100, 101):

"Section 4 of the dramshop act, Laws 1891, page 128, declares: 'Application for a license as a dramshop keeper shall be made in writing to the county court, and shall state specifically where the dramshop is to be kept, and if the court shall be of the opinion that the applicant is a law-abiding, assessed, taxpaying citizen, above twenty-one years of age, the court may grant a license for six months. \*\*\*\*\*'

We interpret that language to mean that the court only has authority to grant a

license to a person who is a law-abiding citizen, an assessed taxpayer and a male over twenty-one years old; and that if the court should grant a license to one who was not found by the court to be a law-abiding, male, assessed, tax-paying citizen, over twenty-one years of age, the license would be void. Unless the person applying for the license was found to fill the description prescribed by the statute, the court would have no authority to grant the license.

\*\*\*\*\*

But, in our opinion, jurisdiction does not attach in the county court to grant a license except upon the application of 'a law-abiding, assessed, taxpaying, male citizen, above the age of twenty-one years'. If the applicant was a female, or was a minor, or lacked the other qualifications mentioned, the court would be without jurisdiction, for they have no power to hear an application from such a party. If the record disclosed such a party, the court could strike the application from the files."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that Section 27 of the Liquor Control Act must be strictly complied with, and unless the person applying for the license be found to fill the description prescribed by the statute, the county court has no authority to grant the license.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

JWH:AH

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ROY MCKITTRICK,  
Attorney General



STATE FUNDS AND PROPERTY: Right of State Treasurer to accept Home Owners Loan Bonds in Exchange for Real Estate Security Obtained by Reason of Default of State Depositories; also to accept Federal Farm Loan Bonds.

January 11, 1934.

FILED

66

Honorable Richard R. Nacy,  
State Treasurer,  
Jefferson City, Missouri.

Dear Sir:

A request for opinion under date of December 18, 1933 has been received from you, such request being in the following terms:

"I have been requested to accept Federal Loan Bonds, or Home Loan Owners Bonds for the sale price of farms the State has acquired in closed banks.

Will you kindly give me your opinion of this matter."

This request was further elaborated by letter from you under date of January 4, 1934 which, insofar as it pertains to this matter, was as follows:

"My letter of December 18th was suggested by Judge John S. Farrington, Springfield, Missouri who has been giving this department some assistance in disposing of securities belonging to the State through the failure of State Depositories.

1st. In the particular case I had in mind when this inquiry was made was where the State had foreclosed on real estate and had an opportunity to dispose of same if permitted to accept bonds as mentioned above.

2nd. This department has now come into possession of certain pieces of real estate where the borrower has voluntarily made deed to the State.

3rd. I am holding notes and mortgages to a number of pieces of property as collateral in closed banks which have not been foreclosed."

Revised Statutes of Missouri of 1929, Section 11469, amended by Laws of 1931, page 378, provides as follows:

"Sec. 11469. Security required for safe-keeping of funds deposited by state treasurer.--For the security of the funds deposited by the treasurer under the provisions of articles 1 and 2 of this chapter the governor, attorney-general and the treasurer shall require of said selected and approved

January 11, 1934.

banks or banking institutions giving security for the safe-keeping and payment of said deposits a bond equal to at least twenty-five per cent. of the amount of the accepted bid or bids, to be approved by the governor and attorney-general, and in addition thereto bonds of the United States, the state of Missouri, or in their discretion, the registered bonds of the city of St. Louis or of any other city in this state having a population of not less than two thousand, or in their discretion the registered bonds of any county in this state, or in their discretion the registered bonds of any school district situated in any city, town or village in this state, or in their discretion the approved registered bonds of any drainage or levee district in this state, or in their discretion the approved registered bonds of any special road district in this state, or in their discretion the registered state bonds of any state, or in their discretion the federal land bank bonds, to an amount of at least equal in value to the amount of the deposits with such banks or banking institutions; which bonds shall be delivered to the state treasurer, and receipted for by him and retained by him in the vaults of the state treasury of this state, or in the vaults of such banks or safe depository as the governor, attorney-general and treasurer may agree upon; and if in any case, or at any time, such bonds are not satisfactory security to the governor and attorney-general for deposits made under articles 1 and 2 of this chapter, they may require such additional security to be given as shall be satisfactory to them, which said bonds or any part thereof, may from time to time be withdrawn on the written consent of the governor, attorney-general and treasurer; and the governor, attorney-general and state treasurer shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the state treasury, or in the vaults of such bank or banks other than the bank or banks selected as the state depository, as the governor, attorney-general and state treasurer may have duly agreed upon: Provided, that sufficient amount of said bonds to secure said deposits shall always be kept in the treasury or in such selected depository, and in the event that such bank or banks or banking institutions of deposit shall fail to pay such deposits, or any part thereof, on the check or checks of the state treasurer, then it shall be the duty of the state treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrants drawn by the state auditor upon the funds for which said bonds are security. Any bank making deposits of bonds with the state treasurer under the provisions of articles 1 and 2 of this chapter may cause such bonds to be endorsed or stamped, as may they deem proper, so as to show they are deposited as collateral, and are not transferable, except upon the conditions of articles 1 and 2 of this chapter: Provided, however, the governor, attorney-general and treasurer in their discretion, may allow said selected banks to deposit as security for the safe-keeping of said funds, in lieu of the above mentioned bonds, the notes held by said banks or banking institutions, secured by first deeds of trust

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on Missouri real estate, which notes and deeds of trust shall not exceed fifty per cent of the actual value of said real estate, which security shall also be accompanied by an abstract of title certified to date by a competent abstractor and the written opinion of some reputable lawyer to the effect that the title to the lands covered by such deeds of trust is well vested in the grantors of such deeds, and said bank or banking institutions shall be required to furnish a personal bond equal to at least seventy-five per cent of the amount of the accepted bid or bids: Provided, if by reason of the failure of any of the depositories to renew their contracts by having their bid or bids rejected, they shall be allowed by and with the written consent of the governor, attorney-general and state treasurer, not more than one hundred and eighty days from the day their bid or bids may be opened and rejected, in which to pay over to the state treasurer whatever balance may be due to the state on the deposit held by them such balances so held to bear the same rate of interest as provided for in their original bid or bids. The treasurer shall have authority to employ an additional clerk to assist in carrying (out) the provisions of this section at a salary not to exceed one hundred and fifty dollars a month."

and it was held in the case of *In Re Holland Banking Co.*, 313 Mo. 307, 281 S. W. 702 (1926) in dealing with the scope of the above quoted statute as follows:

"We are satisfied that the decided trend of the better-reasoned cases is to the effect that where a State has a general statute giving priority to the debts due the State, or where the common law to the same effect is recognized and where such state also has a depository law directing the deposit of the state's funds in selected depositories which are required to give full and adequate security equal to or in excess of such deposits as may lawfully be made therein, and where no preference over and above the protection of such security is specifically provided for in such depository law, the State will be deemed to have waived its priority rights under the general priority statute or the common law as the case may be, and will be required to look to the security taken by it for the repayment of such deposits and can only come in on a parity with general creditors for a distributive share of the unpledged assets of the insolvent depository after it has exhausted the security taken by it and applied same upon its debt."

From this quotation it is evident that the Supreme Court of Missouri feels that Section 11469 provides a complete scheme for the protection of state deposits, and that it supplants and supercedes any other common law or statutory rights, powers and duties in connection with security for state funds.

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As to the Federal Home Owners' Loan Bonds, it is evident from Section 11469 that such bonds would not have been under the statute a proper security for state deposits. Of the various types of bonds authorized by Section 11469 as proper bonds for security of state deposits the only type referred to in the statutes which might include Home Owners' Loan Bonds would be "bonds of the United States" and it is submitted that Home Owners' Loan Bonds are not bonds of the United States within the meaning of the statute for the reasons hereinafter set out.

The Home Owners' Loan Corporation was created by the Home Owners' Loan Act of 1933, approved June 13, 1933. Briefly summarized, the corporation created by such act is to function in the following manner, the figures and letters given in such description being the sections and subdivisions of the act. The corporation is governed by the Federal Home Loan Bank Board which is authorized to issue capital stock in the amount of \$200,000,000.00 which is to be subscribed for and paid for by the Secretary of the Treasury of the United States, the money for such payment to be advanced to the Secretary of the Treasury by the Reconstruction Finance Corporation. (Section 4 (b)). The corporation is authorized to issue bonds which are the bonds in question in your request in an amount not to exceed \$2,000,000,000.00, such bonds to be paid for either by cash or by first mortgages on real estate, such bonds being guaranteed as to interest only by the United States (Section 4 (c)). The bonds issued for real estate mortgages may be in amounts up to 80% of the value of the property secured by such mortgages, and also the corporation is authorized to make advances in cash to pay taxes and assessments on the real estate secured by such mortgage to meet the incidental expenses of the transaction, and to pay as much as \$50.00 in cash on each mortgage to the holder thereof (Section 4 (d)), and the corporation is authorized to employ and pay as part of its expenses various agents, employees, officers and attorneys (Section 4 (j)). The bonds issued by the corporation have a maximum eighteen year maturity. (Section 4 (e)).

Home Owners' Loan Bonds are obligations of the Home Owners' Loan Corporation by which they are issued, and the United States is not liable for the principal thereof, but in Section 4 (c) of the Act it is provided that the bonds "shall be fully and unconditionally guaranteed as to interest only by the United States." Thus, so far as interest is concerned, these bonds are bonds of the United States in the sense that the United States undertakes to pay such interest, but there is no undertaking anywhere in the Act for the United States to pay the principal and, therefore, such bonds cannot be considered as bonds of the United States in the sense that Liberty Bonds and Treasury Certificates are bonds of the United States.

There are various similarities between Home Owners' Loan Bonds and Treasury Certificates or Liberty Bonds as, for example, the fact that Home Owners' Loan Bonds are acceptable at par as collateral security against deposits of public moneys with depositories by the Treasury Department of the United States under Treasury Department Circulars Numbers 92 and 176. Likewise, the Reconstruction Finance Corporation will accept such bonds at 80% of par as collateral security for loans, Jesse H. Jones, chairman of the Reconstruction Finance Corporation stating in a letter under date of July 22, 1933 to the chairman of the Home Owners' Loan Corporation that "it is needless



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to add that the determination to make loans of so great a percentage against these bonds has been reached only upon the conclusion that your bonds should be treated as prime collateral." Likewise, the trustees of the Postal Savings System have determined to accept as security for deposit of Postal Savings funds these bonds at their market value, and the Comptroller of the Currency has ruled that these bonds may be acquired and carried on the books at their actual value by national banks (see Preliminary Proof No. 1 of Home Owners' Loan Corporation, Department of Commerce Building, Washington, D. C.) Presumably, the above rulings by various departments of the federal government treating the Home Owners' Loan Corporation's bonds as being the same class of security as United States bonds is somewhat persuasive toward regarding the Home Owners' Loan Corporation's bonds as bonds of the United States for investment and security purposes, and if this opinion were being rendered to a department of the federal government it might possibly be necessary to reach a contrary conclusion from that which has been reached by us. However, the Missouri statutes use the words "bonds of the United States", and a bond the principal of which is not in any sense an obligation of the United States cannot by any reasonable construction of language be regarded as a bond of the United States within a statute which is prescribing strict requirements for investments of public funds.

It has been demonstrated above that Home Owners' Loan Bonds could not have been taken originally as security for state deposits. One reason for the rather lengthy analysis above to that effect was the possible consideration that if such bonds could be taken originally as security they could now be accepted in lieu of that which was originally in your cases taken as security, and the foregoing discussion has been confined to that part of Section 11469 which deals with bonds as security. However, section 11469 provides also that notes secured by first deeds of trust on Missouri real estate may be accepted as security for state deposits in lieu of the bonds above described, and the primary question is presented of whether or not bonds of the Home Owners' Loan Corporation could be regarded as deeds of trust within the meaning of Section 11469. It will be unnecessary to discuss whether or not these bonds are deeds of trust, because although the bonds are secured almost wholly by real estate on which the Home Owners' Loan Corporation has a lien, nevertheless such real estate is scattered all over the United States and, therefore, such bonds could not fall within the language of Section 11469 which provides that deeds of trust securing state deposits must be secured by "Missouri real estate."

There seems to be little doubt that there would be a right to foreclose on the deeds of trust deposited with the state as security for obligations on which default has been made by closed banks because the statutory authorities in Section 11469 to accept the deeds of trust which have been accepted must necessarily imply the power to use such deeds of trust when default has been made in the payment of the state deposits, because otherwise the security would be valueless and, indeed, in the last part of the quotation set out above from *In Re Holland Banking Company* it is apparent that the Supreme Court of Missouri feels that the state can and

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must realize on the security deposited with it by state depositaries. This leaves as the sole question the method of realizing on such security which is, of course, the heart of the problem raised by your inquiry.

Section 11469 provides that where bonds have been deposited to secure state deposits, and where default has been made in paying such state deposits "then it shall be the duty of the state treasurer to forthwith convert such bonds into money" and it is our opinion that the same requirement and the language just quoted would apply equally to real estate securities. In the proviso authorizing the acceptance of notes secured by deeds of trust a requirement that on default such security shall be converted into money does not appear. However, the statutory authorization of Section 11469 to accept deeds of trust as security allows their acceptance "in lieu of the above mentioned bonds" which would seem to indicate that the same procedure should be followed on default with respect to real estate security as would be followed with respect to bonds, and this conclusion is strengthened by the fact that the proviso authorizing the acceptance of such real estate security was added to the statute long after the original enactment of the statute, such proviso being added by Laws of 1913, page 770, which would seem to indicate a purpose of the General Assembly merely to add to the statute another type of security which could be accepted which would be dealt with in the same manner as was provided in the procedure outlined in the statute as it existed before the addition of such proviso. Furthermore, even if it were not mandatory upon the state treasurer to convert such deeds of trust into money, no statutory authorization has been found to convert property acquired by statutory authorization, as were these deeds of trust, into property which is not authorized by any other statute as a state investment so that the burden of justifying such investment would be upon the state treasurer.

In conclusion, it is our opinion that the state treasurer would not be authorized to accept Federal Home Owners' Loan Bonds in exchange for deeds of trust or real estate acquired by the state by reason of the default of state depositaries by whom such deeds of trust or real estate had been deposited with the state as security for such deposits.

As to Federal Farm Loan Bonds a different question is presented. By section 11469 it is expressly provided that it shall be proper to accept "the federal land bank bonds" as security for state deposits. There is no such thing technically as a federal land bank bond, that designation being merely the popular description for bonds issued by federal land banks which are called by the statute and are technically and correctly designated as federal farm loan bonds, and such federal farm loan bonds have been authorized since 1916. Act July 17, 1916 c. 245, section 39, 39 Stat. 372, see also Executive Order March 27, 1933, No. 6064, 12 U. S. C. A. section 751. Thus, since there is no such thing technically as a federal land bank bond section 11469 of the Missouri statutes must refer to Federal Farm Loan Bonds issued by the federal land banks. The new Federal Farm Loan Bonds under the Act of 1933 do differ slightly from the Federal Farm Loan Bonds under the 1916 Act, but these differences are to the advantage of the new bonds in connection with which there is a statutory authorization given for the United States to guarantee



7. Honorable Richard W. Casey

January 11, 1934.

the interest up to two years, no such authorization or provision being effective for the old bonds, Act June 16, 1933 c. 98, Section 80 (a), 48 Stat. 273, 12 U. S. C. A. Section 792, so that both practically and technically the new bonds to be issued by the Federal Land Bank under the 1933 Act would seem to be qualified as a proper form of security for state deposits under Section 11469 equally, at least, with the Federal Farm Loan Bonds issued under the 1916 Act, and if qualified as security originally it does not seem improper now to receive them in exchange for other property such as real estate security which was acquired through closed banks. It might be remarked that no Federal Farm Loan Bonds of the new type are yet in the hands of the public nor, according to the Manager of the Bond Department of the Federal Land Bank in St. Louis, have any regulations or advance information been issued concerning them.

In conclusion, it is our opinion as to Federal Farm Loan Bonds that such bonds that are issued prior to 1933 or under the 1933 Act of Congress would be proper security for state deposits under U. S. No. 1929, Section 11469, and that there would be no statutory prohibition to receiving such bonds in exchange for other assets acquired under foreclosure on securities deposited with the state to secure state deposits.

Yours very truly,

EDWARD H. MILLER,

ESM:LR

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

ASSESSOR: Should assess land as acreage when plat nullified by foreclosure of prior Deed of Trust.

1-22  
January 17, 1934.



Mr. Martin L. Neaf  
Assessor of St. Louis County  
Clayton, Missouri

Dear Mr. Neaf:

I acknowledge receipt of your request for an opinion of this office reading as follows:

"Kindly let us have opinion by your office as to how assessment should be made in the following case, whether property should be assessed as lots or acreage.

On March 1, 1931 the Ladue Terrace Realty Company, a corporation, executed a Deed of Trust to Edward K. Love Realty Company in the sum of \$30,000.00. On April 22, 1931, the Ladue Terrace Realty Company executed a plat of said property and caused same to be filed in the office of the Recorder of Deeds; said plat was approved by the City Clerk of Ladue Village although the streets were not released from the Deed of Trust. On June 24, 1931, the above Company executed an amended plat of said subdivision and caused same to be filed in the office of the Recorder of Deeds of St. Louis County; said plat was approved by the City Clerk of Ladue Village although the streets were not released from the Deed of Trust.

In the execution and filing of said plats of said subdivision the holder of the Deed of Trust did not release the streets from the lien of said Deed of Trust nor did he join in any manner with said Subdivision.

On October 20, 1932, the holder of notes foreclosed and caused the property to be sold under Deed of Trust. He now requests that the Assessor

assess the property as acreage without having the said plats of the Subdivision vacated by the County Court.

Trusting that you may be able to give us this information at a very early date and thanking you for many past favors, I am

I.

FORECLOSURE OF DEED OF TRUST  
NULLIFIED PLAT.

From your letter it is apparent that at the time these plats were executed and filed, to-wit, in April and June of 1931, the entire tract of land which was sought to be subdivided was subject to deed of trust to the Edward K. Love Realty Company. By the overwhelming weight of authority in this case the foreclosure of this deed of trust cut out and rendered void the plat filed by the Ladue Terrace Realty Company.

The Springfield Court of Appeals in the case of Granite Bituminous Paving Company vs. Thomas Ward McManus et al. 144 Mo. A. 593, was confronted with the validity of a subdivision of a tract of ground in the City of St. Louis, plat of which had been filed subsequent to the filing of a deed of trust on the property. The deed of trust was subsequently foreclosed. The plaintiff sought to enforce a tax bill assessed against the tract of land as a whole and entirely disregarding the plat which had been filed. As stated by the Court, the gravamen of the defendant's case was that the property had been wrongfully assessed as one tract and should have been assessed according to the plat which had been filed. The Court stated at page 608 as follows:

\* \* \* Prior to said pretended dedication, about the year 1874, the said Robert Baker and his wife had conveyed the legal title of said property to one Robert W. Powell, by a deed of trust duly recorded, thus reserving to themselves only the conditional defeasible right of redemption. Therefore at the time of said pretended dedication, the said Robert W. Powell was the owner of the legal and fee simple title, subject to the right of redemption of the said Baker, and nothing more. However regular said pretended plat may be with reference to the technical requirements of the statutes in force in this State at the time

it was filed, said Baker was incompetent and held no title upon which he could base a valid dedication.\* \* \* \* \*

And held at page 610:

"\* \* \* \*As the property was sold out in 1878, under a deed of trust antedating the plat, all interest conveyed and the subdivisions attempted to be established by the plat were extinguished and the fee invested in the purchaser free therefrom, including the strip designated on the plat as 'West avenue.' And, as no act has been performed by the present owner (the purchaser under said deed of trust) which would amount to a dedication of the property either under the statute or at common law, it must follow that the officials of the city acted within their authority and duty in assessing it as acre property.\* \* \* \*"

A case upon the same state of facts reached the Supreme Court and is reported at 244 Mo. 184. The Supreme Court in affirming the view of the Court of Appeals stated at page 190:

"\* \* \* \*When Robert Baker filed the plat of his subdivision, the property was encumbered by a deed of trust, and the foreclosure under that deed of trust in 1878, by which Mrs. McManus became the owner of the land, nullified Baker's plat and destroyed it forever as a statutory dedication\* \* \* \*"

The St. Louis Court of Appeals held similarly in the case of Boatmen's Bank vs. Realty Company, 202 Mo. A. 57. At page 70 the Court stated as follows:

"\* \* \* \*Upon this state of facts we hold that the learned trial court properly held that as to defendant Clarke there had been no dedication of the land in question and as to him the property had to be assessed as one entire tract because the conditional dedication of the streets and alleys, as had been made by the filing of the plat of Semple Place by Hogan in 1892, had been wiped out by the foreclosure

of the deed of trust which was existing and of record against the said property at the time such dedication was made." \* \* \* "

While these cases arose under the provisions of the St. Louis Charter, particularly Section 14, Article 6, which provides:

"The word 'lot' as used in this section shall be held to mean the lots as shown by recorded plats of additions or subdivisions. But if there be no such reported plat or if the owners of property had disregarded the lines of lots as platted and has treated two or more lots or fractions thereof as one lot then the whole parcel of ground or lot so treated as one shall be regarded as a lot for the purposes hereof."

Yet this provision is not materially different from the provision of Section 9793 R. S. Mo. 1929, which provides in part as follows:

"The assessor shall value and assess all the property on the assessor's books according to the true value in money at the time of the assessment; and all other property shall be valued at the cash price of such property at the time and place of listing the same for taxation. Each tract of land and town lot shall be assessed and valued separately; but all land in a section and lots in a square or block owned by one person, which are contiguous, or which can be consolidated into one tract, lot or call, shall be valued as one tract, lot or call, as contemplated in Section 9780."

## II.

### LAND SHOULD BE ASSESSED AS ONE TRACT.

It appearing conclusively from the foregoing that the attempted subdivisions of this property is a nullity and that there has been no valid and continuing dedication of the streets, we now proceed to the question as to how the property should be assessed.

In reviewing the above cited cases, we find that the assessment of the tax against the whole tract, disregarding the plat or subdivision was approved. As herein quoted from the 144th Mo. A. case supra:

"it must follow that the city acted within their authority and duty in assessing it as acre property."

In Welty's "Law of Assessments" p. 213, we find the following statement:

"Lands may have been surveyed according to a plan, and platted, and such plat recorded as a town plat, but as long as such land continues to be occupied and used as a single tract or parcel, and is so treated by the owner, the whole may be so treated and assessed."

Again referring to Section 9792 herein quoted, we emphasize the fact that this property must be assessed at its true value in money, whether that greatest value is as building sites or acreage. This was decided in the early case of Benoist vs. City of St. Louis, 15 Mo. 669. The facts in the case are stated by Scott, Judge, at page 671 as follows:

"\* \* \* On the 8th of February, 1843, an act was passed to reduce into one, the several acts relative to the incorporation of the city of St. Louis, the 10th section of which (art. 6) provides, that lands within the limits of the city, which have not been laid off into blocks and lots, shall not be assessed or taxed otherwise than by the acre as agricultural lands, and shall continue to be so assessed and taxed till laid off into blocks and lots by the owners thereof respectively. The actual value of the land was estimated at \$6,000 per acre, but, if used for agricultural purposes only, its estimated worth was two hundred dollars per acre. The assessment was made on its actual value of \$6,000 per acre, at the rate of one-sixteenth of one per cent, according to the provisions of the act of 1841. The plaintiff appealed from the assessment to the city authorities, in pursuance of the



the ordinance in relation to appeals, when the assessment was confirmed, and they then applied to the Circuit Court for an injunction, when the proceedings were perpetually enjoined; from which decree the city of St. Louis appealed." \* \* \*

The whole issue in that case was whether or not the lots should be valued at their value for agricultural purposes or at their actual value. The lower Court held that they were to be valued as agricultural property. The Supreme Court reversed this holding and stated at page 672:

"\* \* \* Shall these improvements, made in part at the expense of others, continue to enhance the value of the estates of the land-owners yearly, and yet, shall not their taxes be increased in proportion to the enhanced value of their property? By the mode of assessment contended for, while the yearly value of the land is increased, its value for agricultural purposes may be diminished. The compensation to land-holders for including their farms within the limits, is to be found in the great improvements required by the act of 1841, and not in the supposed mode of assessment, as is clearly shown by the guaranty given, that their taxes shall not exceed one-sixteenth of one per cent. until the improvements are made while property within the old limits might be taxed as high as one-half of one per cent. The other Judges concurring, the decree will be reversed, the injunction dissolved, and the complainant's bill dismissed."

#### CONCLUSION.

In view of the foregoing authorities, it is the opinion of this office that it would be proper for this assessment to be made as a single tract at its actual value in money, entirely disregarding the subdivision of the tract heretofore filed for the reason that such plat or subdivision has been rendered nugatory and void by the foreclosure of the prior deed of trust.

Respectfully submitted,

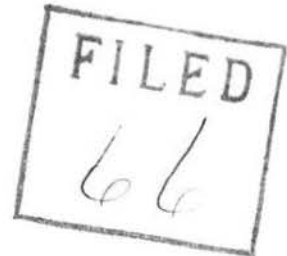
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED \_\_\_\_\_  
Attorney General.

ESCHEAT REFUNDS FROM STATE TREASURER: Order must be directed to State Auditor and not State Treasurer.

1-31  
January 25, 1934.

Hon. Richard R. Nacy,  
State Treasurer,  
Jefferson City, Missouri.



Dear Sir:

This department is in receipt of your request for an opinion as follows:

"Enclosed find the petition for judgment for refund from the Escheats Fund. Will you be kind enough to advise whether under this petition and court order the Treasurer will be required to refund this amount?"

I.

Court shall order State Auditor to issue warrant on State Treasurer in order to recover money paid into State Treasury under Chapter 3, R. S. Mo. 1929.

Section 623, R.S. Mo. 1929 provides:

"Within twenty-one years after any money has been paid into the state treasury by an executor or administrator, assignee, sheriff or receiver, any person who appears and claims the same may file his petition in the court in which the final settlement of the executor or administrator, assignee, sheriff or receiver was had, stating the nature of his claim and praying that such money be paid to him, a copy of which petition shall be served upon the prosecuting attorney, who shall file an answer to the same."

Section 624, R.S. Mo. 1929 provides:

"The court shall examine the said claim, and the allegations and proofs, and if it find that such person is entitled to any money so paid into the state treasury it shall order the state auditor to issue his warrant on the state treasurer for the amount of said claim, but without interest or costs; a copy of which order, under seal of the court, shall be a sufficient voucher for issuing such warrant."

In the case here before us, the order of the Circuit Court of Webster County, Missouri provides in part as follows:

"It is therefore ordered and adjudged by the Court that the said Fred R. Cantrell, administrator of the estate of the said John H. Cantrell, deceased, have and recover from and against the said Escheats Fund, in the hands of the State Treasurer of the said State of Missouri, the said sum of Five Hundred and Forty-four Dollars and Seventy-six Cents (\$544.76); and the said, the Treasurer of the State of Missouri, is hereby ordered to turn over and pay the said Fred R. Cantrell, Administrator aforesaid, the said above sum."

It will be noticed that the order of the court is directed to the State Treasurer and not to the State Auditor, as required by Sec. 624, R.S. Mo. 1929, supra. The recovery of this money from the State Treasury is allowable only because the statutes of this state allow such recovery, and the statutes must be literally followed.

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the order of the Circuit Court is not sufficient to require you as State Treasurer to refund this amount.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

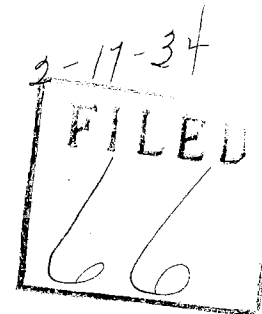
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ROY MCKITTRICK,  
Attorney General.

BONDS  
STATE TREASURER:—Executor of deceased owner of registered bonds  
entitled to receive accruing interest thereon  
without having bonds formally registered in  
executor's name.

February 14, 1934.

Hon. Richard R. Nacy,  
State Treasurer of Missouri,  
Jefferson City, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which  
you inquire as follows:

"I am writing to request a written opinion on  
the following matter:

A party living in Washington, D. C., is the  
owner of \$15,000.00 State of Missouri Road  
Bonds, said bonds being fully registered  
in his name. Recently this Department re-  
ceived a letter from a Washington bank  
stating that the holder of these bonds has  
died, and that the bank and wife of deceased  
have been appointed co-executors of the  
estate. A certified copy of Record of Pro-  
bate is enclosed with the bank's letter.  
The bank requests that future drafts in  
payment of semi-annual interest be made  
payable to the executors of the estate  
rather than the person in whose name the  
bonds are registered. We have requested  
that bonds be transferred, but in reply  
to our request they state that they do not  
wish the bonds to be transferred at this  
time.

The bank takes the position that upon the death  
of the owner of these bonds, the bonds automati-  
cally become a part of his estate and that a  
formal transfer is not necessary. The position  
of this Department is that under the law we  
cannot make interest payments to other than  
the actual recorded holder of said registered  
bonds without making a formal transfer. Since  
questions of this sort arise frequently we  
are requesting a written opinion from your  
office as to whether or not under the laws  
of the State of Missouri we can comply with  
this request.

For your information, we are enclosing our file of all correspondence in this particular case. We shall be grateful if you will return it with your opinion."

We believe that the title to the \$15,000.00 of registered bonds owned by Woodbury Blair and registered in his name upon his death passed immediately to his executors under the will. We do not believe that it is necessary, in order for the title to pass, that a formal change in the registration of these bonds be made. The general rule regarding the passing of title of personal property upon the death of the owner is stated as follows in 34 C. J. page 304, where it is said:

"It is usually considered that the title of the executor, being derived from the will, vests at the moment of decedent's death, while the title of an administrator, being based upon the ground of administration, vests when his letters are granted.

The right to the possession and use of the personal estate of a decedent, whether testate or intestate, vests at once in the personal representative, to the exclusion of the widow, next of kin, legatees, or creditors, and continues until distribution is ordered or the debts and legacies are settled."

In *In Re Estate of Messersmith*, 264 Mo. 610, 616, the Supreme Court says:

"If, however, a leasehold is personal property, it passes primarily, on the death of the owner, to the executor or administrator, and until the heirs or legatees receive it through the process of administration, the legal title thereto is in such legal representative."

In *Richardson v. Cole*, 160 Mo. 372, 376, the Court says:

"It may be conceded at the outset that the legal title to personal property of a deceased person is in the administrator who holds it in trust for heirs and legatees, and that he alone can sue for and recover the assets of such deceased person. \*\*\*\*\* But these decisions go no farther than has already been conceded, that is, that the administrator is, under ordinary circumstances, entitled to the possession of the

personal property of the deceased, and that his right to sue for such possession is exclusive of all others."

Under the law the title to personal property vests in the executor at the death of the deceased, and in the administrator upon the issuance of letters. The title passes from the deceased person to a personal representative by operation of law and is not made dependent upon the compliance with any technical transfer by any other person. Immediately upon the death of a person the administrator or executor is entitled to the immediate possession. Applying these principles to the inquiry at hand, we believe that upon the death of Mr. Blair that the bonds registered in his name in this State passed immediately to his executors. They are the owners of the bonds and as such would be entitled to the interest accruing thereon. We do not believe that you can compel them to have the bonds registered in their names as a condition precedent to the paying of the interest to the executors. No doubt these executors are postponing the change in the registration of these bonds on the theory that the bonds may be distributed in kind and the transfer might be made upon distribution to some person under the will.

If the State does not pay this interest due on these bonds to the executors, then apparently the interest cannot be collected by anyone, because the formal owner of the bonds is now deceased. We do not believe that the law requires that these bonds be registered in the names of these executors before they are entitled to receive the interest thereon. On the contrary, as we understand the law, they are the only persons who are entitled to receive the interest and the only persons who can give a valid receipt which would be binding upon the former owner, or any person claiming under him. If you are satisfied of the regularity of the appointment of the executors demanding the interest, then we believe that you may direct that the interest be paid to them, and that you will be fully protected in so doing. On the other hand, if a draft be made payable to the designated person and an indorsement of his name by these executors substantiated by their authority as such, this would be complete protection in the payment of the draft.

It is therefore the opinion of this Department that the title to registered bonds and interest due thereon immediately vests in the executors under the will, upon the death of the testator, and that from that time on they are entitled to the interest and possession of said bonds, and that it is not necessary that said bonds be formally registered in their names before they may demand the interest accruing.




Hon. Richard K. Nacy,

-4-

February 14, 1934.

We are of the further opinion that a payment of the interest due on these bonds to the properly qualified executors would protect the State Treasurer in this transaction. You, of course, must be satisfied that the persons making this demand upon you are legally entitled to receive the payment.

Very truly yours,

A handwritten signature in cursive script, reading "Frank W. Sawyer", is written over a horizontal line.

Assistant Attorney General.

APPROVED:

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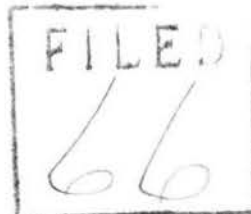
Attorney General.

FWS:S

**STATE TREASURER:** Revenue Notes of State of Illinois not acceptable as security for State deposits.

**DEPOSIT PUBLIC FUNDS:** Revenue Notes not acceptable; not registered bonds within meaning of Sec. 11469, and not acceptable by State Treasurer as security for State deposits.

3-5  
March 2, 1934.



Honorable Richard R. Nacy  
State Treasurer  
Jefferson City, Missouri

Dear Mr. Nacy:

We are in receipt of your letter of February 10th, 1934, with request for an opinion, which letter of request is as follows:

"I am enclosing correspondence with the Telegraphers National Bank of St. Louis, including their letters, resolution, and our replies, requesting an exchange of securities posted by them to secure State funds on deposit in that bank.

Will you kindly return all correspondence along with an opinion as to the legality of the acceptance of these particular bonds by the State Treasurer as security for State deposits."

Accompanying said letter of request we find certain correspondence, a letter from Mr. H. Kolkmeier, Assistant Cashier of The Telegraphers National Bank of St. Louis, and a copy of a resolution, dated February 7th, 1934, of the Board of Directors of The Telegraphers National Bank of St. Louis, and also a copy of an advertisement submitted by the Telegraphers National Bank, relating to the issue of ten million dollars (\$10,000,000.00), State of Illinois six per cent revenue notes. The question upon which you desire an opinion is, as to the legality of the acceptance of these particular revenue notes by the State Treasurer as the security for deposits made by the State Treasurer in The Telegraphers National Bank.

By an examination of Section 11469, R. S. No. 1929, as amended by Acts of 1931, at page 378, we find that,

"For the security of the funds deposited by the treasurer under the provisions of articles 1 and 2 of this chapter the governor, attorney-general and the treasurer shall require of said selected and approved banks or banking institutions giving security for the safe-keeping and payment of said deposits a bond equal to at least twenty-five per cent of the amount of the accepted bid or bids, to be approved by the governor and attorney-general, and in addition thereto bonds of the United States, the State of Missouri, or in their discretion, the registered bonds of the City of St. Louis or of any other city in this state having a population of not less than two thousand, or in their discretion the registered bonds of any school district situated in any city, town or village in this state, or in their discretion the approved registered bonds of any drainage or levee district in this state, or in their discretion the approved registered bonds of any special road district in this state, or in their discretion the registered state bonds of any state, or in their discretion the federal land bank bonds, to an amount of at least equal in value to the amount of the deposits with such bank or banking institutions; \* \* \* \* \*."

We do not have before us, and they are not in the State Library, the Acts of the Fifty-eighth General Assembly, first extra session, of the State of Illinois; but we do have before us a statement published in the newspaper, and submitted by The Telegraphers National Bank, relative to the revenue notes aforementioned, which statement is as follows:

"Exempt From All Federal Income Taxes

\$10,000,000

STATE OF ILLINOIS

6% Revenue Notes

"Dated February 1, 1934 Redeemable on or  
after December 1, 1934

THESE REVENUE NOTES, issued by the State of Illinois and authorized by act of the State Legislature, are, in the opinion of counsel, issued in anticipation of and payable from a general State ad valorem tax now levied and to be collected as a part of the 1934 tax levy for emergency relief. These Revenue Notes may be issued in an amount not to exceed 75% of the amount of the levy specifically provided for by a legislative act of the 58th General Assembly, First Special Session, such levy having been made upon all the taxable property in the State in an amount of \$38,000,000.

Another act passed at said First Special Session as one of the group of six acts for emergency relief provides for the submission to popular vote at the Fall election in 1934 of a general obligation State of Illinois Bond Issue in an amount of \$30,000,000 with serial maturities and provides for the levy of an annual tax sufficient to meet the principal and interest requirements of the bonds. This tax will be extended and collected only if a sufficient amount is not realized to pay such principal and interest out of the motor fuel or gasoline tax, as a portion of the gasoline tax which is distributed to the several counties and municipalities has been specially appropriated by law for this purpose, each county and municipality contributing in proportion to the amount of relief it receives.

These Revenue Notes are redeemable by lot at any time after December 1, 1934, after fifteen days' public notice, at par and accrued interest, from the proceeds of the sale of this State Bond Issue, if voted; otherwise, said notes will be paid solely as said emergency relief tax levied for the year 1934 becomes available.

The entire proceeds from the sale of these notes are appropriated to the Emergency Relief Fund to be used under the supervision of the Illinois Emergency Relief Commission."

March 2, 1934.

From this statement we find that these revenue notes are dated February 1, 1934, and redeemable on or after December 1, 1934, and are payable after fifteen days' public notice, at par and accrued interest, from the proceeds of the sale of a state bond issue to be submitted to popular vote at the fall election in 1934 of a general obligation State of Illinois bond issue in an amount of thirty million dollars (\$30,000,000.00). From this statement we find that these revenue notes are an obligation of the State of Illinois, but they are not bonds of the State of Illinois, as their name indicates, and they were issued as an emergency relief measure to provide for relief in Illinois, and they are not, therefore, the registered state bonds of the State of Illinois.

Our statute (Acts of 1931, supra) provides in addition to the surety bond required of the depositary:

"And in addition thereto \* \* \* \* \*  
or in their discretion the registered  
state bonds of any state."

#### CONCLUSION.

By the statement submitted by The Telegraphers National Bank relating to the Revenue Notes in question, it is our opinion that said notes cannot be classified as registered state bonds of the State of Illinois, not having been voted by the people of that State, and do not come within the provisions of Section 11469, supra, and therefore not acceptable by the State Treasurer as security for State deposits.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRM:EG

**BANKS & BANKING:**

National banks located in Missouri may pledge their assets to secure state deposits.

March 6, 1934. 3-7-34



Hon. Richard R. Nacy  
State Treasurer  
Jefferson City, Missouri

Dear Mr. Nacy:

We are in receipt of your letter of February 9th, 1934, with request for an opinion, which letter of request is as follows:

"Recently the United States Supreme Court held that National Banks have no authority to pledge securities to guarantee deposits of public funds. The ruling was made on appeal brought by the City of Marion, Illinois vs the Receiver of the City National Bank in Herrin, Illinois.

Will you please advise this office, officially, whether the above decision of the Supreme Court of the United States invalidates Section 5153 and Amendments thereto, of the National Banking Acts, as amended in 1930?

The opinion that I specifically request is whether or not the National Banks in the State of Missouri are permitted to deposit with the State Treasurer their securities to guarantee the deposits of the State Treasurer held by the respective National Banks."



Your letter with request for an opinion is based on the interpretation to be given to the case of City of Marion, Illinois, v. Sneed et al., decided February 5th, 1934, by the Supreme Court of the United States and reported in the Supreme Court Reporter, Vol. 54, p. 421, and the application it may have to the Missouri statutes as to whether or not the National banks within the State of Missouri are permitted to pledge their assets and securities to the State Treasurer to secure the deposits of the State Treasurer in the respective National banks.

Briefly, the facts in the above case are as follows: Carroll was the Treasurer of the City of Marion, Illinois, and as such Treasurer was required by the Illinois statutes to give bond to the City. The Fidelity and Casualty Company became Surety under his bond under an agreement that Carroll, in turn, would deposit the public moneys of the City of Marion in the City National Bank of Herrin, Illinois, and that the bank would give satisfactory collateral security for the repayment of his deposits of the public moneys. The City National Bank of Herrin agreed to this and thereafter it delivered to the Continental Illinois National Bank and Trust Company of Chicago, as escrow agent, negotiable bonds of the par value of \$25,000, under an agreement so to secure the city's deposit. The Fidelity Company executed Carroll's official bond and he deposited the city's moneys in the Herrin Bank in accordance with the agreement. The Herrin Bank thereafter became insolvent and a receiver was appointed. The Receiver, Ben Sneed, brought suit in the Federal Court against the City, its Treasurer, the Surety, and the escrow agent, setting forth and praying in his petition that the pledge of the securities be declared ultra vires and void, and that the bonds be delivered to him as Receiver. This case ultimately reached the United States Supreme Court as the case of City of Marion, Ill., v. Sneed, et al, supra.

# I.

The Act of June 25, 1930, R. S. 5153 U. S.:

"The Act of June 25, 1930, c. 604, 46 Stat. 809 (12 USCA Sec. 90), amends section 45 of the National Bank Act of 1864 by adding thereto the following:

'Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.'

The question decided by this case is stated in the Supreme Court opinion, page 421, as follows:

"The controlling question is whether Illinois has conferred upon banks organized under its laws power to pledge assets as security for deposits of public moneys of political subdivisions of the state."

And, Justice Brandeis, who wrote the opinion in this case, said:

"For the reasons stated in *Texas & Pacific Railway Co. v. Pottorff*, 290 U. S. \_\_\_\_\_, 54 S. Ct. 416, 78 L. Ed. \_\_\_\_\_, decided this day, we are of opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits except those made under section 45 by the Secretary of the Treasury of the United States. The power conferred by each later act, except that of 1930, was limited to securing specific federal funds. A national bank could not legally pledge assets to secure funds of a state, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a state in which state banks are so authorized. In some states national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the state or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

It will be seen that, under the authority of the amendment of June 25, 1930, shown at Section 90, Title 12, under "Banks and Banking" in Cumulative Supplement, USCA, Vol. 12, page 30, R. S. 5153, national banks may legally pledge assets to secure funds of state or political subdivisions only if located in a state in which state banks are so authorized to pledge their assets to secure public deposit.

## II.

The question which you ask is whether or not national banks in the State of Missouri are permitted to deposit with the State Treasurer its securities to guarantee the deposits of the State Treasurer of state funds deposited with national banks.

Section 15, Article X, of the Missouri Constitution provides that state funds may be deposited in selected depositories with satisfactory security for the repayment thereof; which section is as follows:

"All moneys now, or at any time hereafter, in the State treasury, belonging to the State, shall, immediately on receipt thereof, be deposited by the Treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may, from time to time, with the approval of the Governor and Attorney-General, select, the said bank or banks giving security, satisfactory to the Governor and Attorney-General, for the safe-keeping and payment of such deposit, when demanded by the State Treasurer on his check--such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same, together with such interest and profits as may accrue thereon, shall be disbursed by said Treasurer for the purposes of the State, according to law, upon warrants drawn by the State Auditor, and not otherwise."

The depository law, with regard to state moneys, is found in Article 2, Chapter 72, R. S. Mo. 1929, and Laws of 1931, at page 378. This article provides a complete and separate scheme for the safe-guarding and protection of state moneys.

Section 11465, of said article and chapter, provides that the State Treasurer shall deposit all state moneys in such banks as he shall select, with the approval of the Governor and the Attorney-General, the banks or banking institutions giving satisfactory security for the safe-keeping and payment of such deposits upon demand by the State Treasurer.

Section 11466 provides the manner of soliciting of bids and the division of state moneys into eighty equal parts.

Section 11467 provides for the payment of interest on the deposits by the depositories.

Section 11468 provides for the securing of the bids, how received and opened, and the manner of the selection of the state depository.

The General Assembly in 1879 passed the first act to carry out the provisions of the Constitution of 1875, to-wit, Section 15, Article X, supra. Section 11469, R. S. 1929, as amended by Acts of 1931, page 378, has been amended many times since its original enactment in 1879, and now provides in part as follows:

"For the security of the funds deposited by the treasurer under the provisions of articles 1 and 2 of this chapter the governor, attorney-general and the treasurer shall require of said selected and approved banks or banking institutions giving security for the safe-keeping and payment of said deposits a bond equal to at least twenty-five per cent. of the amount of the accepted bid or bids, to be approved by the governor and attorney-general, and in addition thereto bonds of the United States, the state of Missouri, or in their discretion, the registered bonds of the city of St. Louis or of any other city in this state having a population of not less than two thousand, or in their discretion the

registered bonds of any county in this state, or in their discretion the registered bonds of any school district situated in any city, town or village in this state, or in their discretion the approved registered bonds of any drainage or levee district in this state, or in their discretion the approved registered bonds of any special road district in this state, or in their discretion the registered state bonds of any state, or in their discretion the federal land bank bonds, to an amount of at least equal in value to the amount of the deposits with such banks or banking institutions; which bonds shall be delivered to the state treasurer, and receipted for by him and retained by him in the vaults of the state treasury of this state, or in the vaults of such banks or safe depository as the governor, attorney-general and treasurer may agree upon; and if in any case, or at any time, such bonds are not satisfactory security to the governor and attorney-general for deposits made under articles 1 and 2 of this chapter, they may require such additional security to be given as shall be satisfactory to them, which said bonds or any part thereof, may from time to time be withdrawn on the written consent of the governor, attorney-general and treasurer; etc."

Our state depository law provides a complete, separate and adequate scheme for securing and protecting state deposits by the depository giving a bond equal to at least 25% of the amount of the accepted bid, or bids, and in addition thereto the deposit with the State Treasurer, by the bank depository, of certain designated assets and securities of such bank, as being acceptable security, as set forth and described in Section 11469, supra.

From the decision of the United States Supreme Court in the case of City of Marion, Ill., v. Sneed et al., supra, it will be seen that prior to the amendment of 1930, Acts of June 25, 1930, 12 USCA, Sec. 90 (Section 5153 R. S.), cited above, national banks had no authority and could not legally pledge

March 6, 1934.

their assets to secure funds of a state, or its political subdivisions, and since then it can do so legally only if it is located in a state in which state banks are so authorized.

It is our opinion that the State of Missouri, having provided a complete and adequate system for the pledging of assets and securities by banks for deposit of public funds made by the State Treasurer, and it having been the statutory method recognized by the executive officers of this State enacted in pursuance of the Constitution, Sec. 15, Art. X, *supra*, that it comes within the purview of the Act of June 25, 1930, 12 USCA, Sec. 90 (Sec. 5153 R. S.). Therefore, under the Missouri statutes banks may give security for the safe-keeping and prompt payment of money so deposited; the national banks located in Missouri may do likewise and pledge their assets to secure state deposits under the authority of the Act of June 25, 1930, as determined by the Supreme Court of the United States in the case of *City of Marion v. Sneed*, *supra*.

Very truly yours,

GOVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General

CRH:EG



STATE TREASURER: CONSCIENCE MONEY: How disposed of by  
State Treasurer.

3-28  
March 27, 1934



Honorable Richard R. Nacy  
State Treasurer  
Jefferson City, Missouri

Dear Sir:

Answering the oral request of Mr. H. S. Johnson as to what disposition you should make of a certain sum of money received by you as State Treasurer and which you term "conscience money".

"Conscience money" is defined in Webster's New International Dictionary to be:

"Money paid to relieve the conscience by rendering or restoring, usually anonymously, what has been wrongfully acquired or withheld, as a tax payment: such money paid into the United States treasury is called the conscience fund."

We have searched all the available digests and text-books and have been unable to find a decision on the question presented by you.

If Webster is correct in saying that a "conscience fund" is carried in the United States Treasury, we see no reason why you should not set up a like fund and deposit thereto such moneys as above referred to. The moneys in such fund could thereafter be appropriated by the General Assembly for such purposes as it might deem fit.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

ROY MCKITTRICK  
Attorney General.

GE:LC

APPROPRIATIONS:  
STATE TREASURER:  
STATE AUDITOR:

) Appropriations provided for in Section 41,  
) Laws of 1933, page 86, with reference to  
) schools, expires under the provisions of  
) Section 19, of Article X of the Constitution  
) of the State of Missouri.

July 17, 1934.

7-21



Honorable Richard R. Nacy  
State Treasurer  
Jefferson City, Missouri

Dear Mr. Nacy:

Receipt of your letter dated June 30th, 1934, is  
acknowledged. Your letter is as follows:

"On Page 86, Section #41, 1933, Reg-  
ular Session, an appropriation was  
made for Vocational Education which  
reads in part as follows:

There is hereby appropriated  
for the fiscal year beginning  
July 1, 1932 and ending June  
30, 1934, certain sums of  
money for Vocational Education.

"I would like your opinion as to whether  
or not the State Treasurer be authorized  
to pay out of money in this appropriation  
on State Auditor's warrants bearing a  
date later than June 30, 1934."

Section 41, Laws of 1933, page 86, referred to in your  
letter is a part of the general appropriation bill enacted by  
the General Assembly in 1933, approved 23rd day of May, 1933,  
carrying an emergency clause.

Section 41, above referred to, is more fully set out  
as follows:

"There is hereby appropriated out of  
the State treasury, chargeable to

that part of the state revenue set apart for the support of the free public schools of Missouri, for the fiscal year beginning July 1, 1932, and ending on June 30, 1934, the sum of two hundred and eighty-three thousand and four hundred dollars (\$283,400) for carrying into effect the provisions of article 6, chapter 57, Revised Statutes of 1929, respecting vocational education in the amounts and for the specific purposes as in this section set out as follows: "

Then follows the naming of the specific purposes and objects for which the sum so appropriated may be used.

Rules to be applied in construing appropriation laws as stated in 59 C. J. 262, Section 401, are as follows:

"An appropriation law is to be construed under and by the same rules as other legislation. Where the intention of the legislature is plain and obvious, there is no room for judicial construction of an appropriation. They are to be construed without liberality towards those who claim their benefits; but are not to be construed so strictly as to defeat their manifest objects. The language is to be presumed to have been used in its natural and ordinary meaning, and not to be given a forced and unnatural construction. The whole bill is to be examined to arrive at the true intention of the parties. Where the meaning of an appropriation act is doubtful the construction placed upon it by the officers charged with the administration thereof is entitled to considerable weight, but is not controlling when it is clearly wrong. They are to be construed in connection with other legislation concerning related matters and with relevant constitutional provisions. Rules of construction confirmed or established by statute for the construction of statutes generally are to be applied in the construction of appropriation bills."

It will be here noted that the appropriation is made for the support of schools for the fiscal years beginning July 1, 1932, and ending on June 30, 1934 -- that is the two dates prescribe the period for which support was to be furnished by means of the appropriation.

Section 19 of Article X of the Constitution of the State of Missouri, provides:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The title to the Appropriation Act, above referred to, Laws of 1933, page 62, reads:

"AN ACT appropriating money to pay salaries, wages and per diem for the original purchase of property, for the repair and replacement of property; for the operative expenses and for other purposes of several state agencies herein designated out of the funds in the amounts set out and for the specific purposes herein expressed; for the biennial period beginning January 1, 1933, and ending December 31, 1934, and placing a limitation upon the purchase price of passenger automobiles, with an emergency clause."

Discussing a somewhat similar situation in State ex rel. Smearing v. Thompson, 45 S. W. (2d) 1078, Ragland, J. said:

"The only question here is whether the payment which relatrix seeks to have made out of the state treasury is within the 'object' to which the appropriation under the act just set out is to be applied. If it is a 'pension to the deserving blind as provided for in chapter 51, Revised Statutes, 1929,' it is. The language in the title of the Appropriation Act, 'for the biennial period beginning on the first day of January 1931, and ending on the thirty-first day of December, 1932,' if read into the act itself, merely limits the period within which the appropriation made shall be available, in conformity with said section 19 of the Constitution; it has no reference to the time when the right to the pensions for the payment of which the appropriation is made should accrue or had accrued, nor to the period for which such pensions are payable."

While the foregoing statement of the court may be said to be dictum, yet, if it be sound law, Section 19 of Article X of the Constitution has no reference to the time when the right to payments under Section 41 shall accrue nor to the period for which such support be payable but simply provides that the payment provided for in the appropriation shall not be made after the time specified in Section 19 of Article X of the Constitution. Section 41 of the appropriation bill seems to fix the times between which claims for the support provided for in the section shall accrue -- that is, between July 1, 1932, and ending June 30, 1934, both dates inclusive. Or stated in another way, the provisions of Section 41 do not undertake to fix the date when the appropriation provided for in that section shall expire nor be payable but relates only to the time when the support is to be provided for by the appropriation and the expiration of the life or vitality of the appropriation act,

so far as payments thereunder are concerned is to be determined by considerations other than the provisions of Section 41 of the Appropriation Act.

The title to the Appropriation Act above set out recites that it is an act appropriating money for certain purposes for the biennial period beginning January 1, 1933, and ending December 31, 1934. Section 19 of Article X of the Constitution above quoted provides that no moneys shall be paid out of the state treasury except in pursuance of an appropriation by law and that such moneys shall be paid out or a warrant issued therefor within two years after the passage of such appropriation act. The Appropriation Act under consideration was passed May 23, 1933, when the same was approved by the Governor.

While Section 19 of Article X of the State Constitution does not specifically say that payments may be made out of appropriations for two years after the passage of the Appropriation Act, yet it does say that payments shall not be made out of appropriations or warrants be drawn thereon after two years have elapsed from the date of the passage of the Act. There is no limitation sought to be placed on the time of payments by the Appropriation Act under consideration, except in the title to the bill.

In the case of *State ex rel. v. Holladay*, 64 Mo. 526, the court had under consideration the effect of a statute enacted prior to the adoption of the Constitution of 1875, which statute sought to make an annual appropriation of certain funds. The court at page 527 of the opinion said:

"From a consideration of these two sections, it seems quite obvious that no appropriations of money find recognition in the constitution except 'regular appropriations,' and that such cannot be made except at regular legislative sessions, occurring biennially. This view of the matter receives abundant confirmation in the prohibitions of section 19 of article X, that 'no moneys



July 17, 1934.

shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have been issued therefor, within two years after the passage of such appropriation act, and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object,' etc.

"The act of March, 1870, is clearly inconsistent with the provisions of the constitution above quoted, and in consequence thereof, and in conformity with what the schedule ordains, the provisions of that act ceased when the constitution was adopted. For although the sections of the constitution just cited, do not in express and direct terms inhibit the auditor from drawing his warrant in favor of a claimant who relies on an appropriation more than two years old, yet those sections, by necessary and inevitable implication, accomplish the same result; for it cannot, with any show of reason, be claimed that a warrant can be drawn without an appropriation; but as just seen, no appropriation possesses any validity, force, or even existence, after the lapse of two years.

"These provisions of the organic law are self-executive, and consequently need no legislation in their aid."

The foregoing opinion seems to imply that an appropriation act is effective for two years from the date of its passage.

Hon. Richard R. Macy

-7-

July 17, 1934.

We are of the opinion that payments may be made out of the appropriation above referred to at least until and including December 31, 1934, if the claim or right to support for which a warrant is issued accrued or arose prior to July 1, 1934.

Yours very truly,

GILBERT LAMB  
Assistant Attorney-General.

APPROVED:

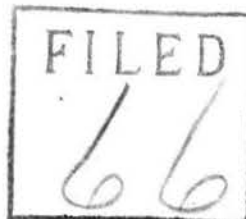
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ROY MCKITTRICK  
Attorney-General

OL:EG

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ELECTIONS - Necessity of Congressmen to file expense account.

8.2  
August 17, 1934.



Honorable W. L. Nelson  
Columbia, Missouri

Dear Sir:

Your inquiry of August 8, 1934 relative to the necessity of Congressional candidates filing a primary expense account has been received.

In answer to that inquiry, we call your attention to that part of Section 10482 R. S. Mo. 1929 which provides as follows:

"Every person who shall be a candidate \* \* at any primary election, \* \* for senator or representative in the congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which said candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to \* \* setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed, disbursed, expended or promised by him, and, to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to

#2 - Honorable W. L. Nelson

secure \* \* his nomination or election  
to such office \* \* "

This affidavit is to be filed with the Secretary of State, since he is the party who issues the certificate of election - Section 10175 R. S. Mo. 1929.

It is, therefore, the opinion of this office that candidates for Congress must file the expense accounts required under the Corrupt Practice Act of Missouri.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General

FBR:FE

APPROPRIATIONS: ) Appropriations for vocational education,  
STATE TREASURER ) Section 41, Laws 1933, p. 86, for bi-  
STATE AUDITOR ) ennial period of 1933-1934.

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August 22, 1934.



Honorable Richard R. Nacy  
State Treasurer  
Jefferson City, Missouri

Dear Mr. Nacy:

We have your request of June 30, 1934  
for an opinion on the following statement:

"On Page 86, Section #41, 1933,  
Regular Session, an appropriation  
was made for Vocational Education  
which reads in part as follows:

There is hereby appropriated  
for the fiscal year beginning  
July 1, 1932 and ending June  
30, 1934, certain sums of  
money for Vocational Education.

I would like your opinion as to  
whether or not the State Treasurer  
be authorized to pay out of money  
in this appropriation on State  
Auditor's warrants bearing a date  
later than June 30, 1934."

After careful consideration and reexamina-  
tion of new and additional information received by this  
office, the opinion heretofore written under date of  
July 17, 1934, particularly the conclusions reached there-  
in, is modified by this opinion, based upon such addi-  
tional information received since the writing of that  
opinion.

#2 - Honorable Richard R. Nacy

The 1933 appropriation for vocational education, Laws 1933, p. 86, Section 41, is rather awkwardly worded. An examination of earlier Appropriation Acts for vocational education, to-wit, Laws 1929, p. 33, Section 26, finds that this appropriation was,

" \* appropriated out of the state treasury, chargeable to the one-third (1/3) part of the ordinary revenue paid into the state treasury for the fiscal years beginning on the 1st day of July, and ending on the 30th day of June two years later."

You will note that the intent of the 1929 Appropriation Act was that the vocational education money should be chargeable to the school funds which were paid into the state treasury beginning on the 1st day of July and ending on the 30th day of June two years thereafter.

We are further advised that all previous Appropriation Acts for vocational education have been for the regular two year period for which all other appropriations are made. Some confusion has resulted from the 1933 Appropriation Act by the insertion of a comma after the word "Missouri". Transposed, it is apparent that the true meaning of Section 41 is as follows:

"There is hereby appropriated out of the State treasury, the sum of \$283,400., chargeable to that part of the state revenue set apart for the support of the free public schools of Missouri for the fiscal year beginning July 1st, 1932 and ending on June 30, 1934, for carrying into effect the provisions of article 6 etc."

We are of the opinion that the dates July 1st, 1932 to June 30th, 1934 are dates between which the school moneys, out of which this appropriation is to be paid, are



#3 - Honorable Richard R. Macy

actually paid into the state treasury.

The title of the Act, Laws 1933, p. 62, states that the appropriations are for the biennial period beginning January 1, 1933 and ending December 31, 1934.

It is, therefore, the opinion of this office that any item or debt properly chargeable to this appropriation, and which item or debt accrued during the year 1933, or the year 1934, is properly chargeable to this appropriation and should be paid from this appropriation; that warrants bearing dates subsequent to June 1st, 1934 and not later than December 31st, 1934 are properly chargeable to this appropriation and should be paid by the state treasurer.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY MCKITTRICK  
Attorney General

FER:FE

INHERITANCE TAX:

LIFE ESTATE:

Life Estate of Widow and remainder should be taxed according to provisions of Sec. 595, RSMo 1929, and tax should be at highest rate possible under provisions of Inheritance Tax Law of Mo.

August 29, 1934



Honorable Richard R. Nacy,  
State Treasurer,  
Jefferson City, Missouri

Attention: Mr. E. J. Arnett, Supervisor,  
Inheritance Tax Department

Dear Sir:

This department is in receipt of your communication of August 25 with reference to the Estate of Wilhelm Scheer, deceased.

It appears that the deceased by Will left to his widow his entire estate "for and during her natural life\*\*\*\* with full power and right for her to use any and all of my personal property for her support and maintenance." Subject to this life estate in his wife, the remainder was devised to one Arthur Morgenstern. The precise question involved here, as raised in your communication, is as follows:

"How can the total interest of the widow be figured in view of the power and right she has to use and dispose of the personal property? How can the interest of Arthur Morgenstern be figured under the tables as you cannot know what his age will be when his life interest starts?"

Section 596, R. S. Mo. 1929 provides in part as follows:

"\*\*\*\*When the property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and

such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred:

\* \* \* \* \*

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estate for purposes of taxation, upon which said estates in expectancy may have been limited. \*\*\*\*"

The sections of the statutes heretofore quoted are similar to those provisions of the former New York statute. The Court of Appeals of the State of New York in the case of Matter of Zborowski, 213 N. Y. 109, in passing upon this statute, said (l. c. 116):

"The different statutes hereinbefore referred to contain evidence of a constant effort of the legislature to enlarge the class of transfers immediately taxable upon the death of the transferor. The question of the legislature's power in that regard was set at rest by the decision of this court in Matter of Vanderbilt (supra). In one aspect it may be unjust to the life tenant to tax at once the transfer, both of the life estate and of the remainder though contingent, and it may seem unwise for the state to collect taxes which it may have to refund with interest, but those considerations are solely for the legislature, who are to judge whether they are more than offset by the greater certainty which the state thus has of receiving the tax ultimately its due under the statute. However unwise and unjust it may seem in a particular case like this for the state to collect the tax at the highest rate when in all probability the remainder will vest

Aug. 29, 1934

in a class taxable at the lowest rate, it is the duty of this court to give effect to the statute as it is written."

In the case of *In Re Blun's Estate*, 160 N.Y. Sup. 731, the Court specifically approved the *Zborowski Case*, *supra*, and said (1.C. 733):

"Under the seventh clause of decedent's will the executors are given the power to pay out a portion of the principal of the trust fund to decedent's son if he should desire to use it for business purposes. This is undoubtedly a power to invade the principal. The appellants contend that under the law, as laid down in the *Matter of Granfield*, 79 Misc. Rep. 374, 140 N. Y. Supp. 922, *Matter of Blyn*, 160 N. Y. Supp. 730, and *Matter of Spiegelberg*, 160 N. Y. Supp. 730, this portion of the estate, owing to the fact that the power of invasion is created, should be suspended for taxation. I do not agree with this contention. An examination of the last two mentioned cases shows that they were based upon the decision in the *Matter of Granfield*, *supra*. This case was decided prior to the decision of the Court of Appeals in the *Matter of Zborowski*, 213 N. Y. 109, 107 N. E. 44. The theory of law as laid down in that case consequently was not applied in the disposition of the said cases. I think therefore, that in the case under discussion the *Matter of Zborowski* governs, and that the said remainder is presently taxable."

The above decisions of the New York Courts are specifically approved by the Supreme Court of Missouri in the case of *State Treasurer v. Trust Company*, 293 Mo. 545.

#### CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that the life estate of the widow and the remainder should be taxed according to the provisions of Sec. 595, R. S. Mo. 1929. The tax imposed should be at the highest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of the Inheritance Tax Law of the State of Missouri, and the tax so imposed should be due and payable forthwith by the executor, administrator or trustee out of the property transferred.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
Attorney General

STATE BOARD OF HEALTH: Relating to the changes made by the Legislature in 1933 concerning the State Board of Health and Health Commissioner ; the duties of the State Board of Health in relation to the Health Commissioner ; and changes relating to the by-laws, under the statutes governing the operation of the board.

May 3, 1934. 574

Dr. Emmett P. North  
President  
The State Board of Health of Mo.,  
3511 Washington Avenue  
Saint Louis, Missouri.



Dear Doctor North:

This department is in receipt of your letters and enclosures of March 17, 1934, and April 10, 1934, Your letter of March 17, is in part as follows:

"The State Board of Health of Missouri is desirous that you outline to them the changes made by the Legislature concerning the State Board of Health and the Health Commissioner, and kindly outline the duties of the State Board of Health in relation to the Health Commissioner."

Your letter of April 10, reads as follows:

"Supplementing my letter of March 17th I enclose a set of by-laws, rules and regulations for the guidance of the State Board of Health. Several members of the Board have asked me to request you to give us your opinion upon the propriety of these items in respect to their harmony with the statutes. If any of the items are in conflict with the laws may I request that you make such alterations as are necessary in order to remove such conflicts."

"When I receive your opinion on the approval and correctness of these items I will submit the entire set of items to a full meeting of the Board."

Your enclosures of April 10, 1934, are:

(1)

BY-LAWS, RULES AND REGULATIONS  
OF THE  
DEPARTMENT OF HEALTH  
OF THE  
STATE OF MISSOURI

-0-

ADOPTED  
BY THE  
STATE BOARD OF HEALTH OF MISSOURI  
\_\_\_\_\_ 1934.

\* \* \* \* \*

(2)

STATE BOARD OF HEALTH OF MISSOURI

Emmett P. North, M. D., St. Louis - President  
Wm. T. Elam, M. D., St. Joseph - Vice President  
Peter T. Bohan, M. D., Kansas City - Member



Timothy S. Bourke, M. D., Kansas City - Member  
Wm. A. Clark, M. D., Jefferson City - Member  
E. S. Smith, M. D., Kirksville, - Member  
E. T. McGaugh, M. D., Jefferson City - Member,  
Secretary, and  
Commissioner of Health.

\* \* \* \* \*

(3)

By Virtue of the authority vested in it by law the State Board of Health of Missouri has adopted the following By-Laws, rules and regulations for the government of the Department of Health of the state of Missouri effective on and after the \_\_\_\_\_ day of \_\_\_\_\_ 1934, and hereby revokes any by-laws, rules and regulations or parts thereof, adopted prior to this date in conflict herewith and hereby holds any authority delegated to anyone prior to this enactment void. The Board reserves the right to alter, amend or revoke any of these by-laws, rules and regulations, and to make additional ones from time to time as the good of the service may require.

By order of the State Board of Health of Missouri this \_\_\_\_\_ day of \_\_\_\_\_ 1934.

ATTEST:  
E. T. McGaugh  
Secretary.

Emmett P. North  
President.

\* \* \* \* \*

(4)

## BY - LAWS

**Section 1. State Board of Health.**---The government of the Department of Health of the State of Missouri is vested in a board styled "The State Board of Health of Missouri" (hereinafter called the Board), consisting of seven members appointed by the Governor by and with the advice of the Senate.

**2. Officers of the Board.**---The officers of the Board shall be a president and a vice-president. The Commissioner of Health, ex officio by law, shall be secretary to the Board. He may or may not be a member of the Board.

**3. Duties and powers of the Board.**---The Board reserves unto itself all rights, powers, privileges and duties conferred by law except those herein specifically delegated, and unless so done now or hereafter shall be deemed unauthorized and illegal.

**4. Duties of the President.**---The president shall preside at all meetings of the Board. He shall be the executive officer of the Board and shall act for it when the Board is not in session. He is authorized to administer oaths.

**5. Duties of the Vice President.**---The vice president, in the absence of the president, shall perform the duties of the president.

**6. Duties of the Secretary.**---The secretary (Commissioner of Health) shall assume the rights, powers, privileges and duties conferred upon him by law and by the rules and regulations of the Board. He shall perform such duties as may be prescribed by the Board. He shall have supervision of the Central Bureau of Vital Statistics and shall act as State Registrar.

**7. Meetings of the Board.**---The meetings of the Board shall be in January and July of each year and at such other times as the Board shall deem expedient. The meeting in January shall be held in the City of Jefferson. The president shall call meetings of the Board when deemed expedient.

**8. Quorum.**---Four members shall constitute a quorum.

9. Order of Business.--The order of business at each regular meeting of the Board shall be as follows:

- (a) Open Session
  - 1. Administration of oaths
  - 2. Hearings
- (b) Executive Session
  - 1. Reading of minutes
  - 2. Report of the president
  - 3. Report of the vice president
  - 4. Report of the Secretary
  - 5. Report of members
  - 6. Unfinished business
  - 7. New business
  - 8. Adjournment

10. Salary and Expenses of Members.--"The members of the Board shall receive no compensation for their services but their traveling and other expenses while employed on the business of the Board shall be paid. The president of the Board shall certify the amount to the Commissioner of Health, and the traveling and other expenses of members, and on presentation of his certificate the Auditor of the State shall draw his warrant on the state treasurer for the amount." (Section 9020, Laws of Missouri, 1933, page 269.)

#### RULES AND REGULATIONS

1. The Board shall have general supervision over the registration of medicine, surgery and midwifery as provided by law.

2. The Board shall have general supervision over enforcement of the terms and provisions of the law relating to cosmetology, hairdressers and manicurists.

3. The Board shall have authority to take testimony in all matters relating to its duties and powers.

4. All divisions now established shall be continued under such rules and regulations herein or hereafter formulated by the Board. The Board shall provide for such clerks and other assistants as may be necessary

for the conduct of the central Bureau of Vital Statistics including the appointment of local registrars and all other divisions of the Department of Health now or hereinafter established, who shall serve during the pleasure of the Board and at such compensations as may be fixed by the Board.

5. The division of Child Hygiene is hereby re-established under the general supervision and direction of the Board as provided by law. The director in charge, or by whatever title he shall be hereafter designated, shall be responsible directly to the Board for his actions and conduct in office. He shall cooperate in all matters as to the conduct of his division with the Commissioner of Health.

\* \* \* \* \*

Laws of Missouri, 1933, pages 269-270 -

"HEALTH, PUBLIC, AND VITAL STATISTICS: Relating to State Board of Health and Appointment, Qualifications, Compensation and Duties of Commissioner of Health."

Section 1 repeals Sections 9020 and 9024 of Article I, Chapter 52 of R. S. Mo. 1929, and in lieu thereof enacted two new sections known as Sections 9020 and 9024, which read as follows:

"Section 9020:--

"The Commissioner of Health shall perform such duties as may be prescribed by the board and this article. The members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. The president of the board shall certify the amount to the Commissioner of Health, and the traveling and other expenses of members, and on presentation of his certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

**"Section 9024:--**

"The Governor, by and with the advice and consent of the Senate shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars (\$5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

Whereas, under Section 9024, R. S. Mo. 1929, repealed, the Commissioner of Health was selected by the board, under the new Section 9024, supra, he is now appointed by "\*\*\*\* the Governor, by and with the advice and consent of the Senate, \*\*\*\* for a term of four years \*\*\*\* and is \*\*\*\* subject to removal from office for cause by the Governor at his pleasure. \*\*\*\*"

Whereas, under the new Section 9024, supra, "\*\*\*\* the Commissioner of Health \*\*\*\* assumes all the rights, powers, privileges and duties heretofore conferred by law upon the secretary of the State Board of Health heretofore authorized by law and which office (Section 9019 R. S. Mo. 1929 repealed) is now abolished \*\*\*\*, it is now \*\*\*\* the duty

(Section 9023, R. S. Mo. 1929 ) of the Board of Health to make an annual report through its secretary (Commissioner of Health) or otherwise in writing to the Governor of this State on or before the first day of January of each year, and such report shall include so much of the proceedings of the Board and such information concerning vital and mortuary statistics, such knowledge respecting diseases, and such instructions on the subject of hygiene, as may be thought useful by the board for dissemination among the people, with such suggestions as to legislative action as it may deem necessary."

Whereas, under Section 9024, R. S. Mo. 1929, repealed, it was the duty of the Commissioner of Health to enforce the rules and regulations of the board, and to submit an annual report with his recommendations, the same duty may now be required of him for as stated in Section 9020, supra, "the commissioner of health shall perform such duties as may be prescribed by the board and this article."

\*\*\*\*\*

Laws of Missouri, 1933, pages 271 and 272 -

"HEALTH, PUBLIC, AND VITAL STATISTICS:  
Relating to Deputy State Commissioners  
of Health for Counties."

Section 1 repealed Section 9025, of Article I, Chapter 52 of R. S. Mo. 1929, and in lieu thereof enacted a new section known as Section 9025, which reads as follows:

"Section 9025:--

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State Commissioner of Health for a term of one year. In case of a vacancy in the office of



The Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

Whereas, under Section 9035, R. S. Mo. 1929, repealed, the county court was given the power to appoint a reputable physician as deputy state commissioner of health at the regular February term of said county court every third year and for a term of three years; under the present section it has been changed to read "every year thereafter \*\*\*\* and for a term of one year \*\*\*\*."

Whereas, under Section 9035, R. S. Mo. 1929, repealed, if the county court failed to appoint a deputy state commissioner of health as above provided, the state board of health was given the power to appoint a reputable physician as deputy state commissioner of health for that county who was to serve until the county court of such county made such appointment; under the present section it has been changed to read that "\*\*\*\* the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court, \*\*\*\*" so that now the appointing of a deputy health commissioner rests exclusively (discretionary) with the county court.

\*\*\*\*\*

Laws of Missouri, 1933, pages 270 and 271 -

"HEALTH, PUBLIC, AND VITAL STATISTICS:  
Relating to Registration of Births and  
Deaths."

Section 1 amends Section 9044, Article II, Chapter 52, R. S. Mo. 1929, entitled "Registration of Births and Deaths", "Burial Permits", by inserting between the word

"occurs" and the word "and" in line 10, the following words:

"Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs."

We are of the opinion that all the sections of the by-laws, except Section 2, as set out in your enclosures of April 10, 1934, are in harmony with the present sections of the statutes. Section 2, of the by-laws dealing with officers of the Board reads as follows:

"Officers of the Board.--The officers of the Board shall be a president and a vice president. The Commissioner of Health, ex officio by law, shall be secretary to the Board. He may or may not be a member of the Board."

We are of the opinion that Section 2 should be changed to read as follows:

"Officers of the Board.--The officers of the Board shall be a president and a vice president. The Commissioner of Health, by law, shall be a secretary to the Board, and is also a member of the Board."

#### CONCLUSION.

In view of Section 9013, R. S. Mo. 1929, providing that the board consist of seven members; and Section 9019, R. S. Mo. 1929, providing that the Secretary of the State Board of Health be a member of the Board; and in view of

Section 9024, Laws of Missouri, 1933, providing that the Commissioner of Health assume all rights, powers, privileges and duties heretofore conferred by law upon the secretary of the State Board of Health, we are of the opinion that the Commissioner of Health is secretary to the board and is also a member of the board.

Trusting that this is the information you desire and if we may be of further service, please let us know.

Respectfully submitted,

---

JAMES L. HORNBOSTEL  
Assistant Attorney-General.

APPROVED:

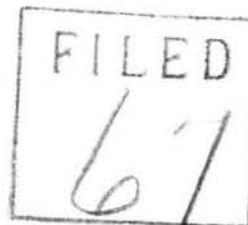
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ROY McKITTRICK  
Attorney-General.

MW/JLH/afj

STATE BOARD OF HEALTH: Various questions concerning duties, funds, Commissioner of Health, chiropody, cosmetology etc.

October 19, 1934.



Dr. Emmett P. North,  
President,  
State Board of Health,  
3511 Washington,  
St. Louis, Missouri.

Dear Dr. North:

This is to acknowledge the request of the State Board of Health for an opinion upon various subjects hereinafter set out and discussed.

I.

Please inform us whether the Act of the Fifty-seventh General Assembly in repealing Section 9024, R. S. Mo. 1929, and placing the appointment of Commissioner of Health in the Governor, by and with the advice and consent of the Senate, has changed the position of Commissioner of Health as an administrative officer to perform such duties as may be prescribed by the State Board of Health and the Statutes?

For a better understanding of our present statutes relating to the State Board of Health, we briefly sketch the history of same.

On Friday, January 5, 1883, the following message was received by the State Senate from his Excellency, Governor T. T. Crittenden, with reference to the State Board of Health:

"There should be a Board of Health established in this State, with its headquarters at St. Louis. It should consist of five physicians, selected from the different reputable Schools of Medicine; the Board to have

charge of the State sanitation and to act as a Board of Censors in the regulation of the practice of medicine and surgery. The State is full of medical quacks who are killing annually, through their criminal ignorance, more men, women and children than die from natural causes. The Legislature should give this question serious consideration as it is one involving the lives of the people and the reputation of the State."

Laws of Missouri, 1883, Section 3, page 95, provides in part as follows:

"The State Board of Health shall have general supervision over the health and sanitary interests of the citizens of the State. \* \* \* \* \*"

Revised Statutes of Missouri, 1929, Section 9015, provides in part as follows:

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. \* \* \* \* \*"

Aside from the wording of the statute, we find no change in the duty of the State Board of Health to safeguard the health and sanitary interests of the citizens of the State from 1883 to the present time.

Laws of Missouri, 1883, Section 13, page 97, reads in part as follows:

"\* \* \* \* \* They shall choose from their number a president, vice president and a secretary and they may adopt rules and by-laws for their government, subject to the provisions of this act."

Revised Statutes of Missouri, 1929, Section 9019, reads in part as follows:

"\* \* \* \* \* They shall choose from their number a president, vice president and

and a secretary and they may adopt rules and by-laws for their government subject to the provisions of this article."

Laws of Missouri, 1883, Section 14, page 97, reads in part as follows:

"The secretary shall perform such duties as may be prescribed by the board and this act; \* \* \* \* \*."

Revised Statutes of Missouri, 1929, Section 9020, reads in part as follows:

"The secretary shall perform such duties as may be prescribed by the board and this article; \* \* \* \* \*."

As late as the year 1929, no important changes appear in the organization and duties of the secretary of the State Board of Health. He is still a member of the Board, chosen from their number and purely an administrative officer for he performs such duties as may be prescribed by the Board.

In 1919, the Fiftieth General Assembly created a Commissioner of Health. Section 6654, Laws of Missouri, 1919, page 373, reads as follows:

"A commissioner of health may be selected by the board who shall be a physician skilled in sanitary science and experienced in public health administration. It shall be his duty to enforce the rules and regulations of the board and he shall submit to the state board of health an annual report with his recommendations."

The same section appears in the Revised Statutes of Missouri, 1929, Section 9024, without any change, and by virtue of such the Commissioner of Health (prior to 1933) was selected by the Board and his duties consisted of enforcing the rules and regulations of the State Board of Health. And in 1933 the Legislature provided that "The Commissioner of Health shall perform such duties as may be



prescribed by the board and this article." Section 9020, Laws of Missouri, 1933, page 269. However, observe the change made, with reference to the appointment of the Commissioner of Health, in 1933 by the Legislature, found in Laws of Missouri, 1933, Section 9024, pp. 269-270, which provides in part as follows:

"The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, \* \* \* \* \*. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted. \* \* \* \* \*."

Under Section 9024, R. S. Mo. 1929 (repealed in 1933), the Commissioner of Health was selected by the Board but (Section 9204, Laws 1933) he is now appointed by the Governor by and with the advice and consent of the Senate. However, he is still a Member of the Board and must perform such duties as they prescribe for him and as set out in the statutes.

{From the foregoing, we are of the opinion that since the creation of the State Board of Health in 1883, it has been the intention of the Legislature to center the power of authority over health matters in the State Board of Health. And although under the present statute the power to appoint a Commissioner of Health has been taken away from the Board of Health, as likewise its power to appoint a secretary, same now provided by appointment by the Governor, so that the Secretary and the Commissioner of Health are one and the same person and the Secretary designated as Commissioner of Health and a member of the Board, he is merely an administrative officer and must perform only the duties as are prescribed by the Board and the statutes regardless of the fact that he is appointed by the Governor and not by the Board. He is responsible to the Board. In other words, the position of the Commissioner of Health is that of an administrative officer.

II.

Please advise us how representatives,  
and by what authority, may be sent to  
public health conferences.

Section 9015, R. S. Mo. 1929, sets out the powers and duties of the State Board of Health pertaining to the subject matter, and provides in part as follows:

"\* \* \* \* \* It may send representatives to public health conferences when deemed advisable, and the expenses of such representatives shall be paid by the state as provided in this chapter for expenses of the members of the state board of Health."

Laws of Missouri, 1933, pages 83 and 84, Section 33, is the appropriation made to the State Board of Health to cover such expenses; said section in part provides:

"General expenses: consisting of communication, printing and binding, travel;  
etc., . . . . . \$12,375."

Discretion and power to send representatives to public health conferences lies only with the State Board of Health and no individual member can assume the responsibility of sending representatives. The Commissioner of Health is a member of the Board and he cannot direct travel to such conferences solely by his authority. Neither is he permitted to attend without authorization by the Board. If attendance is occasioned by anyone without authority by the Board, then the expenses of such cannot be paid until authorized by the Board.

III.

How are the members of the Board of Health  
and the Commissioner of Health to receive  
reimbursement for traveling and other ex-  
penditures in the performance of their official  
duties?

Laws of Missouri, 1933, Section 9020, page 269, provides in part as follows:

"\* \* \* \* \* The president of the board shall certify the amount to the Commissioner of Health, and the traveling and other expenses of members, and on presentation of his certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

The Legislature in 1933, Laws of Missouri, 1933, pages 83 and 84, appropriated money to pay for the expenses. Thus, there is a statute providing that the expenses shall be paid and an appropriation out of which to pay them.

From the foregoing it is our opinion that before any payment or reimbursement can be made to any member of the State Board of Health for traveling and other expenses while employed on the business of the Board, a voucher or claim for expenses must be signed by the President of the Board and by the Commissioner of Health. Upon presentation of this certificate the State Auditor shall draw his warrant on the State Treasurer for the amount.

Section 9019, R. S. Mo. 1929, provides in part as follows:

"\* \* \* \* \* they may adopt rules and by-laws for their government, subject to the provisions of this article."

Laws of Missouri, 1933, Section 9020, page 269, provides in part as follows:

"The Commissioner of Health shall perform such duties as may be prescribed by the Board and this article. \* \* \* \* \*"

Laws of Missouri, 1933, Section 9024, page 269, provides in part as follows:

"\* \* \* \* \* He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. \* \* \*"

The question arises whether the Commissioner of Health, who is also a member of the State Board of Health, must obtain the signature of the President of the State Board of Health before any payment or reimbursement can be made to him for traveling and other expenses while employed on the business of the Board.

Laws of Missouri, 1933, Section 9020, supra, provides that the President of the Board shall certify the amount to the Commissioner of Health, and we are of the opinion that, inasmuch as the Commissioner is a member of the Board and is to perform such duties as may be prescribed by the Board and the provisions of the statutes, it is necessary that he obtain the signature of the President of the Board before presenting such certificate to the State Auditor for a warrant on the State Treasurer for the amount. Also, by virtue of Section 9019, supra, we are of the opinion that the State Board of Health may adopt rules and by-laws requiring him to secure the signature of the President for, as set out in Laws of Missouri, 1933, Section 9020, supra, "the Commissioner of Health must perform such duties as may be prescribed by the board and this article."

#### IV.

Is the Commissioner of Health limited to funds appropriated to his office or may he also draw upon funds appropriated to the State Board of Health?

Laws of Missouri, 1933, pages 83 - 84, is an appropriation in the amount of \$30,000 to the "board of health fund" to pay for expenses entailed by the State Board of Health. It is the only fund appropriated for the use of the State Board of Health. Hereinbefore we have shown that this fund is to be used by the State Board of Health and withdrawn only when certified by the President to the Commissioner of Health. See section III of this opinion.

The Constitution of Missouri provides, "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law \* \* \* ." --Article X, Section 19.

October 19, 1934.

The above provision was construed by the Supreme Court in the case of State ex rel. v. Gordon, 236 Mo. 142, 1. c. 158, wherein it was said:

"The language of the foregoing provisions of the Constitution is clear and explicit and forbids the payment of money from the State treasury 'received from any source whatsoever' or 'of any funds under its management' except in pursuance of regular appropriations made by law."

And in the case of State v. Seibert, 103 Mo. 401, the court held that the Laws of 1889, page 16, making appropriation "for the purpose of paying the cost of assessing and collecting the revenue for the years 1889 and 1890, including the contingent expenses of the State Board of Equalization" did not authorize the payment from the fund so appropriated for the compensation of a member of the Board of Equalization for services rendered during the years 1876 to 1886, as the appropriation applies only to the years 1889 and 1890.

It is our opinion that the Commissioner of Health is limited to the funds appropriated to his office and he may not draw upon or use the funds appropriated to the State Board of Health. That is to say, if the Commissioner of Health performs duties for his office and not for the State Board of Health, then the Commissioner's expenses must be borne from the appropriation made to his office and not pay such expenses from the fund of the State Board of Health.

Laws of Missouri, 1933, pages 82-83, Section 32, appropriates the amount of \$41,250 for "general expenses, communication, printing and binding, transportation of things, travel, other general expense" chargeable to the state revenue fund, for "the departments of the state board of health of Missouri or its legal successor." It is out of this fund that the Commissioner of Health receives reimbursement for expenses entailed when performing duties pertaining to his office, and not out of the "Board of Health Fund." In other words, there are two funds provided for the payment of expenses, (1) Board of Health Fund, and (2) Department of Health fund. The board members, including the Commissioner, when performing duties for the Board are paid out



of the first fund, and the Commissioner of Health when performing duties not for the Board of Health is paid out of the second fund.

V.

Please advise us from what source the Board of Health collects fees and into what fund such are placed.

The State Board of Health receives the following fees, which are paid into the "State Board of Health Fund":

1. Water Analysis Fees -- Section 9032, which provides:

"The analysis of all waters required by this article shall be made at the state board of health laboratories at Jefferson City, Missouri. The fees collected by the state board of health under this article shall be turned over to the state treasurer, who shall place them in a special fund to be known as the state board of health water and sewage fund and as much as is necessary of this fund shall be used for maintaining the division of the state board of health to be known as the division of water and sewage and said fund is hereby appropriated for said purpose, and the state auditor shall draw his warrant for claims against this fund after such claims have been approved by the secretary of the state board of health: Provided, no fees under this section shall be paid by any city or municipality except when the waterworks is owned and operated by said city or municipality."

This fund is appropriated to the use of the Board by virtue of Section 33, Laws of Missouri, 1933, page 83, supra, to-wit, "and fees for water analysis \$15,000".

2. Fees for Licensing Persons to Practice Chiropractic --  
Article 4, Chapter 52, R. S. Mo. 1929.



3. Fees for Licensing Persons to Practice Medicine and Surgery -- Chapter 53, R. S. Mo. 1929.
4. Fees for Licensing Persons to Practice Midwifery.

The following fees are collected, which are paid into the General Revenue Fund:

1. Registration of Vital Statistics -- Section 9054a, page 230, Laws of Missouri, 1931.
2. Fees for Licensing Cosmetologists, Hairdressers and Manicurists -- Article 5, Chapter 52, R. S. Mo. 1929.

VI.

What compensation is allowed to the Members of the Board of Health pertaining to chiropody, if any?

Section 9020, Laws of Missouri, 1933, page 269, provides in part as follows:

"\* \* \* The members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. \* \* \*"

The above statute is unambiguous and in no uncertain terms says that no compensation is to be received by the members of the Board. It is well settled in this State that a public officer must point to the statute authorizing payment for services, and absent such statute he is presumed to render his services gratuitously. King v. Riverland Levee District, 279 S. W. 195. However, in matters pertaining to "Chiropody" the Legislature has specifically provided that the members shall receive ten dollars per diem for every day actually spent in the performance of duties pertaining thereto. We quote Section 9086, R. S. Mo. 1929, as follows:

"Each member of the board shall receive ten dollars for every day actually spent in the performance of his duties in connection with the provisions of this article, and the necessary traveling expenses actually incurred, not exceeding three cents per mile each way. The said compensation and traveling expenses, and any incidental expenses necessarily incurred by the board or any member thereof, shall, if approved by the board, be paid from the treasury of the state, but only from the fees received under the provisions of this article and paid into the said treasury of the board."

Thus, two statutes are found which are incapable of harmonizing, namely, Section 9020, supra, providing that the members shall receive no compensation, and Section 9086, supra, providing that the members shall receive ten dollars per diem.

In view of the fact that there is a special law pertaining to "Chiropody", it is our opinion that the special law prevails over the general law. That is to say, that when the members perform duties in connection with "Chiropody", then Section 9086 prevails and the members of the Board are entitled to the per diem of ten dollars per day for each day actually spent in the performance of duties in connection with "Chiropody". The Legislature evidently had this section in mind when they appropriated money for the payment of same because Section 33, Laws of Missouri, 1933, page 83 provides in part as follows:

"The per diem of the members of the board  
and consultant; \* \* \* "

Thus, the Legislature has enacted a statute to which the members of the Board may point to as authority for payment for such services, and also to an appropriation act appropriating the moneys for payment for such services.

As to the grading of examination papers, it is our opinion that the members of the Board are not permitted to receive compensation therefor.

We are attaching hereto copy of opinion rendered on August 10th, 1934, to Honorable Forrest Smith, State Auditor, which is the opinion of this Department concerning same.

In this connection, we also call attention to the fact that recently the Supreme Court of Missouri has sustained said ruling in the case of State ex rel. Davis v. Smith (not yet reported) and commonly referred to as the "Barber Board Decision."

VII.

Please state the duties of the Board of Health pertaining to cosmetology.

Article 5, Chapter 52, R. S. Mo. 1929, pertains to "Cosmetologists, Hairdressers and Manicurists."

Section 9093 of said article and chapter provides:

"The control, supervision and enforcement of the terms and provisions of this article shall be under the state board of health, or by whatever name said board may hereafter be designated."

Section 9089, R. S. Mo. 1929, provides:

"It shall be unlawful for any person in this state to engage in the occupation of hairdresser or cosmetologist or manicurist, or to conduct a hairdressing or cosmetologist's or manicurist's establishment or school, unless such person shall have first obtained a certificate of registration as provided by this article."

Section 9096, R. S. Mo. 1929, provides:

"If said state board of health finds the applicant has submitted the credentials required for admission to the examination and has paid the required fee, said board shall admit such applicant to examination or registration."

Section 9099, R. S. Mo. 1929, provides:

"The state board of health shall have supervision over the matter of inspection of the sanitary conditions of the establishments referred to in this article."

Section 9106, R. S. Mo. 1929, provides:

"The fees for examination and certificate as provided in this article shall be paid in advance to the secretary of the state board of health and by him paid each month into the state treasury to the credit of the general revenue fund. On failure to pass an examination the fees shall not be returned to the applicant, but he or she may present himself or herself within one year after such failure and be re-examined without payment of an additional fee."

Section 9098, R. S. Mo. 1929, provides in part as follows:

"If an applicant for examination for operator passes such examination to the satisfaction of the examining board and has paid the fee required and complied with the requirements pertaining to instructors provided in this article, the state board of health shall issue a certificate to that effect, signed by the president and secretary and attested by its seal. \* \* \* \* \*"

A mere reading of the above sections shows that cosmetologists, hairdressers and manicurists are under the direct supervision and control of the State Board of Health and no person shall engage in the occupation of such until a certificate is issued, signed by the president and secretary and attested by the seal. In other words, the Board of Health examines into the qualifications of cosmetologists, hairdressers and manicurists and finding such to

be qualified under the law formally issue a certificate signed by the president and the secretary and attested by its seal. This certificate must be displayed in the office of the person practicing his business or employment. Section 9098, R. S. Mo. 1929.

We will not further lengthen this opinion on the discussion of the duties of the Board pertaining to cosmetologists, etc., because the statutes very plainly and conclusively show that the Board of Health has sole supervision over same.

We conclude this opinion by calling attention to a previous opinion rendered to the State Board of Health on May 3rd, 1934, and respectfully request that said opinion be read in conjunction with this opinion.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

MW:

JLH:EG

Enc.

STATE BOARD OF HEALTH - AUTHORITY OF THE BOARD TO EMPLOY AGENTS  
AND FIX COMPENSATION.

November 20, 1934.



Emmett P. North, M. D.  
President State Board of Health  
Jefferson City, Missouri

My dear Doctor North:

Acknowledgement is made of your request for  
an opinion on the following matter:

"On July 2, 1934, the State Board of  
Health had its regular meeting, unani-  
mously passed a motion that the salary  
of Mr. J. J. Ferns, Medical Licensure  
be raised to \$300.00 per month, effect-  
ive July 1, 1934.

Kindly render us an opinion as to the  
legality of this act."

Many years ago the State Board of Health of  
Missouri was created. Authority was given the Gov-  
ernor by and with the advice and counsel of the Senate  
to appoint seven persons, five of whom are required  
to be physicians in good standing and at least five  
years a resident of the State next preceding their  
appointment, which body was to constitute the Board.

The general duties of the Board are stated in  
Section 9015, a portion of which section reads as  
follows:



Emmett P. North, M. D.

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November 20, 1934.

"It shall be the duty of the state board of health to safeguard the health of the people in the state, counties, cities, villages and towns. It shall make a study of the causes and prevention of diseases and shall have full power and authority to make such rules and regulations as will prevent the entrance of infectious, contagious, communicable or dangerous diseases into the State. "

Shortly after the establishment of the Board it was realized that one of the most effective means of safeguarding the public health was to strictly supervise and regulate the right to practice medicine in this State. To effectuate this need a general medical practice act was adopted. One of the sections of this act, now Section 9112 provided:

"The state board of health shall have general supervision over the registration of all practitioners of medicine, surgery and midwifery in this state. "

By means of the foregoing provision direct general supervision over practitioners of medicine and surgery is given to the State Board of Health in no uncertain terms.

It is certain that the legislature did not expect or intend the members of the Board to personally do all the administrative and clerical work necessary to effectuate the purpose of the act and to fulfil the numerous duties placed upon them by the various laws applicable to the Board. They were expected to provide for themselves such assistance as would be necessary to effectuate the purposes of the act.

As one of the many indications of this intent we refer to the fact that the members of the Board are required to serve without compensation. Section 9020. Laws of Missouri 1933, page 269.

Furthermore, under the provisions of Section 9017 it is provided:

"In addition to the divisions of vital statistics and laboratories already established, the board shall establish the following divisions: Preventable diseases, including tuberculosis, child hygiene, venereal diseases; and other divisions as it may deem necessary from time to time. The board shall formulate rules and regulations for the proper conduct of these divisions. "

By virtue of the foregoing statutes authorizing the establishment of such divisions as the Board may deem necessary from time to time, the division of medical licensure has been established and under the provision of Section 9112 heretofore referred to it is specifically provided that the State Board should have general supervision over the subject matter of registration of practitioners of medicine and surgery.

It is therefore inescapable that the State Board would have authority to employ a director of medical licensure and to establish the amount of compensation he is to receive as well as to prescribe the other rules and conditions under which he is to be employed.

For precedent in this decision we direct attention to the case of Aull vs. City of Lexington, 18 Mo. 401. The City of Lexington in 1851 adopted an ordinance providing for a city board of health whose duties were prescribed as follows:

"It shall be the duty of the board of health to exercise a general supervision over the health of the city, and from time to time make such report to the mayor and city council as they may deem necessary; and said board are hereby vested with all power necessary to carry the provisions of this ordinance into effect."

Under that authority the Board leased quarters for a transient hospital in which to place persons landing from steamboats infected with cholera. The plaintiff in the case was suing the city for the rental agreed upon by the board. The court held that the term "general supervision over the health of the city" conferred more than mere authority to examine into the condition of the health of the city, that it was intended that the board should have active and sufficient power to be exercised for the public good, and the court provided for the payment of the agreed rental.

In the case of Kent vs. Village of Tarrytown, 64 N.Y. Supplement, 178, the court considered the power of the board of health to employ persons to carry out their rules and regulations. The plaintiff in that case had been employed by the board to investigate local health conditions and was suing the municipality for the reasonable value of the services. The defense on the part of the Village was made that:

"The criticism is made that it nowhere appears that any legal regulation or order was made by the Board of Health, that without such preliminary step it was not authorized to employ any person \* \* \* the complaint should have contained an averment of the regulations and orders as made by the board of health before any legal employment would be shown."

The court overruled the contention of the defendant stating that in view of the duties of the board to execute the laws to suppress nuisances and to protect the public health, narrow construction should not be placed upon the board's authority to legally employ assistance, l.c. 181:

Emmett P. North, M. D.

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November 20, 1934.

"\* \* \* it would be quite within the powers of the board to make employment of persons when necessary to inspect, report and describe a given condition, in order that the Board of Health might intelligently act thereon, and that the language of the statute, that it would employ persons to carry into effect its rules and regulations, is not necessarily limited to the right to employ after the nuisance has been declared, but it is broad in its scope, when taken in connection with the purposes and objects of the law, to authorize the employment of necessary persons in connection with the whole subject matter, as well as the duties which they are obligated to perform. "

#### CONCLUSION

It is therefore the opinion of this department that the State Board of Health was acting within the powers granted it in determining the compensation of the Director of Medical Licensure to be paid to the Director of Medical Licensure.

Respectfully submitted

HARRY G. WALTNER, JR.  
Assistant Attorney General

APPROVED:

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Attorney General.

HGW:EMW

TAXATION: Delinquent land taxes enforced under Senate Bill 94  
after July 24, 1933.

January 17, 1934.

Hon. John B. Owen  
Prosecuting Attorney  
Henry County  
Clinton, Missouri

*See opinion  
no 63-1933*



Dear Mr. Owen:

We acknowledge receipt of your request for an opinion  
of this office reading as follows:

"Will you please advise if under the present  
law a back tax attorney can proceed to file  
suit and endeavor to collect delinquent taxes  
and add all penalties as provided by the statutes  
in such cases.

I take it that the waiving of penalties in 1933  
is no longer in effect and that the present  
status of the law is a reversion to the old  
law which was in effect prior to the passage  
of Senate Bill No. 80 of last year.

Our back tax collector and attorney in this  
County are anxious to press the collection of  
delinquent taxes. Please advise."

I.

CANNOT FILE SUIT FOR STATE AND  
COUNTY DELINQUENT TAXES AFTER  
JULY 24, 1933.

Senate Bill 80 as passed by the 57th General Assembly,  
in regular session, and contained in Missouri Laws of 1933 at  
page 423, was by the special session repealed and a new law known  
as Senate Bill 40 enacted in lieu thereof. This new law became  
effective on December 12, 1933, and expired by operation of law  
December 31, 1933. See Senate Bill 40, Extra Session.

"Section 3. The provisions of this act shall  
cease and be of no effect after December 31st,  
1933."

January 17, 1934

Therefore, neither of these statutory provisions will at this time affect the institution or prosecution of suit for collection of delinquent taxes.

We direct your attention however to Senate Bill 94 as enacted by the 57th General Assembly and found at page 425 Laws of Missouri, 1933. By reason of this law Sections 9945, 9949, 9950, 9951, 9952, 9953, 9954, 9955, 9956, 9957, 9958, 9959, 9960, 9962, 9963 and 9969 of the 1929 Revision were repealed and new sections enacted in lieu thereof. See title to Act, page 425 Laws of Missouri, 1933. This new law sets up an entirely new and different method for the collection of delinquent land taxes. No provision whatsoever is made for the enforcement of the payment of delinquent land taxes by suit. As this new law does not have an emergency clause, it did not become effective until July 25, 1933. However, from and after that date there was no authority whatsoever for the institution of suits for the collection of delinquent land taxes. Suits may still be brought for the collection of delinquent personal taxes under the provisions of Section 9940 R. S. Mo. 1929, and as Senate Bill 80 was repealed and Senate Bill 40 expired December 31, 1933, such suits are not in any way effected by these acts.

#### CONCLUSION.

It is the opinion of this office that your back tax collector and attorney is not authorized at this time to institute suit for delinquent land taxes but is required to enforce the collection of these taxes under the provisions of Senate Bill 94, page 425, Laws of Missouri 1933, as hereinabove referred to.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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Attorney General.

HGW:MM



QUO WARRANTO:

OFFICERS: Cities of the Fourth Class.



3-2

February 27, 1934

Honorable Morris E. Osborn  
Prosecuting Attorney  
Shelbyville, Missouri

Dear Mr. Osborn:

We acknowledge receipt of your letter dated  
February 8, 1934 as follows:

"The other day when I saw you in Jefferson City, it was my intention to talk with you about the subject matter of this letter, but realizing how busy you were, I did not at that time care to bother you. However, I talked with your assistant, Mr. Noland,

Clarence is a 4th class city. For some time the citizens thereof have had several elections on water works. The results of the last election shows that the necessary two-thirds voted in favor of the program. Soon thereafterwards a temporary restraining was granted by Judge Drain to prohibit the issuance of the bonds. The order was dissolved a few days ago owing to the failure of petitioners to post a bond.

Now complaint has been made to this office that the Mayor and several members of the board have never taken a statutory oath etc. And I have been asked to file Quo Warranto proceedings to oust them.

Mr. Rendlin, attorney of Hannibal, is sending the data necessary to inform you of the facts in the matter. I wish

you would give me your department's opinion as to whether the mayor and board members can be ousted on these grounds.

If you rule that Quo Warranto will oust them, will your department handle the matter."

1.

Section 6970 Revised Statutes Missouri 1929, applying to cities of the fourth class, reads as follows:

"Every officer of the city and his assistants, and every alderman, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation before some court of record in the county, or justice of the peace in the township, or the city clerk, that he possesses all the qualifications prescribed for his office by law; that he will support the Constitution of the United States and of the state of Missouri, the provisions of all laws of this state affecting cities of this class, and the ordinances of the city, and faithfully demean himself while in office; which official oath or affirmation shall be filed with the city clerk. Every officer of the corporation, when required by law or ordinance, shall, within fifteen days after his appointment or election, and before entering upon the discharge of the duties of his office, give bond to the city in such sum and with such sureties as may be designated by ordinance, conditioned upon the faithful performance of his duty, and that he will pay over all moneys belonging to the city, as provided by law, that may come into his hands. If any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation, or to give bond as herein required, his office shall be deemed vacant. For any breach of condition of

any such bond, suit may be instituted thereon by the city, or by any person in the name of the city to the use of such person."

In the case of *Edwards v. Kirkwood* 162 Mo. App. 576, the court had under consideration the validity of the acts of the city attorney of the City of Kirkwood who had failed to take and subscribe an oath of office. The court at page 582 of the opinion said:

"Admitting that he had not duly qualified by taking the oath of office, beyond question there was evidence in the case from which the trial court had a right to draw the inference that plaintiff was de facto city attorney of the city of Kirkwood at the time of entering into this contract and covering the period of the performance of the services for which he sued. It is true that section 9323, Revised Statutes 1909, provides that if any person elected or appointed to any office shall fail to take and subscribe the oath of office, his office shall be deemed vacant. But we have always recognized in this state that we may have officers de facto as well as de jure. (*State v. Douglass*, 50 Mo. 593; *Wilson v. Kimmel*, 109 Mo. 260, 1 c. 264, 19 S. W. 24; *County of Ralls v. Douglass*, 105 U. S. 728, 1 c. 730.) In *State ex rel. Lemon v. Board of Equalization of Buchanan County*, 108 Mo. 235, 1 c. 241, 18 S. W. 782, it is held that although the law requires an oath of office to be taken, it is not indispensable; it is a mere incident of the office, constituting no part of the office itself."

In *Simpson v. McGonegal* 52 Mo. App. 540, the Kansas City Court of Appeals at page 545 of the opinion, defined a de facto officer in the following language;

"The definition of an eminent English judge is often repeated in the books:  
'An officer de facto is no other than

he who has the reputation of being such, and yet is not a good officer in point of law.' Or, as more fully put by BUTLER, C. J., in perhaps the ablest opinion on the subject in this country: 'An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons.' State v. Carroll, 38 Conn. 449."

In the case of State v. Dierberger 90 Mo. 369, the question considered was as to the validity of the acts of a deputy constable who had failed to execute the oath of office. The court at page 374 of the opinion said:

"Clearly the deputy constable is an officer under the authority of the state. He should take the oath, and until he does so, he is not an officer de jure; and the further question is, was he an officer de facto."

And again on page 375:

"The appointment made and constituted him a deputy; and though he failed to take the oath he was an officer de facto."

The holding as to officers being officers de facto proceeds upon the theory of protecting the interests of the public so far as the acts of those are concerned who have assumed to discharge the duties of an office and upon which assumption the public has relied.

Section 1618 Revised Statutes Missouri 1929, under the title of Quo Warranto, provides in part:

"In case any person shall usurp, intrude into or unlawfully hold or execute any office or franchise, the attorney-general

of the state, or any circuit or prosecuting attorney of the county in which the action is commenced, shall exhibit to the circuit court, or other court having concurrent jurisdiction therewith in civil cases, an information in the nature of a quo warranto, at the relation of any person desiring to prosecute the same\* \* \* \*."

2.

It is true that in the case of State ex rel Attorney General v. Steers 44 Mo. 223, it is held that:

"A person derives his title to an office by his election, and not by his commission\* \* \*."

Similar statements are made in subsequent decisions of the Supreme Court of this state but such a holding is not inconsistent with Section 6970, above quoted, because it is there provided that if any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation his office shall be deemed vacant, thus assuming that the person elected acquired title to the office by an election but that the office thereafter became vacant because of the failure of the person elected to perform certain statutory requirements.

3.

The case of State ex inf. Ellis v. Dr. L. H. Ferguson, number 32,395, decided by the Supreme Court, and not yet reported, was an action to oust the Mayor of the City of Monett, Missouri, a city of the third class for an alleged violation of Section 13 of Article XIV of the Constitution of the State of Missouri, and it was there held that the Mayor of the City of Monett was a public officer, the court saying,

"The first question is: Is the mayor of a city of the third class a public officer? The answer must be Yes."

February 27, 1934

The same rule would necessarily apply to the elective offices of a city of the fourth class.

4.

Section 1618, supra, gives to the prosecuting attorney the same authority to institute actions in quo warranto as it gives the attorney general. The right of prosecuting attorneys to institute a quo warranto proceeding is expressly held in State ex inf. Norman v. Ellis 325 Mo. 154.

#### CONCLUSION

From the foregoing, we are of the opinion that the offices of the mayor and members of the board of aldermen of the City of Clarence, Missouri, who have failed to take and subscribe, respectively, the oath of office as provided in Section 6970 Revised Statutes Missouri 1929, are vacant and a proceeding in quo warranto instituted by the prosecuting attorney of Shelby County will lie to oust such persons from exercising the privileges and powers of such offices.

Should it appear that the persons above referred to were elected to succeed themselves, and if it should appear that they had after such prior election taken and subscribed the oath of office, then a different situation might arise. In other words a question then would be presented as to whether or not such persons would not be entitled to hold their respective offices under a prior election until their successors were duly elected and qualified.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



22/12  
SALARIES AND FEES:

Court Reporter's salary determined  
by decennial census.

4.23  
April 12, 1934



Hon. Morris E. Osborn  
Prosecuting Attorney  
Shelby County  
Shelbyville, Missouri

Dear Mr. Osborn:

as follows:

This is to acknowledge your letter which reads

"This letter will introduce Mr. Chas. W.  
Heumann, Jr., Court Reporter for Judge  
H. L. Drain.

I have been informed that the County  
Court of Macon Missouri, one of the  
counties of the Judicial District of  
Judge V. L. Drain, has instructed its  
County Treasurer to reduce the salary  
of Mr. Heumann in conformity with an  
opinion rendered by your predecessor,  
the Hon. Stratton Shartel, on the 16th  
day of February 193\_. Also it has been  
called to my attention that your Dep-  
artment has affirmed that opinion.

I hope it is not asking too much, but  
as a friend and as the Attorney General  
of the State of Missouri, I beg of you  
to re-examine the case law of this  
State for the purpose of ascertaining  
whether you deem it necessary to re-  
write this opinion.

In asking that you re-write this opinion,  
I want to call your attention to the  
recent decisions pertaining to the  
salaries of Court Reporters in this State,  
and particularly to the Hoffman case in

April 12, 1934

the 294 S. W. Page 249. My information is that Mr. Shartel's opinion, the opinion which you have affirmed, holds that the court reporter of Pettis County is entitled to be paid according to the population ascertained by the general election vote multiplied by five; that you come to this conclusion because his circuit consists of only one county. Should you multiply the vote of Macon County at the last presidential election by five you will find that Mr. Heumann is entitled to \$3000.00. Therefore, according to your opinion, he is penalized to the extent of \$1000.00 because his circuit consists of two counties.

You will further recall that in the Prosecuting Attorneys case to-wit: State ex rel O'Connor -vs- Reidl, 46 S. W. (2) Page 133., the Hon. Judge Ragland held that the prosecutors could be paid on a population basis on the last decennial census because where all the prosecutors of the State were paid on the same basis then there was a compliance with Article 9 Section 12 of the State Constitution. Do you believe that a court reporter of the circuit consisting of Pettis County and the court reporter of the Judicial Circuit consisting of Macon and Shelby Counties can be paid on two entirely different basis and yet the conformity section of the State Constitution be complied with?

Personally, I cannot understand why a Court Reporter should be so penalized because there are more than one county in his circuit. To me it seems absolutely in conflict with the uniformity salary section of the State Constitution.

Trusting that you will give this matter your earliest attention, I am."

The narrow question presented in your inquiry is: What basis is used (census or multiplication method) in determining population of Second Judicial Circuit in order to classify court reporter as to salary?

I.

The Second Judicial Circuit consists of Macon and Shelby Counties. The population of these counties according to the last previous (1930) decennial census of the United States is as follows:

Macon County 23,070; Shelby County 11,983 - - a total population of 35,053 for the circuit (Official Manual of the State of Missouri 1933-34).

II.

Laws Missouri 1933, page 369, repealed and re-enacted Section 11808 R. S. 1929 so that said section now provides:

"The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

Previous to the enactment of the above statute salaries of county officers not otherwise provided for were ascertained by the multiplication method, that is the multiplying of the total vote in the last general election by five as was done in the case of State ex rel. Rucker v. Hoffman 294 S. W. 429 (Kansas City Court of Appeals), in which the court said:

"Having found that such reporter is a county officer and that the proper basis for calculating his salary is by taking the highest number of votes cast at the last general election and multiplying them by 5, it follows  
\*\*\*\*\*  
and that the salary of such reporter is \$3,000 per annum."

In the above case Pettis County was a circuit separate and independent of itself and it apparently conflicts with State ex info. v. McKay 249 Mo. (En Banc) 249.

In the McKay case the question for determination was that of fixing the term of office of a court stenographer, and in which the court held that a court stenographer was an officer of the court and held his term so long as the judge was in office. In State ex rel. Adams v. Coon et al. 295 S. W. 821 (Kansas City Court of Appeals) l.c. 823, the court referred to the McKay case, saying the following:

"The decision in the McKay case was handed down April 8, 1913. The Legislature of 1919 (Laws 1919, p. 713) repealed sections 11231 and 11244, R.S. 1909, and in lieu thereof enacted section 12668, R. S. 1919, which provides that the official court reporter 'shall hold his office during the term for which the judge appointing him was elected.' It was evidently the purpose and intent of the Legislature to remove the ambiguity referred to in the McKay opinion, and to fix definitely the term of office of the official court reporter as the term for which the judge appointing him was elected."

As shown above the Second Judicial Circuit is composed of two counties, and that in the Hoffman case it was decided that the court reporter in a circuit that comprised only one county was a county officer; so we do not believe that the Hoffman case is analogous to the present inquiry. However, we do not believe it necessary or decisive of the question here involved to determine the applicability of the McKay case and the Hoffman case in this inquiry for reasons hereinafter stated.

### III.

Section 11720 R. S. 1929 provides the compensation or salary to be paid to court reporters. This statute was before the court for construction in State ex rel.

Gleason v. Walker (Supreme Court En Banc) 257 S. W. 470. At page 473 thereof the court said the following:

"Such considerations, in view of the ambiguity of the language used in said section, require the following construction to be given to said section 12670; (11720 R. S. 1929): In all judicial circuits having a population of 60,000 or more, the salary of the official court reporter is \$3,000 per annum; in all judicial circuits having a population of 45,000 and less than 60,000, such salary is \$2,500 per annum; in all judicial circuits having less than 45,000 population, such salary is \$2,000 per annum. Where the judicial circuit comprises only one county or one city, as St. Louis, such salary is payable out of the county (or city) treasury in equal monthly installments; where the judicial circuit is composed of two or more counties, such salary is payable in equal monthly installments out of the county treasuries of the respective counties, and the amount thereof any particular county must pay is such proportion as its population bears to the population of the entire circuit.

Such construction makes of section 12670 a simple, workable, and common sense law. Any other construction makes it unreasonable and absurd."

The defining then of the above section by the Supreme Court is controlling. We call to your attention the fact that the court says,

"Such salary is \_\_\_\_\_ per annum."

In other words it is an annual salary and not a salary dependent upon the term.

" 'Annual salary,' as used in said section 10938, means salary for each year of the incumbency. It cannot be split up into periods by elections which occur during the year, and must be calculated on a year as a whole. We conclude further that 'annual,' as applied to salaries, means not the calendar years, but the years of the incumbent's term, which in the case of relator begins on the 1st day of April each year."

State ex rel. Harvey v. Linville 300 S. W. (Missouri Supreme) 1066, 1. c. 1067.

Thus the court reporter receives an annual salary, and in 1933 the Legislature (Section 11808) provided

"for the purpose of ascertaining the salary of any county officer for any year"

that it should be based on the previous decennial census.

And, in State v. Walker, supra, the court said (1. c. 472):

"In section 12670 (11270 R. S. 1929) the proviso that, 'where a judicial circuit is composed of more than one county, such salary shall be divided among the counties and be paid by them proportional as the population of such counties bear to the entire population of the circuit,' indicates the legislative understanding and intent that the salary itself should be fixed upon the population of the circuit, rather than upon the population of any county therein."



In view of the foregoing, it is our opinion that the annual salary the Court Reporter of the Second Judicial Circuit will receive, is determined by the population of the Circuit as shown by the previous decennial census.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:LC

LIQUOR CONTROL ACT - Board of trustees of an incorporated village may charge for licenses issued to manufacturers, distillers, brewers, wholesalers and retailers of intoxicating liquor.

June 28th, 1934.

6-28



Honorable J. Ed Old, Chairman  
Board of Trustees  
Koshkonong, Missouri

Dear Sir:

This department is in receipt of your letter of June 8th, 1934 requesting an opinion as to the following state of facts:

"Some discussion has arisen here as to whether or not our Village Board of Trustees have the power and right to assess license fees for the sale of Liquor in our Village.

"We, the Village Board of Trustees would like to have an opinion from your office, and if we are allowed to assess this license fee just how much we may be able to assess.

"The Village of Koshkonong has a population of approximately 350."

I.

BOARD OF TRUSTEES OF AN INCORPORATED VILLAGE MAY  
CHARGE FOR LICENSES ISSUED TO MANUFACTURERS, DISTILLERS,  
BREWERS, WHOLESALERS AND RETAILERS OF INTOXICATING LIQUOR.

The Liquor Control Act of the State of Missouri provides in Section 25 as follows:

"SECTION 25. The Board of Aldermen, City Council or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers, wholesalers, and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

It will be noticed that this section refers only to cities and makes no mention of towns incorporated by virtue of Chapter 38 of the Revised Statutes of Missouri, 1929. A literal interpretation of this section therefore could not include incorporated towns within its provisions. However, the spirit of the law and the intent of the Legislature would seem to indicate that the word "city" should include incorporated towns. This construction is made more apparent when we consider the nature of the law concerning which the Supreme Court of Missouri stated, in the case of *State ex rel. Troll v. Hudson*, 78 Mo. 302; 1.c. 304,

"Such laws are regarded 'as police regulations, established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances,' and are not regarded as an exercise of the taxing power. 'Pursuits that are pernicious or detrimental to public morals may be prohibited altogether, or licensed for a compensation to the public.' "

In addition, we have the construction of the Kansas City Court of Appeals in the case of State ex rel. Rice v. Simmons, 35 Mo. App. 374, l.c. 380, wherein it was held that the word "town" included the word city. The language of the court on this point is illuminating.

"The contention in that case was that the word, 'towns,' as used in the constitution, did not embrace cities. The court said: 'But this argument is founded on the false basis of looking only at the letter of the law, and turning away from its spirit. It is true that if the letter of the law is absolutely unambiguous and definite and were susceptible of but a single meaning, the clause would have to be read in such sense, no matter to what futility it might lead. But such is not the case; the word 'town', has no such fixed signification as this, for though in its narrower sense it denotes something other than a city, in its broader scope it comprehends such a municipality. Mr. Tomlyn, in his law dictionary, under the title, 'Town,' says: 'Under the name of a town or village, boroughs, and, it is said cities are contained, for every borough or city is a town.' Lord Coke, in 1 Inst., 116, showing the capaciousness of the term, has this language: 'And is appeareth by Littleton, that a town is a genus, and a borough is the species.' Bouvier's definition of the word 'city' is, 'a town incorporated by that name.' These authorities suffice to show that the term in question is sufficiently classic to take in, when put to some of its uses, the institution denoted by the term 'city.'

Nor is the force of this consideration countervailed by the fact that some of the local governments in this state are incorporated under the designation of towns, and that others by the same means, are denominated cities. Pell v. Newark, 1b. 550; Anderson v. City of Trenton, 42 N. J. L. 487; State v. Goldstucker, 40 Wis. 124."

In Section 13a of the Liquor Control Act, the following provision is made:

"Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred (500) inhabitants or more."

The wording of this law in 13-a would seem to foreclose the application of Section 25 to any city or incorporated village having less than five hundred (500) inhabitants. However, Section 13-a has to do with the right of the municipal corporations having less than twenty thousand (20,000) inhabitants to vote on the question of whether or not the sale of intoxicating liquor by the drink shall be allowed within the confines of said city. The provision heretofore referred to is a part of Section 13-a and a logical construction of the intent of the Legislature in enacting this provision is that they intended that to apply only to Section 13-a, the intent being that intoxicating liquor could not be sold by the drink under any circumstances in a municipal corporation having less than five hundred (500) inhabitants.

We conclude, therefore, that this provision of Section 13-a is not applicable to Section 25 of the Liquor Control Act of Missouri. While we believe these statutory constructions to be sound as tending to carry out the spirit of the law and the intention of the Legislature,

nevertheless it is not necessary in the instant case to rely wholly upon our construction of the Liquor Control Act. Section 7091 R. S. Mo. 1929 provides for the incorporation of towns and villages. Section 7097 R. S. Mo. 1929 provides in part as follows:

"Such board of trustees shall have power to pass by-laws and ordinances to prevent and remove nuisances; \* to license, tax and regulate merchants, peddlers and auctioneers, and to regulate and prohibit the sale or giving away of intoxicating liquors under merchants' licenses in such towns: \* "

Volume 37 of Corpus Juris, p. 178 states the general law to be:

"Unless some other provision of law forbids the exercise of the power to license, the power of a municipal corporation to license an occupation or privilege and impose a license fee or tax thereon is generally implied from power to regulate such occupation or privilege; or from power to control or suppress, to suppress and restrain, to license, regulate, and tax, or to prohibit, such occupation or privilege."

In the case of City of Troy v. Harris, 102 Mo. App. 51, 1.c. 59, the court said:

"A license with or without a substantial charge for it (that is, one intended either for regulation or for revenue) may be exacted by municipalities as a prerequisite to the pursuit of a business in



its borders when the statutes so prescribe."

In the very early case of City of St. Louis v. Smith, 2 Mo. 113, the court said:

"But as to the tippling house, by law it may exist. The County Court may grant it a license, (94) and I cannot see how the corporation could well prohibit their existence if the County Court should license them. Then as to the tippling houses licensed by the County Court, the corporation may restrain, and where not authorized by the County Court, may suppress and prohibit altogether. (a)

"The question then arises, what is meant by restrain? I understand that any impediment thrown in the way of an unlimited exercise of a power, is a restraint; the restraint may be so great that it amounts almost or entirely to an exclusion to the exercise of the power. Yet it may be less, so much so that the restraint is scarcely perceptible. To require a license on the payment of fifty dollars, or to pay a fine of one hundred for neglect of this license, is a restraint. It may be a sufficient one, and if not, the corporation may provide other restraints."

#### CONCLUSION.

In view of the foregoing, it is the opinion of this department that by reason of the provisions of the Liquor

Honorable J. Ed Old

-7-

June 28th, 1934.

Control Act of Missouri and Section 7097 R. S. Mo. 1929, the Board of Trustees of an incorporated town or village has the power to pass by-laws and ordinances to regulate and prohibit the sale or giving away of intoxicating liquors, and that the power to license such occupation is a necessary incident to the power to regulate and prohibit.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

JWH:FE

247  
INSURANCE DEPARTMENT: CORPORATIONS: SECRETARY OF STATE:

Receiver of dissolved insurance corporation does not have authority to sell the charter of the corporation and no rights could be acquired by such a sale.

9-12  
September 1, 1934

Honorable R. E. O'Malley  
Superintendent Insurance Department  
Jefferson City  
Missouri



Dear Sir:

Re: Sedalia Life Insurance Company  
now claimed Guaranty Fund Life and  
Casualty Insurance Company.

This Department acknowledges receipt of your letter dated August 29, 1934 as follows:

"Re: Sedalia Life Insurance Company  
now, Guaranty Fund Life and  
Casualty Insurance Company.

You will find enclosed copies of the petition and decree in the case of Joseph B. Thompson, Superintendent vs. Sedalia Life Insurance Company, and also a copy of a motion to set aside order of dissolution and an order in that connection, and an order modifying the original decree and authorizing the sale of the charter. You will note that this receivership proceeding was lodged in the Circuit Court of Pettis County, Missouri.

The records of this Department show that prior to the 7th day of April, 1932, the Sedalia Life Insurance Company, a Corporation, was chartered by the Secretary of State of the State of Missouri as a stipulated premium company, organized under the terms of Article 4, Chapter 37, R.S. Mo. 1929. At that time this company was licensed by this Department to issue

September 1, 1934

insurance contracts upon the stipulated premium plan.

Our records further show that some time prior to April 7, 1932 the petition attached hereto was filed in the Circuit Court of Pettis County, Missouri, in which the dissolution of the Sedalia Life Insurance Company was asked. The copy of that decree attached hereto shows that on the 7th day of April, 1932 that the said company was dissolved as of that date. The attached application and order also show that on or about the 26th day of September, 1932 the Circuit Court of Pettis County attempted to modify its decree of April 7, 1932 and to reinstate the charter. The records of the Department show that on or about this time this charter was sold to D. Sharpe of Kansas City, Missouri and on March 1, 1933 the charter was amended in the office of the Secretary of State to change the name of the company to the Guaranty Fund Life and Casualty Insurance Company and the location of the home office from Sedalia, Missouri to Kansas City, Missouri; that as of March 1, 1933 this amended charter was reinstated by the Secretary of State and has been since that time, and still is, operating under this reinstatement.

Under the statutes of Missouri relating to insurance companies the Circuit Court has the power to dissolve an insurance corporation and annul its charter.

We would like to have your opinion as to whether or not the Circuit Court of Pettis County, Missouri had the power to reinstate the charter and to modify its former decree to that extent. It so happens that all of the assets of the company were completely liquidated and after such liquidation the receiver was discharged.

We are giving you this information also for the purpose of permitting you to take any steps in regard to this charter that you might care to, if you should find that the

September 1, 1934

Circuit Court exceeded its power in attempting to reinstate the charter."

1.

From the inclosures attached to your letter it appears that the then Superintendent of Insurance, Joseph B. Thompson, prayed in the petition filed in the Circuit Court of Pettis County, Missouri against the Sedalia Life Insurance Company, for a permanent injunction against the company from further transacting its business; for a decree dissolving the defendant company, and for the appointment of a temporary agent to take charge of the company.

The draft of the decree attached to your letter contains the following:

"WHEREFORE, the court renders and enters its judgment herein dissolving defendant company and cancelling and making void all of defendant's policy obligations, if any, outstanding and in force as of this date. "

Thereafter, on the 26th day of September, 1932, on motion filed by Thompson, Superintendent, the Circuit Court of Pettis County attempted to modify its original decree of dissolution and among other things made an order as follows:

"It is accordingly ordered, adjudged and decreed that the parts of the decree heretofore on the 7th day of April, 1932, entered which may be construed to annul or dissolve the charter of Sedalia Life Insurance Company be and the same hereby is modified and set aside and that said charter be and the same hereby is adjudged and decreed to be alive and an existing asset and subject to sale.

It is further ordered, adjudged and decreed that the receiver be and he hereby is authorized to sell same at private sale to D. Sharpe for the price and sum of two hundred dollars cash."

2.

The petition referred to alleges that the Sedalia Life Insurance Company was a corporation organized and existing under and by virtue of the laws of the State of Missouri. The decree of the court so found, so that we necessarily assume that a charter was issued to the defendant corporation by the Secretary of State of the State of Missouri.

A 'charter' is defined in Ryan v. Witt (Tex.Civ.A.) 173 S. W. 952, 959, as follows:

" 'A charter' is the authority by virtue of which an organized body acts."

As to the effect of the dissolution by a decree of court on a corporation, in Park Co. v. Gibson 268 Mo. 394, 403, the Supreme Court of this state said:

"In the case of Crossman v. Vivienda Water Co., 150 Cal. 1, c. 580, it was held: 'It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death. There is no one who can appear or act for it, and all actions pending against it are abated, and any judgment attempted to be given against it is void. As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority.'"

3.

It appears from the inclosures in this case that, acting under the pretended sale of the pretended charter of the Sedalia Life Insurance Company, the alleged charter was purported to be amended in the office of the Secretary of State to change the name of the company from Sedalia Life Insurance Company to Guaranty Fund Life and Casualty Insurance Company, and the location of the home office from Sedalia to Kansas City, Missouri. Doubtless this was done without



September 1, 1934

knowledge on the part of the office of the Secretary of State as to what had previously transpired as to the Sedalia Life Insurance Company. The laws of this state provide for the organization of corporations and for the payment of certain fees on account thereof, and the maintenance of certain deposits when certain insurance companies are incorporated. The evident purpose of the manner of the handling of the purported charter of the defunct Sedalia Life Insurance Company, was to defraud the state of its legitimate fees and income which it would have derived from a proper organization of the Guaranty Fund Life and Casualty Insurance Company, and to evade the requirements of the insurance laws with reference to the maintenance of deposits for the protection of policyholders. When the Circuit Court of Pettis County dissolved the Sedalia Life Insurance Company as a corporation, according to the decision of the Supreme Court of this state above quoted the corporation lost its identity and the existence theretofore given it by its charter, and necessarily the evidence and source of its former incorporation went with it.

To approve the record made in this case would be to give sanction to a patent fraud on the State of Missouri.

#### CONCLUSION.

We are of the opinion that the pretended sale of the pretended charter of the Sedalia Life Insurance Company was a nullity, and that the pretended Guaranty Fund Life and Casualty Insurance Company does not have legal existence as a corporation under the laws of this state.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK  
Attorney General.

GL:LC

DENTISTS  
INTOXICATING LIQUORS

- Without authority to write pre-  
scriptions for intoxicating liquors.

9-12  
September 7, 1934



Honorable John B. Owen  
Prosecuting Attorney  
Henry County  
Clinton, Missouri

Dear Sir:

We have your request for an opinion upon  
the following matter:

"Can a dentist in your opinion  
prescribe for medicinal purposes  
intoxicating liquor."

We call your attention to Chapter 106 R. S.  
Mo. 1929 regulating the practice of dentistry in this  
state. The only statute therein we find dealing with  
the right of a dentist to issue a prescription is in  
the form of an authorization that druggists may fill  
such prescription. Section 13579 is as follows:

"Legally licensed druggists of  
this state may fill prescriptions  
of legally licensed dentists of  
this state for any drug necessary  
in the practice of dentistry."

It will thus be noted that under the State  
Dental Act the authority of druggists to fill pre-

#2 - Honorable John B. Owen

scriptions of dentists is confined to drugs.

The 1933 Legislature, in dealing with intoxicating liquors, Laws 1933, p. 277, Section 4486, provided:

"It shall be lawful for any registered pharmacist engaged in the retail drug business or employed as a pharmacist in any retail drug store in this state to fill any prescription of any reputable physician licensed to practice medicine and surgery in this state, prescribing for the person named in such prescription any distilled, spiritous, vinous, fermented or other alcoholic liquor."

It will be noted in the above section that the prescriptions for intoxicating liquors are to be issued by a physician licensed to practice medicine and surgery in this state. We are confronted with the proposition of whether or not a dentist is such a physician. An examination of Chapter 53, R. S. Mo. 1929 relating to medicine and surgery, will reveal that dentists are not therein included.

The Supreme Court of Missouri en banc, State ex rel. Flickinger v. Fisher (1893), 119 Mo. 344, had before it for construction a statute exempting persons from jury service, among which exemptions were:

"a practitioner of medicine and surgery in any of their departments."

The contention made was that a dentist was a practitioner of medicine and surgery. In denying such contention and in holding that a dentist then was subject to jury service, the court said: l.c. 353,

"Relator evidently feels unsteady on his logical legs if his sole reliance is to be on the statutory exemptions heretofore noted, and so he resorts to the lexicographers, and quotes from the Century Dictionary, where 'Dentist' is thus defined: 'One whose profession it is to clean and extract teeth, repair them when diseased, and replace them when necessary by artificial ones; one who practices dental surgery and mechanical dentistry; a dental surgeon.' If relator had delved more deeply into the science of definitions, and had turned another page of the same work, he would have found 'Chiropodist. One who treats diseases or malformations of the hands or feet; especially a surgeon for the feet, hands and nails; a cutter or extractor of corns and callosities; a corn doctor.' So that if relator is exempt from jury duty because, as he says, he 'treats professionally diseases of the oral cavity,' so, also, is his less pretentious professional brother, who, with equal scientific skill, treats diseases or malformations of the hands or feet, and who is content to be dubbed 'corn doctor.' Certainly the argument and the definition which would support the exemption of the dentist as a 'practitioner of medicine and surgery,' would also equally support that of his cognate scientist, albeit of humbler professional pretensions.

The disposition of persons to magnify and exalt their callings or occupations has become wonderfully prevalent in these latter days. He who shoves a jackplane and wields a saw is no longer a 'carpenter,' but an 'architect and builder;' the solicitor of orders from our retail merchants

#4 - Honorable John B. Owen

is no longer a 'drummer,' but a 'commercial traveler;' and the loquacious individual who scrapes your chin is no longer a 'barber', but a 'tonsorial artist.' "

The above interpretation of the jury statute was followed in construing a similar statute in Michigan, *People v. DeFrance* (Mich. 1895) 22 L.R.A. 139.

The special session of the Legislature, Laws Mo. Special Session 1933-34, p. 79, Sec. 4, attempted to go into this matter further, and, among other things, provided:

"\*provided further, that nothing in this act shall be construed as limiting the right of a physician to prescribe intoxicating liquor in accordance with his professional judgment for any patient at any time, or prevent a druggist from selling intoxicating liquor to a person on prescription from a regularly licensed physician as above provided."

From the above utterance, last and point of time of the Legislature, the authority to issue prescriptions for intoxicating liquor is limited to the general class known as "physicians". This identical question was raised in *State v. McMinn*, 24 S. E. 523 wherein the laws of North Carolina, provided a separate governing act for dentists and a separate governing act for physicians and surgeons such as we have in this state at this time. In holding that a dentist is not a physician authorized to issue prescriptions for intoxicating liquor, the Supreme Court of North Carolina, l.c. 524, said:

"If dentists come within the term 'physician,' as used in Code, Sec.

#5 - Honorable John B. Owen

1117, 'toothache' would become more alarmingly prevalent than 'snake bite'; and that it would, with usage, become more dangerous, is evident from the fact that the very first dental surgeon's prescription for toothache, coming before us, is for 'one pint of whiskey.' The size of the tooth is not given, nor whether it was a molar, incisor, eye tooth, or wisdom tooth; and yet there are 32 teeth in a full set, each of which might ache on Sunday. The duties of a dentist are limited to the 'manual or mechanical operations' on the teeth. Whenever the use of liquor is necessary, it being a remedy to act on the body, and only indirectly in any case for the teeth, within the purview of the statute, it must be prescribed by a 'physician', to authorize a sale on Sunday."

It is, therefore, the opinion of this office that a dentist is not authorized to write prescriptions for intoxicating liquors.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE



TOWNSHIP ROAD BOND FUNDS:

Monies in hands of township trustee for use in paying principal and interest on road bonds cannot be invested but must be placed by trustee in bank on order of township board of directors.

9-10

September 8th, 1934.



Mr. John B. Owen,  
Prosecuting Attorney, Henry County,  
Clinton, Missouri.

Dear Sir:-

We have your letter of July 5, 1934, in which was contained a request for an opinion as follows:

"We have a situation in this county where a township has voted bonds for road purposes. All bonds have been paid as they became due. The township now has monies on hands with which additional bonds could be retired but the holders refuse to release unless paid a premium as their bonds are not yet subject to recall. The township does not want the money on hand in bank and are desirous of investing same pending time when the bonds are due. Can they do this and if so does the law provide for any special form of investment in such cases. They desire to put them in Government bonds but I am unable to find any authorization for such investment under Township Organization. Your opinion in the matter will be appreciated."

We assume that the bonds referred to in your letter are those provided for in sections 7960, 7961, 7962, 7963 and 7964, Revised Statutes of Missouri, 1929, and that the monies referred to are monies collected under the tax levied in accordance with section 7961 for the purpose of paying the principal and interest of such bonds as provided therein.

A careful search of the statutes has failed to reveal any provision authorizing the investment of such funds pending their payment on principal and interest of the bonds.

Article X, section 20, of the Constitution of Missouri provides as follows:

September 8th, 1934.

"The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise."

Investment of such funds might not militate against the above provision but the matter is problematical. The chief difficulty is that there is no statutory or constitutional provision authorizing the investment of these funds, whereas, for instance, in the case of township school funds such is specifically provided (Sections 9250, 9251, R. S. Mo. 1929). There being no specific provision for the handling of such funds, they must be handled in the ordinary way as provided by statute.

Section 12291, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 12291. MONEY TO BE PAID OUT ONLY ON ORDER OF TOWNSHIP BOARD--SCHOOL DISTRICTS NOT AFFECTED.--The township trustee and ex officio treasurer shall not pay out any moneys belonging to the township for any purpose whatever, except upon the order of the township board of directors, signed by the chairman of said board and attested by the township clerk: Provided, that nothing in this chapter shall be so construed as to change or interfere with any school district, the boundary lines of which are different from that of the municipal township as organized under the provisions of this chapter, nor with the payment of any school moneys upon proper vouchers. He shall receive from the township collector and the county collector or treasurer all road and bridge and other taxes due the township when collected by such officers, and shall receipt for the same, and shall account therefor in like manner as for other moneys in his hands belonging to the township."

Section 12184, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 12184. DEPOSITARY OF COUNTY FUNDS.--HOW SELECTED.--It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds

John B. Owen--#3

September 8th, 1934.

of said county. For the purpose of letting such funds, such county court shall, by order of record, divide said funds into not less than two nor more than ten equal parts, and the bids herein provided for may be for one or more of such parts. Notice that such bids will be received, shall be published by the clerk of said court twenty days before the commencement of said term in some newspaper published in said county, and if no newspaper be published therein, then such notice shall be published at the door of the courthouse of said county: Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety; provided, also, that in all cases of the letting of township funds, three notices, posted in three public places by the township clerk, will be a sufficient notice of such letting. (R.S. 1919, Sec. 9582)."

Under the above two sections the funds in question should, upon the order of the township board of directors, be placed in the designated bank by the township trustee. We have no choice but to so hold.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

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Attorney-General.

OFFICERS: Section 3945, R. S. Mo. 1929, makes misconduct  
; CIRCUIT CLERK: or abuse of authority in office a misdemeanor;  
Section 11681, R. S. Mo. 1929, makes a wilfull  
act contrary to duties a misdemeanor; whether or  
not Clerk wrongfully issuing subpoenas is guilty  
under either section depends upon full develop-  
ment of facts.

September 12, 1934.



Mr. John B. Owen,  
Prosecuting Attorney,  
Clinton, Missouri.

Dear Sir:

We are acknowledging receipt of your letter  
in which you inquire as follows:

"We have a grand jury called in this county for the middle of September. The order was made and turned over to the sheriff two days before the August 7th primary. The Circuit Judge wrote all judges of election and cautioned them to be on the alert and be prepared to get information if possible, to present before said body of any election irregularities that might come to their attention. This was a few days prior to said primary. On the night before the primary the Circuit Clerk issued some 60 subpoenas for all judges and many of the election workers in the City of Clinton to appear before the grand jury which the Sheriff had not even selected or summoned. Said subpoenas were issued under the signature of said clerk and his official seal and had the general effect of checking all activities of workers at the polls on primary day so subpoenaed. Subpoenas were not ordered issued by Circuit Judge but solely on the Circuit Clerk's initiative and to aid in his own political ends. Is there, in your opinion, any liability, civil or criminal, on the part of the clerk for such act? Also is the Sheriff entitled to fees on these subpoenas served which were issued without authority or order?

"There is considerable feeling over the transaction in the county and the matter is bound to be called to the attention of the grand jury. Will you therefore kindly advance this request on your file and give me an early opinion."

You inquire what civil or criminal liability arises where the Circuit Clerk, of his own motion, and without being requested by any proper officer, issues subpoenas for witnesses to appear before a grand jury before the grand jury is even subpoenaed, called or impaneled. In attempting to solve your problem we shall first call your attention to the sections which involve the issuing of subpoenas by the Circuit Clerk.

Section 3525, R. S. Mo. 1929, provides as follows:

"Whenever thereto required by any grand jury, or the foreman thereof, or by the prosecuting attorney, the clerk of the court in which such jury is impaneled shall issue subpoenas and other process to bring witnesses to testify before such grand jury: Provided, that after the finding and returning of any indictment by said grand jury, such foreman, prosecuting attorney, or jury, shall not have the right to cause any subpoena or other process to be issued for any person who is known or believed by such foreman, prosecuting attorney or jury to be a witness in behalf of the person or persons so indicted, or who has been subpoenaed as a witness in behalf of such person or persons, or whom such foreman, prosecuting attorney or jury may have reason to believe will be summoned as a witness in behalf of such person or persons, in regard to the matter or matters charged against said person or persons in such indictment, except upon the written order of the judge of the court into which such indictment is returned."

Section 3545, R. S. Mo. 1929, provides as follows:

"It shall be the duty of the circuit clerk, or clerk of any court having criminal jurisdiction, to issue subpoenas in vacation for witnesses to be and appear before the grand jury at the ensuing term of the circuit court thereafter, at the instance of the prosecuting attorney, whenever it shall be shown that such witnesses are about to absent themselves to avoid



being subpoenaed before the grand jury in term time."

It appears that under Section 3525 the Clerk of the Court in which the grand jury is impaneled shall issue subpoenas and other process to bring witnesses to testify before such grand jury whenever required by any grand jury, or the foreman thereof, or by the prosecuting attorney. Under Section 3545, it is the duty of the Clerk to issue subpoenas in vacation to witnesses to appear before the grand jury at the instance of the prosecuting attorney whenever it is shown that such witnesses are about to absent themselves in order to avoid being subpoenaed. We have diligently searched the Statutes and have been unable to find any section in the Statutes which authorizes the Circuit Clerk to issue subpoenas or other process to witnesses to appear before a grand jury, unless directed to by the Judge, the grand jury, the foreman of the grand jury, or by the prosecuting attorney. You state in your letter that no officer authorized by law directed the Circuit Clerk to issue the subpoenas which he did issue, but that such subpoenas were issued without authority by the Circuit Clerk and for the purpose of furthering his own political ambitions. We must conclude, therefore, that the Circuit Clerk was not authorized to issue the subpoenas in question. There is no Statute that we know of which would authorize him to issue subpoenas under the circumstances, and when he issued subpoenas without any authority of law, then it appears to us that he has committed an illegal act.

Section 11681, R. S. Mo. 1929, provides as follows:

"If any clerk shall knowingly and willfully do any act contrary to the duties of his office, or shall knowingly and willfully fail to perform any act or duty required of him by law, he shall be deemed guilty of a misdemeanor in office."

Under the foregoing section it is provided that; "If any clerk shall knowingly and willfully do any act contrary to the duties of his office, he shall be deemed guilty of a misdemeanor in office." Upon the facts stated in your letter it was certainly not the duty of the Circuit Clerk to issue the subpoenas in the manner in which he did. As a matter of fact, the issuing of those subpoenas were not authorized by law because he was not directed to issue them by an officer which the law empowers to direct the issuance of subpoenas. Although we have not been able to find any



decision which directly holds that a ministerial officer who does the acts which were committed by the Circuit Clerk is a misdemeanor, yet the plain terms of the Statute makes it a misdemeanor in office when the Circuit Clerk commits any act contrary to the duties of his office. The duties of his office are set out by Statute and among other duties it is his duty, when directed by the proper official, to issue the subpoenas in question. If he issues subpoenas for witnesses to appear before the grand jury when not directed by the officers specified in the Statute, then it appears to us that he has committed an act contrary to the duties of his office, within the meaning of the above Statute. Under Section 11682, R. S. Mo. 1929, and the following sections, which we shall not quote because they are merely incidental to your inquiry, the method of trying a Circuit Clerk for a misdemeanor in office is fully set out. Section 11687, R. S. Mo. 1929, provides as follows:

"If any clerk against whom charges shall be exhibited as aforesaid shall be found guilty thereof, he shall be removed from his office, and be fined at the discretion of the court in any sum not exceeding one thousand dollars to the use of the county of which he was clerk; or, if a clerk of the supreme court, for the use of the state; and he shall pay all the costs of the proceedings."

Under the foregoing section, if the clerk has been found guilty of a misdemeanor in office, it provides for his removal and that he may be fined at the discretion of the court in any sum not exceeding one thousand dollars, to the use of the county. It would appear, therefore, that if the court should find him guilty of a misdemeanor in office he would have a right to fine him. If, however, the court <sup>not</sup> finds him not guilty of a misdemeanor in office he would be subject to a fine under the foregoing section.

Under Article 3 of Chapter 30, R. S. Mo. 1929, which deals with the offenses of persons in office, we find the following sections. Section 3945, provides as follows:

"Every person exercising or holding any office of public trust who shall be guilty of willful and malicious oppression, partiality, misconduct or abuse of authority in his official capacity or under color of his office, shall, on conviction, be deemed guilty of a misdemeanor."

Section 3947, R. S. Mo. 1929, provides as follows:

"Every person who shall be convicted of any of the offenses mentioned in the preceding sections of this article shall be forever disqualified from holding any office of honor, trust or profit under the Constitution and laws of this state, and from voting at any election; and every officer who shall be convicted of any official misdemeanor or misconduct in office, or of any offense which is by this or any other statute punishable by disqualification to hold office, shall, in addition to the other punishment prescribed for such offenses, forfeit his office."

Under Section 3945 above a person who is guilty of willful and malicious oppression, partiality, misconduct or abuse of authority or under color of his office, is guilty of a misdemeanor.

Section 3947 provides that if he is convicted under the above section he shall be disqualified from holding any office under the Constitution and laws of this State and from voting, and shall forfeit his office.

In State v. Gardner, 2 Mo. 23, a Justice of the Peace was prosecuted for a misdemeanor in office for illegally issuing a summons against the defendant. The point raised in that case was whether or not the indictment was sufficient. The indictment did not include the word "corruptly." The court says:

"And the circuit attorney insists that it being clearly a void summons, is a misdemeanor; and it having been alleged to be willful, the statute is satisfied and the indictment good. I am of a contrary opinion. In this case two things are required. First. That the indictment should show such facts as would amount to a misdemeanor independent of the word willful, and to make this out the indictment should charge the act to have been done knowingly and corruptly; and secondly, that the fact should be alleged to be willful."

In that case the Court held that the indictment was bad.

In State v. Flynn, 119 Mo. App. 712, a police

officer was prosecuted for neglect of duty in failing to prevent interference with voters at an election. The case was reversed because the indictment was held to be defective in that it did not contain the word "corruptly." The Court, in discussing the matter, says:

"The rule that a corrupt motive must be alleged and proved, applies where the misconduct related to judicial or quasi-judicial duty. In cases where the rule was applied, the reasoning of the opinions and the authorities cited, show it pertains only to acts which, in the nature of things, would not be criminal unless they were inspired by a corrupt intent; and this was the view adopted in *State v. Ragsdale*. That case was a prosecution of the mayor of a city for oppression in office and was founded on the same statute involved in this prosecution. The information accused the mayor of having acted corruptly; but the trial court refused to charge the jury that they must find he corruptly, knowingly and willfully, was guilty of oppression in office. The court struck the word 'corruptly' out of the instructions. At common law indictments of judicial officers for misconduct in the performance of duty were always required to charge they acted corruptly. The ancient and modern precedents, and the forms of criminal pleadings given by approved text-writers, conform to that rule. On the other hand indictments for official misconduct in the performance of executive and ministerial duties usually do not contain an averment that the misfeasance was corrupt; and many convictions have been sustained without an averment or proof of that kind, though the point was distinctly made that it was necessary. (Citations omitted). The underlying principle of the distinction appears to be that when the official act complained of is of doubtful legality, and the official enjoyed a discretion in the performance of his duties, he cannot be convicted of acting wrongly unless he acted corruptly. But

when the legality of the act is palpable, then willful and intentional delinquency on the part of an official, whether it be a non-feasance or a mis-feasance, is indictable even though his motive was not corrupt in the sense that he sought personal profit."

In *Burkharth v. Stephens et al.*, 117 Mo. App. 425, the county court was prosecuted for a misdemeanor in office. The court, in discussing the word "corruptly" at page 435, says:

"In the use of the words 'corruptly' and 'corruption' we do not mean them to be understood in the sense of bribery or other benefits received by the county judges. Those words, while including such benefit within their meaning, do not necessarily mean that the officer charged with doing an act corruptly did it for gain to himself. He may be guilty, though no personal advantage is thus received from the act. If he does an official act intentionally and knows that it is a wrongful and unlawful act, he does it corruptly. The word, or words, have been held necessary to a proper description of a charge against an officer in criminal proceedings for misconduct in office, but the cases so holding disclose that neither bribery nor personal gain was intended to be charged. *State v. Gardner*, 2 Mo. 23; *State v. Hein*, 50 Mo. 362; *State v. Pinger*, 57 Mo. 243."

In *State v. Grassle*, 74 Mo. App. 313, an indictment was returned against the chairman of a Board of Trustees, alleging a misdemeanor in office. The Court at page 316 says:

"The word 'willful' must be restricted to such acts as are done with an unlawful intent, and implies tort, wrong; it implies legal malice,--that is, that the act was done with evil intent, or without reasonable grounds to believe that the act was lawful. (Citations omitted). To constitute the offense

the act must have been done willfully, maliciously and with a wrongful intent, and where the indictment is brought against a judicial officer, as in this case, the act must be charged to have been knowingly and corruptly done."

This opinion may have become unduly long but we have tried to point out all of the Statutes and some of the decisions dealing with the matter. The cases quoted from contain the citations of other cases which may be useful to you in determining what action to take. Apparently, the Clerk had no authority to issue the subpoenas which he did. There seems to be two sets of Statutes that deal with misdemeanors in office and whether or not you can make your case come under either depends, of course, upon what you may ultimately be able to prove. The removal of an official from public office is a serious matter, especially where there is no moral turpitude involved. We hesitate, in view of the fact that we do not find a case directly in point, to definitely rule that the Clerk is guilty of a misdemeanor in office, not knowing what facts may be developed. We have submitted to you all of the Statutes of which we are cognizant that might apply, and have pointed out to you some decisions construing those Statutes, which may be of value to you. Whether or not you can remove this Clerk from office depends upon the facts which you may be able to establish.

You also inquire whether the Sheriff is entitled to fees on the subpoenas which he served. No officer is entitled to receive fees unless the Statute authorized the payment of such fees, and such Statute must be strictly construed. In *State ex rel. v. Brown*, 146 Mo. 1. c. 406, it is said;

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. *State ex rel. v. Wofford*, 116 Mo. 220; *Shed v. Railroad*, 67 Mo. 687; *Gannon v. Lafayette Co.*, 76 Mo. 675."

Of course, it will be admitted that the Sheriff, under the statute, is entitled to fees for serving writs of the court. In the instant case, however, it appears to us that the subpoenas issued by the Clerk were without authority of law and were not writs of the court, but were merely a personal matter upon the part



of the Clerk. This is not a situation where the Court had jurisdiction to issue the writs and for some reason it has been attacked as being illegal. Here is a situation where the writs were not issued by any court within its jurisdiction, but were issued by the Clerk as an individual without any authority. We do not believe that under such circumstances the Sheriff is legally entitled to his fees.

It is therefore the opinion of this Department that the acts of the Circuit Clerk in issuing the subpoenas in question may be a misdemeanor in office and illegal, depending upon what facts are finally developed. The decisions quoted above advise you as to whether or not the act must be corruptly done and what is meant by the word "corruptly." Whether or not the unauthorized acts of the Clerk make him guilty of a misdemeanor we do not believe is material in determining whether or not the Sheriff may collect his fees. We are of the opinion that since the subpoenas were issued without authority and not from a court in exercising its jurisdiction, the Sheriff cannot collect his fees.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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(Acting)  
Attorney General.

FWH:MS



TAXATION:

Senate Bill 94; limitations as applied to sales of delinquent real estate. Section 9961 Revised Statutes Missouri 1929, did not apply to Senate Bill 94 and lands for delinquent taxes for 1928 may be sold under the provisions of Senate Bill No. 94

9-29

September 28, 1934



Honorable R. B. Osborn  
Prosecuting Attorney  
Greenville  
Missouri

Dear Mr. Osborn:

Receipt of your letter dated September 7, 1934 is acknowledged. Your letter is as follows:

"I have noticed in the press reports that the Collectors throughout the state are authorized to proceed to sell real estate for the delinquent taxes for the years 1928 and 1929. I have looked into this matter rather carefully, and it is my opinion that real estate cannot be sold for the delinquent taxes for the year 1928, unless an action for said taxes was instituted prior to January 1, 1934.

Under the provisions of Section 9961, Revised Statutes of 1929, a suit cannot be maintained for the collection of taxes delinquent more than five years. At the time of the enactment of the Jones-Munger tax law, the General Assembly of this state did not repeal said Section 9961, and therefore, the time within which to bring any action or proceeding for the collection of the delinquent real estate taxes for 1928 expired December 31, 1933.

At the Special Session of the General Assembly Section 9961 was repealed and a new section enacted in lieu thereof,

but it was not passed and approved until January 6, 1934. It did not contain an emergency clause, and did not take effect and become the law of this state until 90 days after January 11, 1934, the date of the adjournment of the Legislature. This law is found on pages 154 & 155 of the Laws of the Extra Session of the General Assembly in 1933 and 1934.

It is my opinion that since any action for the collection of delinquent taxes for the year 1928 were barred by the statute of limitation relating to tax suits on January 1, 1934, the amended law aforesaid providing for the collection of the 1928 taxes cannot be enforced, and that said provision in the amended law aforesaid is retrospective in its operation, and therefore, unconstitutional under the provisions of Section 15, Article 2 of the Constitution of Missouri.

This question will come before me a great many times this fall, and I want to be right about it, and I will appreciate your opinion on this matter very much."

We are inclosing you herewith portion of a copy of an opinion heretofore issued by this office and dealing directly with the matter discussed by you, which opinion speaks for itself.

It is our opinion that from the time Senate Bill 94, as found in Laws Missouri 1933, page 425, went into effect until the enactment of and going into effect of Section 9961 as found in Laws of Missouri, Extra Session 1933-1934, pages 154 and 155, there was no statute of limitation in effect in this state barring the sale of lands for delinquent taxes for any year, and that the limitation section found in Laws of Missouri, Extra Session 1933-1934, pages 154 and 155, was applicable and referred to sales of delinquent

Honorable R. B. Osborn

-3-

September 28, 1934

lands and lots made under the provisions of the above mentioned Senate Bill 94.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General.

GL:LC

Inclosure

INSURANCE DEPARTMENT:

In order to increase capital stock of a life insurance company names of the subscribers of same, the amount paid, or the securities given by such subscribers guaranteeing payment must be shown in the proceedings to increase the capital stock.

10-5

October 4, 1934

Honorable R. E. O'Malley  
Superintendent of Insurance Department  
Jefferson City  
Missouri



Dear Sir:

We acknowledge receipt of letter of your Department dated September 24, 1934 requesting an opinion as to the increase of the capital stock of the State National Life Insurance Company, with inclosures attached. The letter is as follows:

"We are inclosing herewith a copy of the proceedings of the State National Life Insurance Company purporting to increase the capital stock of said company, as same was filed with us on September 21, 1934. We would like your opinion as to whether the papers included herein are legally sufficient to warrant the Superintendent in authorizing the increase.

In connection with the above, I call your attention particularly to the fact that there is nothing in said papers showing the names of subscribers, if any, nor the amount paid, if any, nor the security given by said subscribers guaranteeing payment, if any.

It is my personal opinion that Article II and, in fact, the whole of Chapter 37, contemplates that a life insurance company shall have no stock which is not

October 4, 1934

subscribed for and paid up or secured. You will note that in Section 5694, R.S. of Mo. 1929, in the formation of a stock life insurance company, the organizers or incorporators must set forth in their declaration of intention the amount of the proposed capital stock, the number of shares into which it shall be divided, and the manner in which it shall be paid up or secured.

Section 5695, R. S. of Mo. 1929, provides that after the filing of the declaration of intention and certain other formalities, the declaration shall be submitted to you for your approval as to its legality and thereafter the Superintendent, if the legality of the corporate papers is sustained by you, shall file same in the office of the Secretary of State and charter be granted, but in this section it is expressly provided that the company shall not issue policies or transact any business of any kind or nature whatsoever until it is organized and has opened books for subscription to the capital stock and kept the same open until the whole amount specified in the charter is subscribed.

There are requirements other than those of Section 5695 which must be complied with before a license to do business is issued by the Superintendent, but for the present I refer particularly to the line underscored above. It would seem from that requirement that it was the intention of the Legislature to provide that all the stock of a life insurance company must be subscribed before the company is to do business and by this requirement a life insurance company would be kept out of the stock selling business.

This conclusion is further substantiated by the provisions of Section 5715, R. S. of Mo. 1929, where the requirements for the capital stock of a company are listed. That section provides that no stock company shall commence or do business unless, among other things, the full amount of capital stock named in its charter or articles of association shall have been in good faith subscribed, nor until such company shall have at least \$100,000 of its capital paid in and invested in certain securities therein described, nor until it holds, for the balance unpaid on all its capital stock subscribed, the note of prospective subscribers with good and sufficient security therefor other than the stock of said company.

Under Section 5915, R. S. of Mo. 1929, pertaining to the increase of stock of a stock life insurance company, under which section the State National Life Insurance Company desires to increase its stock, we find no such requirements except Section 5916, which section provides that any company increasing its capital stock must comply with the other provisions of this Chapter, and its stock shall be subscribed and secured as provided in this Chapter for companies incorporating thereunder.

The question then presented is whether or not, at the time of authorizing the increase, the company should not have on file with the Insurance Department, together with the other papers inclosed herewith, the names of subscribers to the stock if and when the increase is authorized, the amounts that such subscribers have subscribed, and the amount paid in therefor, or the security given other than the stock of the company.



October 4, 1934

As before stated, it is my opinion that the laws relating to the organization of a stock insurance company are so clear, to the effect that a stock company shall not have upon its books unsubscribed stock, that in order to comply with the law, before an increase should be authorized, the company must have had the stock tentatively subscribed and the subscriptions secured in accordance with the laws applicable to its incorporation. This is necessary because the company is already doing business, since it is a going concern, and if my opinion were not the law, then we would have an insurance company writing business with unsubscribed stock on its books."

The reasoning employed; the analysis of the applicable statutes and the conclusions of law reached by learned counsel of your department are so clearly right and satisfactory that we adopt the same as the opinion of this department.

#### CONCLUSION.

Accordingly, we are of the opinion that the copy of the record of the proceedings submitted, in reference to the purported increase of the capital stock of the State National Life Insurance Company, are insufficient to warrant the Superintendent of Insurance in authorizing the increase of its capital stock for the reason that the names of the subscribers to the desired increased stock, nor the amount of such increase paid, nor the security given by subscribers

Honorable R. E. O'Malley

-5-

October 4, 1934

of such stock guaranteeing payment for same are not shown.

We return you your inclosures herewith.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY MCKITTRICK  
Attorney General.

GL:LC

Inclosures

ELECTIONS: printing of ballot to vote on dog tax may be done on regular election ballot and not invalidate same, but a better form would be to have a separate ballot.

10-19  
October 19, 1934.



Hon. Morris E. Osburn,  
Prosecuting Attorney,  
Shelby County,  
Shelbyville, Missouri.

Dear Sir:

This department is in receipt of your request of October 18 for an opinion as to the following matter:

"I would like an opinion as to whether or not a ballot to vote on a dog tax, as set out in Section 12881, R.S. Mo. 1929 should be printed on the regular election ballot or on a separate ballot."

Section 10300, Laws of Mo. 1933, page 225 is in part as follows:

"Every ballot printed under the provisions of this article shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of this chapter, and no other names. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in the

column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. \*\*\*\*"

We especially call your attention to the fact that the statute uses the phrase "and no other names". This may be interpreted to mean not only are there to be no other names on the ballot, but no other propositions or questions.

Section 12881, R.S. Mo. 1929 provides in part as follows:

\*\*\*\*"Provided that upon the filing of petition signed by one hundred or more householders of any county and presented to the county court at any regular or special session thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question, as to whether or not there should be adopted the law, creating a license tax on dogs, submitted to the qualified voter, to be voted upon at the next election. Upon the receiving of such petition it shall be the duty of the county court to make an order as herein recited, and the county clerk shall see that there is printed upon all ballots to be voted at the next election the following: \*\*\*\*"

You will note that the statute uses the clause "and the county clerk shall see that there is printed on all ballots to be voted at the next election the following \*\*\*\*" This clause could be interpreted to mean that under the provisions of Section 12881, supra, the ballot to vote on a dog tax could be included on the regular ballot; however, regardless of the interpretation we may place upon the statute, the Supreme Court of Missouri has made a pointed decision in the case of State ex inf. Barrett v. Imhoff, 291 Mo., 1.c. 620-621, wherein the Court said:

"The provision in Section 4859, Revised Statutes, 1919, that ballots shall contain only the names of the candidates nominated by the party which the ticket represents will not render invalid the printing of the proposition thereon of the submission of township organization,

if otherwise in conformity with the statutory requirements. Although the course pursued in the instant case was irregular, to render the same fatal the statute must so declare. As was said in *Nance v. Kearbey*, 251 Mo. 374, where an irregularity is not declared by statute to be fatal, the courts will be slow to so construe it as to disfranchise voters because of the errors of officials. As was further said in effect by Lamm, C.J., in that case, to permit a great mass of voters to be disfranchised because of an irregularity in the printing of the ballots, whether the result of design or inadvertence, would be to turn the law into an indefensible trap, and greatly multiply the powers of election officials to control the result of an election. It was further held in that case that a challenge of the tickets for irregularity comes too late after the election in which there was no fraud of any sort; that a timely challenge is necessary to change the result of an honest count.

In the early case of *Applegate v. Eagan*, 74 Mo. 258, this court held that where ballots cast at a general election for state, county and township officers contained, in addition to the names of the candidates and the offices to be filled, a clause for and against township organization and a clause against restraining swine from running at large, with a caption to these clauses in the words 'erase the clause you do not favor', did not invalidate the ballot either as to township organization or the restraining of swine or as to the candidates voted for. A like rule was announced as to clauses on ballots other than the names of the candidates in *State ex rel. Broadhead v. Berg*, 76 Mo. 136, and in *Gumm v. Hubbard*, 97 Mo. 318, in which it is held that where the order of the county court submitting a proposition to the voters is otherwise valid the submission of the same on the general ballot will not render it invalid."

The question was again before the court in the case of Yowell v. Mace, 221 Mo. App., l.c. 91, wherein the court said:

"Plaintiff further contends that the form of ballot used for the stock-law election invalidated the election. The stock-law election was held on the same day as the general election. Instead of a separate ballot, however, there was printed at the foot of each of the seven party tickets appearing on the Australian Ballot used, the following, to-wit:

- ' ☐ For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. Yes.'
- ' ☐ For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. No.'

In other words, this form of ballot for the stock-law election appeared seven times on the ballot, once at the bottom of each party ticket. No words of direction or explanation as to how the ballot should be voted appeared thereon. It is contended that this form of ballot was confusing to the voter and not in accordance with section 4284, Revised Statutes 1919, which provides a form of ballot to be used at stock-law elections in language as follows: 'There shall be written or printed on each ballot voted at said election either of the following sentences: "For enforcing the law restraining (insert name of animals in petition) from running at large" "against enforcing the law restraining (insert the name of animals in petition) from running at large."' This statute evidently contemplates that the voter shall be provided with two stock-law ballots, one for and the other against adoption of the law, and that such voter shall use the ballot he desires to vote, the other to be placed in the box of rejected ballots or destroyed. The statute is, however, somewhat ambiguous and is capable of the interpretation apparently placed upon it by the county clerk when he provided only one form using the words heretofore set out.



The statute nowhere prescribes what shall be the result of failure to use the form of ballot provided therein. That being the situation the failure of the county clerk to provide a ballot identical in form with the statutory ballot would not necessarily invalidate the election. The present rule in this State indicates a liberal attitude on such questions and is thus stated, 'Where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; but where it merely provides that certain ballots shall be used, and does not prescribe what results shall follow if they are not used, the statute is directory, and the test as to the legality of the ballot is whether or not the voters were afforded an opportunity to express, and that they did fairly express their will.' (State ex rel. Memphis v. Hackman, 202 S.W. 14, 273 Mo. 670.)"

#### CONCLUSION

In view of the above decisions, it is the opinion of this department that the ballot in question, relating to the dog tax law, may be printed on the regular general election ballot and the same will not invalidate the election. However, noting that the courts treat this as an irregular procedure, it would be a better form to have a separate ballot for the same.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

63191  
COUNTY BUDGET ACT:

The surplus in any class may be used to make up the deficit in any other succeeding class when it does not jeopardize priorities of payment of the other classes.

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12/28/34  
December 28, 1934



Honorable R. B. Osborn  
Prosecuting Attorney  
Wayne County  
Greenville, Missouri

Dear Sir:

This Department is in receipt of your letter of December 28, 1934, wherein you make the following inquiry regarding the County Budget Act.

"I have advised the County Court of my county that they should take any money in Class 3 and put in class 4 under the Budget Law of this state, when all claims which have priority over class 3 have been cared for and there is a surplus left in Class 3.

In other words we have a surplus in the Road and Bridge Fund with no outstanding obligations in Class 1, 2 and 3. I have further advised them that they could use the surplus in any class prior to Class 4 when there are no outstanding obligations against those classes to the extent of 90 per cent of the anticipated revenue in that particular class.

Will you please advise me if I am correct."

The 1933 session of the Legislature of Missouri created six classes and thereby divided and budgeted the funds of the county according to the terms as set forth in the respective classes. You are doubtless familiar with

the classes and we shall not burden this opinion by quoting the same. A portion of Section 1, page 341, Laws of Missouri 1933 is as follows:

"The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

The first three of the classes mentioned in Section 2 are, by its very terms, made prior liens on the fund of the county. Classes four and five have been interpreted by this department to also be prior liens. By the terms of Section 1 above quoted the main and essential duty of the county court is to sacredly preserve the priorities. You state in your letter that classes one, two and three are amply provided for and have met all the obligations for the year 1934 and there remains a surplus in class three. A question arises as to whether or not the surplus in class three can be transferred to class four, in which class we assume there is a deficit. This department recently rendered an opinion to the Honorable J. A. Yadon, Clerk of the County Court at Albany, Missouri, in which we said:

"The New County Budget Law contains the phrase (Sec.1, page 341) 'the County Court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved.' We are, however, of the opinion that if any balance now remains in any of the five classes which are entitled to priority, the balance, or surplus, may be transferred to Class 5, this being upon the condition that the County Court has over-estimated the amount needed for the various classes and that it is obvious there will be a surplus at the close of the year, or when the new budget

is made and that the priority of any of the classes will in no wise be jeopardized. However, we recommend this course purely at the risk of the County Court, as there is no provision made for transferring balances of funds unless same is done in compliance with Section 12167 R. S. Mo. 1929, which is as follows:

'Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance.'

As stated in the above opinion to Mr. Yadon, there is no express provision in the first eight sections of the County Budget Act which is applicable to your county, namely, Wayne, we do not consider it necessary to make any transfer of any surplus funds to any given class. If it is desired to use the funds of any class in which there is a surplus, the surplus may be used by any succeeding class, the main object being to sacredly preserve priority of all classes which have prior liens and precede the class in which the surplus is sought to be used. It has been urged by some that the surplus arising from any of the classes might not be used by another class, due to a prohibition in Section 8, Laws of Missouri 1933, page 346, which is as follows:

" Any order of the county court of any county authorizing and/or directing the issuance of any warrant, contrary to any provision of this act, shall be void and of no binding force or effect, and any county clerk, county treasurer or other officer participating in the payment or issuance of any such warrant shall be liable therefor upon his official bond."

December 28, 1934

We interpret this portion of the section to relate solely to the issuance of warrants, and the using of any surplus in any one of the funds as hereinbefore detailed would not be a violation of this section or subject any officer to liability upon his official bond. In other words, a county court of a county can use the funds of any class for any legitimate purpose just so long as the priorities are sacredly preserved.

CONCLUSION

It is the opinion of this department that your county court may use the surplus funds now in Class 3 for any deficit which might be in Class 4, or succeeding classes, if all obligations have been and will be met at the close of the year.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

OWN:LC

Approval of Stock increase Liberty National Life Insurance Company

December 29, 1934.



Hon. R. E. O'Malley  
Superintendent of Insurance  
Jefferson City, Missouri

Dear Sir:

In reply to your letter written by J. F. Allobach, Assistant Counsel, dated December 28, 1934, it is my opinion that the reduction of the par value of the capital stock of the Liberty National Life Insurance Company from ten dollars (\$10.00) per share to five dollars (\$5.00) per share, and the increase in the number of shares from 3750 to 5,000 has been in conformance to the insurance laws of the State of Missouri and is not in conflict with the laws of Missouri and the United States, and not inconsistent with the Constitution of Missouri and the United States.

Yours respectfully

Roy McKittrick  
Attorney General

RM:EMW



Approval of decrease in par value of stock American Life Insurance Company.

69

December 31, 1934

Honorable R. E. O'Malley  
Superintendent of the Insurance Department  
Jefferson City  
Missouri

Dear Sir:

This Department acknowledges receipt of your letter dated December 31, 1934, together with inclosures concerning the American Covenant Life Insurance Company.

Upon examination of the documents submitted we are of the opinion that the proceedings seeking to authorize the decrease of the capital stock of such company are in accordance with the law of the State of Missouri and of the United States, and are not inconsistent with the Constitution and laws of this State or the Constitution and laws of the United States.

We are returning you your inclosures herewith.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General.

GL:LC

Inclosures

TOWNSHIP TRUSTEE AS EX OFFICIO TREASURER:

Compensation on sums  
received and disbursed.

1-22  
January 5, 1934.

FILED  
70

Hon. Geo. B. Padget  
Prosecuting Attorney  
Davies County  
Gallatin, Missouri

Dear Mr. Padget:

This Department is in receipt of your letter in which you request an opinion as to the compensation due the township trustee as ex officio treasurer, which letter is as follows:

"I am uncertain as to the exact meaning of Sec. 12310 R. S. 1929, referring to the remuneration for the services of a Township Trustee.

It reads in part "And provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent. for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent. of all sums over said amount."

Now the question on which I desire your opinion is, If one thousand dollars, and no more, comes to his hands, I understand that the trustee is entitled to two per cent for receiving and disbursing said sum. Is that correct?

Then, in case a greater sum than one thousand dollars comes into his hands, is he entitled to two per cent on the first thousand, and one per cent on all sums

above one thousand, or is he only entitled to one per cent of all that comes into his hands, where more than one thousand dollars is received and disbursed by him?"

Your request calls for a construction of Section 12310 R. S. Mo., 1929, as amended by Laws of 1931, page 377, and particularly the latter portion of said section, which section is as follows:

"The township clerk, as clerk, the township trustee, as trustee, members of the township board, and judges and clerks of election, shall each receive for their services two dollars and fifty cents per day: Provided, that the township clerk shall receive fees for the following, and not per diem, for serving notices of election, or each: for filing any instrument of writing, ten cents; for recording any order or instrument of writing, authorized by law, ten cents for every hundred words and figures; for copying and certifying any record in his office, ten cents for every hundred words and figures, to be paid by the person applying for the same. And provided further, that the township trustee as ex officio treasurer shall receive a compensation of two per cent. for receiving and disbursing all moneys coming into his hands as such treasurer when the same shall not exceed the sum of one thousand dollars and one per cent. of all sums over said amount."

In addition to Section 12310, referred to in your letter of request, we desire to direct your attention to Section 12290, R. S. Mo., 1929, which pertains to the duties of trustee and ex officio treasurer in counties under township organization, which section is as follows:

"He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; said book to be kept in such a manner as to show the amount of money in his hands belonging to each school district or fractional part in the township and the amount of road money belonging to the township. He shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within twenty days after the apportionment of the school funds to the school district, and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, and shall pay all warrants drawn on him by the board of school directors in his township out of the funds belonging to the district making the order, and he shall not pay any money out belonging to any other fund than that mentioned in the warrants, and he shall file with the township clerk on or before the day of the regular meeting of the township board in April a detailed statement of all money by him received and paid out, to whom and out of what fund, and the amount on hand, and at the expiration of his term of office he shall turn over to his successor all moneys, books and papers belonging to the office, and take duplicate receipts for the same, one to be filed with the township clerk, the other to be retained by himself."

This latter section in addition to other duties makes it the duty of the trustee ex officio treasurer to make annual

Jan. 5, 1934.

settlements "between the twentieth day of March and the fifteenth day of April with the county clerk."

Replying to the first question in your letter, it is our opinion that if the trustee as ex officio treasurer receives and disburses during the year a sum less than one thousand dollars he would be entitled to two per cent. on the sum which he received and disbursed.

And replying to the second question in your letter, it is our opinion that, should the trustee and ex officio treasurer receive and disburse during the year more than one thousand dollars, he would receive as his compensation two per cent. on the first one thousand dollars so received and disbursed, and one per cent. on all sums over said one thousand dollars received and disbursed. For example, if this official receives and disburses three thousand dollars in one year, that is, when he makes his annual report, he would receive as his compensation under Section 12130, supra, two per cent. on one thousand dollars and one per cent. on the remaining two thousand dollars.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

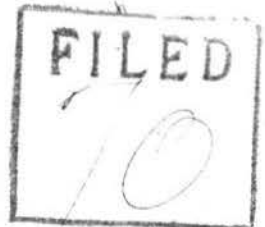
CRH:EG

Optometry Board:

1. Expenses of Board for witness fees, mileage, etc. can be paid.
2. Board not entitled to expenses for travelling investigator of unlicensed operators.

February 16, 1934

2-17-34



Mr. John J. Pardue,  
c/o State Auditor,  
Capitol Building,  
Jefferson City, Missouri.

Dear Mr. Pardue:

We have received your letter of January 30, 1934 in which was contained a request for an opinion as follows:

"I want an opinion from your office in regard to the payment for the Optical Department of the State for witnesses' fees, mileage, affidavits, and all other things pertaining to law suits to drive out the unlicensed operators. They also want to send a man from county to county investigating unlicensed operators with expenses paid for same.

I must have your opinion before I can pay these expenses. Please let me have this at your earliest opportunity."

With regard to your first question concerning the payment of witness fees, mileage, etc., we are of the opinion that such expenses can be paid from the money appropriated to the use of the Board of Optometry. See Laws 1933 page 93, section 7. In subsection D thereof, \$5208.00 is appropriated for operation and general expenses, and the above mentioned items should certainly be classed as general expenses of such board.

Section 13498 R.S. Mo. 1929 provides in part as follows:

"The president and secretary shall have the power to administer oaths and the board to take testimony in all matters relating to its powers and duties, and for that purpose shall be able to compel the attendance of witnesses and the production of all necessary books, papers, or documents, upon the proper service of a subpoena in proper form, duly attested."



Mr. Pardue - #2  
Feb. 16, 1934

Section 13509 R. S. Mo. 1929 provides in part as follows:

"Upon the hearing of any such proceeding, the state board of optometry may administer oaths, and may procure by its subpoena, the attendance of witnesses and the production of relevant books and papers. Any circuit court or any judge of a circuit court, either in term time or in vacation, upon application either of the accused or of the state board of optometry may, by order duly entered, require the attendance of witnesses and the production of relevant books and papers before the state board of optometry in any hearing relating to the refusal, suspension or revocation of certificate of registration."

The above statutory sections are contained in Chapter 101, R. S. Mo. 1929, said chapter being entitled "State Board of Optometry." It will be noticed that while the board is given power to compel the attendance of witnesses, no provision is made for the expense necessarily attendant upon such procedure. Clearly the legislature must have intended that the board should have power to pay these expenses else the nullity of granting a power without the means to use same would result. We are of the opinion that where a power is granted to an officer or a board, that all authority necessary to the effective use of such power is impliedly granted.

In the case of State ex rel Bybee vs Hackmann, 207 S.W. 64, which case was decided by the Supreme Court of Missouri en banc, the court at page 65 stated as follows:

"For it is fundamental that no officer in this state can pay out the money of the state, except pursuant to statutory authority authorizing and warranting such payment. Lamar Tp. v. Lamar, 261 Mo. 171, 169 S.W. 12, Ann. Cas. 1918D, 740. But it is also well-settled, if not fundamental, law that, whenever a duty or power is conferred by statute upon a public officer, all necessary authority to make such powers fully efficacious, or to render the performance of such duties effectual is conferred by implication. Hannibal, etc. Railroad v. County Court, 36 Mo. 303; Walker v. Linn Co., 72 Mo. 650; Sheidley v. Lynch, 95 Mo. 487, 8 S.W. 434."

This decision was approved in State ex rel Bradshaw vs Hackmann, 208 S. W. 445 at pages 447-448.

Under the above decisions, which in our opinion may be taken to apply to boards as well as to officers individually, the board in question should certainly be allowed the witness expenses. In addition, the payment of such expenses can clearly be brought within the terms of the Appropriation Act above referred to, and should be paid from such appropriation.

Mr. Pardue - #3  
Feb. 16, 1934.

As to your second question concerning the right or power of the board to have the expenses of a travelling investigator paid, we are of the opinion that the board has no such right or power. An examination of the statutory sections concerning the Board of Optometry and its powers discloses no such right or power granted, nor is there any provision from which, as in the question above discussed, any such right or power could be inferred. We are relegated, therefore, to the basic principle of law as held in the case of Lamar Township vs. City of Lamar, 261 Mo. 171, and referred to in the Bybee case above cited that no money of the state can be paid out except pursuant to statutory authority authorizing the payment of same.

In addition, Article X, Section 19, of the Constitution of Missouri, provides in part as follows:

"Sec. 19. MONEY TO BE PAID AS APPROPRIATED--  
LIMIT--HOW CONTINUED--RECEIPTS AND EXPENDITURES.- No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law."

We are of the opinion that not only is there no provision in the Board of Optometry statutory sections allowing this right or granting this power but also that the Appropriation Act above referred to does not include same within its purvey; hence, the above constitutional prohibition arises as well. It is true that the Appropriation Act refers in part to "general expenses", but we construe such to include only such expenses as may arise in a usual routine way, and not to include expenses incurred in the instituting and carrying out of an entirely new and unauthorized procedure. Since, therefore, both the lack of statutory authority and the constitutional section militate against this proposition, we are constrained to hold that it cannot be accomplished.

Very truly yours,

CMHjr-LKL

APPROVED:

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

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Attorney-General.

**SUPERINTENDENT OF  
SCHOOLS:**

**— QUALIFICATIONS.**

3-21  
March 21, 1934.



His Excellency  
Governor Guy B. Park  
Jefferson City  
Missouri.

Dear Governor:

We are in receipt of your Excellency's request for an interpretation of Section 9454, R. S. 1929, as to the qualifications of a County Superintendent of public schools.

Section 10929, R. S. Mo. 1909, was amended in 1911 (Laws 1911, page 404), and was carried into the 1919 Revision as Section 11343, which was amended in 1923 (Laws 1923, page 358), so that Section 9454 is the present statute. Said section provides in part as follows:

\*\*\*\*\* said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment, as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent: \*\*\*\*\*

A reading of the above shows that the Legislature intended the County Superintendent of Schools to have the following qualifications:

- (1) Age -- over 24 years;
- (2) Residential -- citizen of county;
- (3) Experience -- teaching or supervise schools;
- (4) Educational -- graduate of schools or having teaching certificate.

The County Superintendent of Schools is an office created by statute, Section 9454, R. S. Mo. 1929. "Such an officer has no common law powers and warrant for all his official acts must appear in statutory enactment." -- State ex inf. Burgess v. Hodge, Missouri Supreme Court In Banc, 320 Mo. 877. This case was a proceeding in the nature of a quo warranto, in which the right of Hodge, respondent, to hold the office of county superintendent of public schools for Barry County was challenged. Hodge was duly elected and qualified but his predecessor in office questioned his right to succeed him in office for the reason that Hodge, on the date of his election, did not have a certificate entitling him to teach in the public schools of Barry County. The trial court gave judgment for respondent, Hodge, which was affirmed by the Supreme Court, which held that a county superintendent elected within three years after a renewal of his certificate was qualified.

The office of County Superintendent of Schools requires that one be qualified as to age, residence, previous experience and education. That provision relating to previous experience is this -

"shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; \*\*\*\*\*"

The Legislature did not prescribe in what grades such person should teach; neither did it say as to what was meant by

"supervised schools". We are inclined to the conclusion (State ex inf. Burgess v. Hodge, supra, and State ex inf. Chinn v. Hollowell, 288 Mo. 674), that this part of the statute simply raises a question of fact as to previous teaching experience; that is to say, that one might not actually have taught school, yet if he "supervised schools" as his chief work during at least two years of the eight years next preceding his election or appointment, then such person would be qualified from an experience or business viewpoint, and this is all we believe that the Legislature intended.

Now, as to the phrase "supervised school as his chief work", we believe that the Legislature intended that to mean, one who had experience and engaged in that particular kind of work, that is, it was not limited to actually being superintendent of schools or a principal of a school but might apply to one who worked with one actually having the authority to supervise. "Supervising" being defined by the Century Dictionary as "oversee, have charge of, with authority to direct or regulate."

In Businessmen's Assurance Company v. Campbell, 6 Fed (2d) 540, the Circuit Court of Appeals, Eighth Circuit, in construing the word "supervise" found in an answer contained in an application for an insurance policy, said the following:

"We think that to supervise such a business means to supervise all of its activities and may include 'demonstrative direction' and 'regulation' in selling, assembling, and teaching the use of farm implements. We do not mean to hold that the term in question would include all general manual labor usually performed by employes or others, and not necessary to the direction and regulation of the work or task in hand. We think that, in determining what is supervision of any particular business, one must consider the character of the business, its customs, and the manner of its general direction and regulation; \*\*\*\*\*"



So we conclude and it is our opinion that if a person actually taught in a school for two years or was engaged in the work of supervising schools either officially or as an employee, or agent, or representative, or aid of a superintendent, then such person would be qualified under this section if such were elected or appointed superintendent.

As to the other part of said section, namely, as to educational qualifications, a person seeking to be County Superintendent would have to hold a State certificate or hold a diploma from one of the State teachers' colleges or State university.

Yours very truly,

---

JAMES L. HORNOSTEL  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.



DELINQUENT TAX ) Appointment and compensation must be approved  
ATTORNEY: ) by county court, Section 9952 R. S. Mo. 1929.

3-26

March 23, 1934.



Hon. George B. Padget  
Prosecuting Attorney  
Daviess County  
Gallatin, Missouri

My Dear Mr. Padget:

Sometime ago you requested an opinion of this office  
on the following matter:

"Judge Brown, presiding Judge of our county court, has requested me to get your opinion pertaining to the collecting of delinquent taxes, and the methods of procedure in such matters. The judge informs me that some time heretofore, Mr. Troxel, the then Treasurer and ex-officio collector, appointed O. O. Mettle, attorney, to collect such delinquent taxes. He further states that under the Statute, such appointment could be made by him, only by, and with the approval of the county court, and that the said court did not approve of the appointment of Mr. Mettle, but that they, the county court wrote on the paper appointing him by said Troxel, that such appointment is not approved. He further states that there are now some suits pending, brought by Mr. Mettle, acting under the appointment of Mr. Troxel, and he desires your opinion as to whether there is any way whereby these pending suits may be dismissed, and collected under and by virtue of the later law for collection of delinquent taxes.

This county court never did approve of this appointment by said Troxel, but notwithstanding Mr. Mettle did continue to act, and institute suits for the collection of taxes,\* \* \* \* \* and therefore they desire this opinion from your office.\* \* \* \* \*

I.

CONTRACT OF DELINQUENT TAX  
ATTORNEY MUST BE IN WRITING  
AND APPROVED BY COUNTY COURT.

We shall first deal with the question as to the status of the delinquent tax attorney under his agreement with the Collector which apparently was not approved by the County Court. Authority for the appointment of a delinquent tax attorney is found in Section 9952 R. S. Mo. 1929 (which section was repealed by the 57th General Assembly). Pertinent portions of this law read as follows:

"\* \* \* \* \*for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court, \* \* \* \* \*to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury,\* \* \* \* \* as may be agreed upon in writing, and approved by the county court, \* \* \* \* \*before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided;\* \* \* \* \*

From the foregoing it is apparent that the County Collector is authorized first, to appoint some attorney at law as his delinquent tax attorney, and second, to agree in writing with such attorney as to his compensation, which in no event shall exceed ten per cent of the amount collected. It is also required that both of these acts of the County Collector, the appointment of the attorney and the agreement as to fees, must be approved by the County Court. While these exact phrases in this section of the statute do not seem to have been passed upon by our Supreme Court, the case of Butler vs. Sullivan County, 108 Mo. 630, is very helpful in determining the necessity for the approval of the County Court of the appointment and the agreement. The Court considered Section 6893 R. S. of 1879, relative to the employment of special counsel for the prosecution of delinquent railroad taxes. Portions of that Section read as follows:

"The County Collectors shall have power with the approval of the county court,\* \* \* \* \* to employ such attorneys as may be deemed necessary to aid and assist the Prosecuting Attorney in conducting and managing such suit; and the Court in which suit is brought shall, if plaintiff obtains judgment, allow such attorneys a reasonable fee for bringing and conducting such suit, which shall be taxed against the defendant, and paid as other costs in the case."

Considering the necessity of the approval of the County Court of the contract contemplated by that section, the Court stated as follows, l. c. 638:

"\* \* \* \* \*The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court.\* \* \* \* \*"

According to this ruling under the statute there considered, it was necessary for the county court to approve the appointment so as to fix the status of the counsel entitling him to receive the compensation fixed by the statute. However, under the instant statute not only must the County Court approve the appointment so as to fix the status of the delinquent tax attorney, but the County Court must also approve the contract for compensation, so as to fix the compensation to be allowed to the delinquent tax attorney. As we view the situation in the absence of the approval of the County Court of the contract, there would be no basis for the assessment of any attorney fees against the delinquent tax payer in the suit, nor would there be any authority for the collection of such attorneys fees and the payment thereof to the purported delinquent tax attorney. This view point is fortified by the ruling in the case of *Schulte vs. City of Jefferson*, 273 S. W. 170. The ordinances of Jefferson City provided that the City Marshal should appoint police officers with the advice and consent of a majority of the members of the City Council. The facts are found at page 171:

"\* \* \* \*It was admitted that plaintiff possessed all of the required qualifications of a police officer; that after the attempted appointment of plaintiff by the marshal, on each of the occasions above referred to, plaintiff began serving as a pretended police officer of the city, and so continued from month to month, acting under order of the marshal and without confirmation by the city council, and was so acting at the time of the commencement of this suit. Plaintiff was never at any time appointed or named as a special officer of the city but has been acting as a regular officer. Plaintiff is suing for pay for services rendered under an alleged 'recess' appointment to fill a vacancy in the office of police officer.\* \* \* \*"

The Court's decision as to the status of the police officer so appointed by the marshal but not approved by the Council is tersely stated on page 172:

"(1) It is well settled--

'Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372. Meachem's Public Office and Officers, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84.

(2) Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office.\* \* \* \*"

We shall next direct our attention to your inquiry as to the authority of the collector to collect these delinquent taxes by virtue of any other law.

II.

COUNTY COLLECTOR MAY DISMISS  
SUIT FOR DELINQUENT TAX AND  
PROCEED UNDER SENATE BILL 94.

At the regular session of the 57th General Assembly the statutes authorizing the enforcement of the payment of delinquent taxes by suit was repealed and an entirely new procedure established for the collection of delinquent taxes. This new law was known as Senate Bill 94 and is found at page 425 Laws of Missouri, 1933. However, in Section 9962b, page 444, the following saving clause is found:

"\* \* \* \* \*provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

By virtue of the foregoing provision the County Collector is specifically authorized under this law to dismiss pending suits for delinquent taxes and to proceed to foreclose the state taxes



Hon. George B. Padget.

-6-

March 23, 1934.

by publication and sale in November of 1934. This provision is clear and explicit

**CONCLUSION.**

It is therefore the opinion of this office, from the information given in your inquiry, that the delinquent tax attorney does not have a valid appointment made in accordance with the appropriate law, and that under the provisions of Section 9962b, Laws of Missouri 1933, the County Collector is empowered, if he deems it advisable, to dismiss the pending suits to enforce the payment of delinquent taxes and proceed with the collection of such delinquent taxes under the provisions of Senate Bill 94.

Respectfully submitted,

**HARRY G. WALTNER, JR.**  
Assistant Attorney General.

**APPROVED:**

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**ROY McKITTRICK,**  
Attorney General.

HGW:MM



**CONSTABLES - Fee for trial or confession in justice court.**

---

4-20

April 11, 1934



Honorable George B. Padget  
Prosecuting Attorney  
Daviness County  
Gallatin, Missouri

Dear Sir:

Your request of March 30th for an opinion is  
as follows:

"I desire your opinion on a little matter pertaining to the fee's legally collectable by a Sheriff. I find under Sec. 11791 R. S. 1929, entitled "Fees of sheriffs, county marshals and other officers", where it provides a fee in every trial in a criminal case, or confession, of \$1.00; Under Sec. 11777, entitled "Fees of constables". I find no provision allowing a constable a fee of \$1.00 or any fee in a trial of a criminal case, or for a confession. Now will you give me an opinion on the two following questions, and oblige. 1st, is a constable entitled to a fee of \$1.00 in a criminal trial, or a confession in a justice of the peace court?, and 2nd, where a county sheriff is acting in a justice peace court, is the sheriff entitled to a fee of \$1.00, or any fee in case of a criminal trial or a confession in the justice of the peace court?."

The pertinent parts of the statute involved  
in this matter are as follows:

Section 11791, R. S. Mo. 1929:

#2 - Honorable George B. Padget

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

\* \* \* \* \*

For every trial in a criminal case  
or confession . . . . . \$1.00."

Certain specific fees are allowed constables under Section 11777 R. S. Mo. 1929, but the statute is silent as to any fee for the constable in the trial of a criminal case or confession in a justice court.

These two statutes (11791 and 11777) are in "pari materia". They relate to the same subject, namely, compensation officers for services rendered in the trial of a criminal case. Section 11791, insofar as its term, "other officers", is concerned, is a general statute and this term would embrace services rendered by anyone else entitled by law to perform the duties ordinarily performed by sheriff or county marshal, and incidentally these duties are daily performed by, and common to, the office of constable. Section 11777, relating to fees of a constable, is a special statute. The two are not repugnant to each other and therefore should be construed so far as to harmonize the two, since this is the general rule of a statutory construction. *Tavis v. Foley*, 30 S. W. (2d) 68 (1930). It is the duty of a court to harmonize statutes relating to the same subject matter if possible, and to give effect to each. *U. S. Veterans Bureau v. Glenn*, 46 S. W. (2d) 200.

It is, therefore, the opinion of this office that a constable comes within that class designated in Section 11791 as "other officers", and that the constable is entitled to a fee of \$1.00 for every trial in a criminal case or confession in the justice court wherein he is the attending officer in the court.

Yours very truly,

APPROVED:

ROY McKITTRICK  
Attorney General

FRANKLIN E. REAGAN  
Assistant Attorney General

FER:FE

**OFFICERS: NOTARY PUBLIC - UNITED STATES POSTMASTERS CANNOT AT THE  
SAME TIME BE A NOTARY PUBLIC IN MISSOURI.**

4-20  
April 16, 1934.



His Excellency  
Governor Guy B. Park  
Executive Office  
Jefferson City, Missouri

Dear Governor:

This department is in receipt of your enclosures and letter dated March 30, 1934, wherein you state as follows:

"I am attaching hereto a letter from Mr. J. W. Swaw, requesting that he be appointed a Notary Public for Maries County, Missouri.

"I am also attaching a copy of our blank Notary Public form of application and you will note that it states in part 'I am not holding an office of profit under the United States'.

"Will you kindly advise me if, in your opinion, a Notary Public Commission should be issued to Mr. Swaw."

Your enclosure signed "J. W. Swaw" and dated March 29, 1934, reads as follows:

"Am asking if you will issue me an appointment as a Notary Public for this Maries County.

"I have served three terms (12 yrs.) as a Notary here and as there is no Notary within 8

4/16/34

miles of here I find a demand for a Notary at this place.

"I have been Postmaster here since 1920 - (4th Class) and also am Justice of the Peace here - this position held for past 12 yrs.

"The Postal Laws will not permit me to hold any elective office, but a 4th Class P.M. may hold appointive positions such as a J.P. or N.P. or other appointive position.

"Will appreciate an early reply."

Your enclosure signed by five citizens and dated March 29th, 1934, reads as follows:

"Realizing the need of a Notary Public at this place we the undersigned citizens ask that you appoint J. W. Swaw, a Notary Public for Maries County. Mr. Swaw has served as Notary at this place for 12 yrs up to 2 yrs ago and he is well qualified for the work."

Your enclosure of Notary Public Form of Application, reads in part as follows:

"Sir: I respectfully request that I be appointed and commissioned a Notary Public from the County of

---

" I am over the age of \_\_\_\_\_ years, a citizen of this State for more than one year, and of the United States, I am not holding an office of profit under the United States, and my occupation at this time is that of \_\_\_\_\_

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" In support of my application, I submit herewith a certificate of my qualifications and moral character, and of my ability to give the necessary bond."

Article XIV., Section 4, of the Missouri Constitution provides that United States officers cannot hold a State office, and reads as follows:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

Section 11738, R. S. Mo. 1929, provides for the term of office for notaries, qualifications, and how appointed, in the following language:

"The governor, shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

Bauer on "John's American Notary", (4th ed.) page 1, paragraph 1, defines a "notary" in the following manner:

"A notary or notary public is an officer appointed by the executive or other appointing power under the laws of different states, having power generally to attest writings for the purpose of establishing their authenticity, to administer oaths, and to perform similar duties."

notaries in the United States and declares in part as follows:

"In the United States, notaries are state officers, usually appointed by the governor. \*\*\*\*\*"

In the case of Fekete v. City of East St. Louis, 145 N. E. 693, the Court said:

\*\*\*\*\*An officer of the United States is one who holds office by virtue of appointment by the President or by heads of departments authorized to make appointments. U. S. v. Mouat, 124 U. S. 303; 8 S. Ct. 505; 31 L. Ed. 463, citing U. S. v. Germaine, 99 U. S. 508, 25 L. Ed. 482; 3 Cyc. 818.\*\*\*\*\*

In the case of State v. Barnham, 137 So. Reporter 862, 1.c. 864, the Court states as follows:

"A postmaster is an officer under the United States, and his office is one of profit. U.S.C.A. Title 5, Sec. 361; Title 39, Sections 31, 34, 53. \*\*\*\*\*"

What is a lucrative office seems to be very well settled upon reason and authority. Kechem on "Public Officers," Section 13, page 10, says:

"An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit."

Section 39, Title 1, of the Postal Laws and Regulations, (1932) deals with restrictions on holding other offices in the



following language:

"No person in the classified civil service and holding a position under the Post Office Department shall accept or hold any elective office under any State, Territorial or Municipal government (including the offices of alderman, councilman, etc.) even though no compensation may attach thereto, and no such person shall accept or hold such office by appointment to fill an unexpired term. Exception is made in the case of a fourth-class postmaster who is a candidate for or holds an elective position of an educational nature such as member of a school board, school committee, etc.; and it is permissible for a fourth-class postmaster to accept or hold such office provided no political issues are involved and no campaign is made for the position."

Paragraph 3 of the same Section sets out the positions that may be held by appointment, and reads as follows:

"A person in the Postal Service may be appointed (not elected) to the office of notary public, \*\*\*\* but will not be permitted to hold such office or position if it interferes with his duties in the Postal Service."

In the case of Foltz v. Kerlin, 4 N. E. Reporter, 439 l.c. 440, the Court held that the offices of postmaster and township trustee, being lucrative offices, they could not be held by one person at the same time. The Court said:

"The state courts have authority to expel him from the office of township trustee, but not from the office held by appointment from the federal government. Our courts cannot decide upon the right of an appointee of the national government, but they can decide upon the right of one asserting a title to an office under the laws

of the state. Within the powers delegated to it, the federal government is supreme, and this necessarily carries the authority to determine upon the qualification of its officers and their right to hold office. \*\*\*\* As our courts have no authority to expel an incumbent from a federal office, they are powerless to control a man who attempts to defy our constitution by holding both a federal and a state office, unless they have authority to expel him from an office held under the laws of the state, notwithstanding the fact that he may have entered into the state office last. We entertain no doubt that our courts do possess power to oust a man from a state office who undertakes to hold it in defiance of our constitution. \*\*\*\* If a man persists in clinging to a federal office, our courts can and will compel him to loosen his hold upon an office created by the state. If he perseveres in his effort to violate our fundamental law by holding two offices, the sure penalty will be the loss of that over which the state has jurisdiction. He may, if he will, surrender the federal office and retain that created by the state, but he cannot retain both in defiance of the constitution. If he elects to hold the federal office, he must surrender the state office. The courts will coerce obedience to the constitution, and will not permit men to hold office in violation of its provisions.

#### CONCLUSION.

Our opinion is limited to the precise issue of whether a postmaster can legally hold a notary public commission within the provisions of Article XIV., Section 4. of the Missouri Constitution, supra.

4/16/34

In the light of the foregoing cases and sections, we reach the conclusion that a postmaster is an officer under the United States and that his office is one of profit under the United States, and further that a notary public is a state officer and that his office is one of profit under this State. This falls directly under the prohibition of Article XIV., Section 4. of the Missouri Constitution, which provides that "no person holding an office under the United States shall, during his continuance in such office, hold any office of profit under this state." We are, therefore, of the opinion that a notary public commission cannot be issued to Mr. Swaw.

It is true that it has been the policy of our Legislature to make an exception in the case of notaries public when restricting the holding of several State offices in one person; but this policy was never intended to apply to State and federal officers as set out in clear and unequivocal language in Article XIV. Section 4. of the Missouri Constitution, *supra*.

It is further true that under paragraph 3 of Section 39 of the Postal Laws and Regulations of 1932, *supra*, an exception is made in the case of persons in postal service who may be appointed (not elected) to the office of the notary public. However, as stated in the case of Foltz v. Kerlin, *supra*, "\*\*\*\* Our courts cannot decide upon the right of an appointee of the national government, but they can decide upon the right of one asserting a title to an office under the laws of the state.\*\*\*\*"

We are, therefore, of the further opinion that Mr. Swaw may be commissioned a notary public if he will surrender his federal office, but he cannot accept or hold both offices in defiance of the Constitution. As was stated in the case of Foltz v. Kerlin, *supra*, "The courts will coerce obedience to the constitution, and will not permit men to hold office in violation of its provisions."

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS  
Assistant Attorney-General.

ROY MCKITTRICK  
Attorney-General.

(Returned to the Governor two of the enclosures - (1) Letter of Mr. J. W. Swaw to the Governor, dated High Gate Mo. March 29th, and the one signed by five citizens by C. E. Davis, dated 3/29/34  
MW/afj

22 ✓ MARSHALL SUPREME COURT - Mileage fees - *When prisoner escapes*

419  
April 19, 1934.



Hon. Guy B. Park,  
Governor of Missouri,  
Jefferson City, Missouri.

Dear Governor:

Acknowledging your request of April 18th for an opinion which was as follows:

"May I ask your opinion as to whether or not the Marshall of the Supreme Court is entitled to mileage and fees as messenger under the following statement of facts:

"The Supreme Court affirmed the sentence of a felon who was on bond at the time sentence was affirmed. The defendant had fled the State and the bond was forfeited. He was apprehended in the State of California and requisition issued to the Governor of that State and by him honored. The Marshall of the Supreme Court was appointed by me as messenger to return the prisoner. He went to California and obtained the custody of the prisoner. Enroute from there to Missouri in a motor car with the prisoner, the prisoner escaped some place in Texas and has not since been apprehended."

The sections of the statutes pertinent to this question are sections 3587 and 3588 of the Revised Statutes of Missouri for 1929 and are in words and figures as follows, to-wit:

"Sec. 3587. Messenger, when to be appointed.- Whenever the governor of this state shall demand a fugitive from Justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to receive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable. R. S. 1919, p. 3930.

Hon. Guy B. Park #2

" Sec. 3588. Expenses under preceding section, how paid. - The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state. (R. S. 1919, p. 3931.)

The question presented has never been passed on by our appellate courts nor can we find any similar case in the United States. The only time the courts of Missouri have construed either section was in *State ex rel. v. Allen*, 180 Mo. 27, when they held that the governor must determine how much shall be paid before the auditor can lawfully issue a warrant.

The cases decided by the other appellate courts of the United States have been determined by some section of their statute involved and which is not in the words of our statutes.

Since our statutes have never been construed upon the points presented by your request it is our purpose to construe them in the manner provided by law.

That part of section 655 of the Revised Statutes of Missouri for 1929 applicable to this opinion is as follows:

"\* \* \*First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import;\* \* \*"

The messenger appointed here was the agent of the Governor to receive and convey the prisoner. The legislature intended that he should not receive any profit from the execution of the Governor's warrant because they fixed as his only compensation actual expenses. Considering the hazards of travel, the time and distance involved we do not feel that the legislature intended that the messenger should be penalized by the loss of his expenses because of an escape, unless

Hon. Guy B. Park #3

it might be shown that he was grossly negligent, and in the absence of any statutory requirement of delivery prior to payment we feel that the legislature took into consideration the fact that a prisoner might be killed, rescued or escape through no fault of the messenger.

#### Conclusion.

The opinion of this office is that since there are no technical words or phrases in these statutes they must be construed in their ordinary meaning and the plain intent was to provide that the messenger in the performance of his duty in the execution of the Governor's warrant, should travel at the expense of the state. It is not reasonable to believe that a messenger as above provided be expected to shoulder necessary expenses of trips where the prisoner escapes his custody. The statutes do not provide any compensation for his time and trouble other than expenses and certainly he should not be an insurer of delivery of his prisoner.

If the legislature had intended the messenger to be an insurer of the safe delivery before expenses be legally allowed they should have so provided in unequivocal terms. We find that the legislature did not so provide but only provided that "expenses be ascertained to the satisfaction of the governor."

It follows then that the governor in his discretion can allow necessary expenses to a messenger in extradition matters and this is true even though the prisoner may escape.

Respectfully submitted,

Roy McKittrick  
Attorney General.



NEPOTISM:-Second cousin not related within the Third Degree, as prohibited by Section 6529, R. S. Mo. 1929.

5-10  
May 7, 1934.



Mr. Kirby W. Patterson,  
City Attorney,  
Springfield, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Our recently elected Commissioner of Streets has requested that I write you for an opinion construing the nepotism provision in the Constitution, and in the Statute relative to cities of the second class, in connection with an appointment which he desires to make.

The person he had in mind for the appointment is the son of a first cousin to the wife of one of the city commissioners. I realize the great number of inquiries that come to your office regarding this subject, but as this is an appointment which the Commissioner desires to make immediately I would greatly appreciate it if you could give an immediate answer to this letter.

Due to the fact that the method of figuring relationship is so different under the civil law and the common law, and also due to the fact that any opinion I would give will be wholly without any authority, it is desirable that we have an opinion from your office on this subject. The section of the statutes relating to nepotism in cities of the second class is Section 6529, R. S. Mo. 1929."

Section 6529, R. S. Mo. 1929, provides as follows:

"It shall be unlawful for any officer of such city to vote for appointment or to appoint any person related to him or to

any member of the city council, by affinity or consanguinity within the third degree, to any clerkship, office, position, employment or duty in such city or in any of its departments; any violation of this section shall ipso facto render vacant the office of the person violating it; and no person appointed in violation of this section shall receive the compensation of the office to which he is so unlawfully appointed."

Under the foregoing section it is illegal for any officer of the city to vote for the appointment, or to appoint any person related to him or to any member of the city council, either by affinity or consanguinity, within the third degree. The question then arises under the section whether the Commissioner is related within the third degree to the son of a first cousin of his wife. The person seeking the appointment and the City Commissioner are related as second cousins.

Under the rule laid down in 12 C. J. 511, there are two methods of computing the degrees of relationship, as follows:

"One by the canon law, which has been adopted into the common law of descents in England, and the other by the civil law which is followed both there and here in determining who is entitled as next of kin to administer personalty of a decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.' By the civil law the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending."

We do not find that the courts of this State have laid down any rule as to how the relationship under the anti-nepotism provision of the Statute or Constitution shall be computed. In other states where anti-nepotism provisions are in force the courts have generally applied the civil rule. We believe that the courts of this State, when the matter is

presented for consideration, will adopt the civil rule and we have consequently applied that rule in computing the degree of relationship prohibited under the Constitution. Applying the civil rule we are of the opinion that a second cousin is not within the third degree, as prohibited by Section 6529, R. S. Mo. 1929, or within the fourth degree, as prohibited by Section 13 of Article XIV of the Constitution.

It is therefore the opinion of this Department that a second cousin is not related within the third degree, as prohibited under Section 6529, R. S. Mo. 1929, or within the fourth degree, as prohibited under Section 13 of Article XIV of the Constitution.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

P. S.  
SHERIFF:

It is the duty of the local sheriff to convey the prisoner to the penitentiary when an appeal is dismissed in the Supreme Court for failure to prosecute same on behalf of the defendant.

June 29, 1934.

6-30

Hon. Geo. B. Padget  
Prosecuting Attorney  
Daviness County  
Gallatin, Missouri



Dear Mr. Padget:

This is to acknowledge your letter of June 20th, as follows:

"I received a postal card from the Clerk of the Supreme Court, dated May 17, 1934, saying 'In case of State v. Milford Lirley. Respondent's motion to dismiss appeal sustained & appeal dismissed'. He was on Dec. 7, 1928 by a jury convicted and punishment two years in penitentiary, various motions and delays were such that he was not formally sentenced until March 31st, 1932 at which time he was formally sentenced by our circuit court to two years in the penitentiary; at which time his appeal was granted to the supreme court, but later the appeal dismissed as above stated.

Now the question is, does the officer's from Supreme court come and take him to the penitentiary, or does our sheriff pick him up and take him?

Now another matter of similar kind; I just received a postal card, from clerk of Supreme Court, saying, 'In case of State vs. Herman Long, respondents motion to dismiss appeal sustained and appeal dismissed.' Herman Long was tried in our circuit court in May 1927, and defendant was convicted and punishment fixed at two years in the Penitentiary.

He filed a motion for new trial, gave a day to day bond and while the case was pending on the motion he forfeited the bond by failing to appear, and afterward he was convicted and sentenced to penitentiary for stealing chickens in another county, and we did not get to sentence him until March 1932. He then appealed, but as above stated the appeal has been dismissed.

The same question in this case as the first one above asked. I don't believe either of them has been taken to penitentiary yet on these convictions, or sentences."

We find that on December 5th, 1933, this Department rendered an opinion which answers your question. In said opinion we held the following:

"We are therefore of the opinion that when a criminal case is dismissed, either at the option of the defendant or for failure to perfect the appeal, it is the duty of the local sheriff to convey the prisoner, in case of a felony, to the penitentiary or to carry out the judgment of the court."

We are of the same opinion at this time, and such applied to the facts in your case.

When an appeal is dismissed by the Supreme Court it has the same effect as though the case had never been before the Supreme Court, consequently the local circuit court has retained jurisdiction all of the while. The appeal being dismissed in the Supreme Court because of the failure of the defendant to perfect same, thus no jurisdiction ever lodged in the Supreme

Court so that that court could not direct the marshal to carry out its mandate affirmance, which would direct the marshall to arrest and convey the prisoner to the Penitentiary.

We are herewith attaching copy of the opinion referred to.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG  
Enc.



TAX

et of judgment on House Bill 124.

9-12

September 4, 1934.



Honorable George B. Padget,  
Prosecuting Attorney,  
Daviess County,  
Gallatin, Missouri.

My dear Mr. Padget:

I acknowledge receipt of your communication of recent date requesting an opinion on the following matter:

"Referring you to page 166 Laws of Mo. Extra Session 1933, where there was a law enacted regarding penalties on delinquent taxes. I desire your opinion.

We have a judgment of our Circuit Court for delinquent taxes against the Farmers Exchange Bank of Gallatin, Mo. which bank failed several years ago, though not yet finally liquidated nor fully settled up; and to date the judgment is not paid. Now does this law have any effect or in any manner interfere with the collecting of the penalties, which penalties are a part and portion of the sum for which the said judgment was obtained before the passing of this law."

House Bill No. 124, found at page 166, Laws of Missouri, Extra Session, 1933-34, reads as follows:

"That all penalties and interest on personal and real estate taxes delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

The title to this act as introduced by Representative Clink-scales indicates that this law was for the relief of the taxpayers of the state, and the Attorney General, in a former opinion, has held that full benefit of this remedial law is to be given the taxpayer. Although this law was approved January 18, 1934, it did not become effective until April 12, 1934. Under the provisions of this law taxes for the year 1932 and prior years are to be computed upon the same penalty basis as taxes for the year 1933.

From your letter I take it that the judgment for these taxes was rendered between the 1st of January and the 12th of April, 1934, or prior to the 13th day of April, 1933. If rendered between April 13 and December 31, 1933, such a decision would be a nullity. In *State ex rel. McKittrick v. Bair*, 63 S.W. (2d) 64, Judge Hays considered the effect of Senate Bill No. 80, a penalty remission law, upon the collection of back taxes by suit and held that no judgment could be rendered during the effective dates of such enactment (l.c. 67):

"All questions necessary to be discussed having been determined, it seems advisable, before closing this opinion, to observe briefly the effect of the change in the law upon the back tax suits that have been filed, or may be filed, subsequently to the date, April 13 of the current year, when this new law became effective. Owing to the alternative opinions granted the taxpayer, with periodically and increasingly reduced advantage to him in the avoidance of penalties, a question of some difficulty is presented pertinent to the effect upon suits pending during any part or all of the entire period covered by the act. Concerning this matter, it is our view (1) that none can proceed to final judgment before the expiration of the act on January 1 next; \*\*\*\*\*"

Providing the judgment referred to in your communication was rendered as aforesaid, to-wit, between January 1 and April 12, 1934, or prior to April 13, 1933, the interests of all the parties thereto thereby became finally settled. Judgment having been rendered, the Legislature would have been without power to remit any portion of the penalties adjudicated to be due in that proceeding. The judgment having vested the right to the various additional charges, the right of the Legislature to remit them is barred by Section 51, Article IV of the Constitution of the State of Missouri. This section reads as follows:

Sept. 4, 1934.

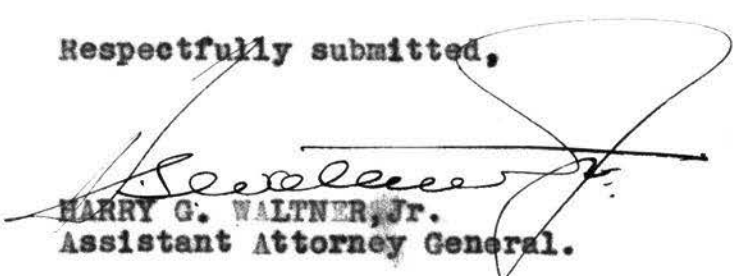
"The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any county or other municipal corporation therein."

However, again returning to House Bill No. 124, there is nothing on the face thereof that indicates that it is to apply to taxes which have been reduced to judgment, and as this act is to be construed so as to remove any constitutional objections thereto, we conclude that there was no intention for this act to apply to valid judgments.

CONCLUSION

It is therefore the opinion of this office that all suits for delinquent taxes which were reduced to judgment prior to the 13th day of April, 1933, or between January 1 and April 12, 1934, have fixed the liability of the taxpayer to pay the penalties, interest and costs legally accruing, and that the payment of such judgments cannot be made under the provisions of House Bill No. 124.

Respectfully submitted,



HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

HGW:AH

HOME OWNERS' LOAN CORPORATION BONDS: Bonds issued under Amended Act of June 27, 1934 may be accepted as collateral for state funds and county deposits; bonds issued prior to effective date of amended section are not acceptable unless they have since received same guarantee.

12-27  
December 17, 1934.



Hon. Francis X. Pavesich,  
Home Owners' Loan Corporation,  
1015 Buder Building,  
7th & Market Streets,  
St. Louis, Missouri.

Dear Sir:

This department is in receipt of your letter of December 7, 1934 making inquiry as to whether or not Home Owners' Loan Corporation Bonds are eligible as security or collateral for the deposit of state funds or county deposits in Missouri.

Section 12187, R.S. Mo. 1929 sets forth the character of security required in Missouri for county deposits and is as follows:

"Within ten days after the selection of depositaries, it shall be the duty of each successful bidder to execute a bond payable to the county, to be approved by the county court and filed in the office of the clerk thereof, with not less than five solvent sureties, who shall own unencumbered real estate in this state of as great value as the amount of said bond, or with a surety or trust company authorized by the laws of this state to execute bonds as surety: Provided, that the court may accept in lieu of real estate as security bonds of the United States or of the state of Missouri, which said bonds shall be deposited as the court may direct; the penalty of each depositary's bond to be not less than such proportion of the total annual revenue of said county for the years for which such bond is given as the sum of the part or parts of the funds awarded to such bidder selected respectively

bears to the whole number of said parts the amount of the bond to be fixed by the court, and said bond shall be conditioned for the faithful performance of all the duties and obligations devolving by law upon said depositary and for the payment upon presentation of all checks drawn upon said depositary by the proper officers of said county or any township whenever any funds shall be in said depositary, and that all interest will be paid promptly, and that all said funds shall be faithfully kept and accounted for according to law; and for a breach of said bond the county or any school district or township of said county or any person injured may maintain an action in the name of the county to the use of the complainant."

Section 11469, Laws of Missouri, 1931, page 378, sets forth the type or character of security required by the State for its deposits and is as follows:

"For the security of the funds deposited by the treasurer under the provisions of articles 1 and 2 of this chapter, the governor, attorney-general and the treasurer shall require of said selected and approved banks or banking institutions giving security for the safe-keeping and payment of said deposits a bond equal to at least 25% of the amount of the accepted bid or bids, to be approved by the governor and attorney-general, and in addition thereto, bonds of the United States, the State of Missouri, or in their discretion, the registered bonds of the City of St. Louis or of any other city in this state having a population of not less than two thousand, or in their discretion the registered bonds of any county in this state, or in their discretion the registered bonds of any school district situated in any city, town or village in this state, or in their discretion the approved registered bonds of any drainage or levee district in this state, or in their discretion the approved registered bonds of any special road district in this state, or in their discretion the registered state bonds of any state, or in their discretion the Federal Land Bank Bonds, to an amount of at least equal in value to the amount of the



deposits with such banks or banking institutions; which bonds shall be delivered to the state treasurer, and receipted for by him and retained by him in the vaults of the state treasury of this state, or in the vaults of such banks or safe depository as the governor, attorney-general and treasurer may agree upon; and if in any case, or at any time, such bonds are not satisfactory security to the governor and attorney-general for deposits made under articles 1 and 2 of this chapter, they may require such additional security to be given as shall be satisfactory to them, which said bonds, or any part thereof, may from time to time be withdrawn on the written consent of the governor, attorney-general and treasurer; and the governor, attorney-general and state treasurer shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the state treasury, or in the vaults of such bank or banks other than the bank or banks selected as the state depository, as the governor, attorney general and state treasurer may have duly agreed upon: Provided, that sufficient amount of said bonds to secure said deposits shall always be kept in the treasury or in such selected depository and in the event that such bank or banks or banking institutions of deposit shall fail to pay such deposits, or any part thereof, on the check or checks of the state treasurer, then it shall be the duty of the state treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrant drawn by the State Auditor upon the funds for which such bonds are security. Any bank making deposits of bonds with the State Treasurer under the provisions of articles 1 and 2 of this chapter may cause such bonds to be indorsed or stamped as may they deem proper, so as to show they are deposited as collateral, and are not transferrable, except upon the conditions of articles 1 and 2 of this chapter: Provided, however, the Governor, Attorney-general and Treasurer in their discretion may allow said selected banks to deposit as security for the safe-keeping of said funds, in lieu of the above mentioned bonds, the notes held by said banks or banking institutions, secured by first deeds of trust on Missouri real estate, which notes and deeds of trust



shall not exceed fifty per cent of the actual value of said real estate, which security shall also be accompanied by an abstract of title certified to date by a competent abstractor and the written opinion of some reputable lawyer to the effect that the title to the lands covered by such deeds of trust is well vested in the grantors of such deeds, and said bank or banking institutions shall be required to furnish a personal bond equal to at least seventy-five per cent of the amount of the accepted bid or bids: Provided, if by reason of the failure of any of the depositories to renew their contracts by having their bid or bids rejected, they shall be allowed by and with the written consent of the governor, attorney-general and state treasurer, not more than one hundred and eighty days from the day their bid or bids may be opened and rejected in which to pay over to the state treasurer whatever balance may be due to the state on the deposit held by them, such balances so held to bear the same rate of interest as provided for in their original bid or bids. The treasurer shall have authority to employ an additional clerk to assist in carrying out the provisions of this section at a salary not to exceed one hundred fifty dollars a month."

You will note in that in both sections of the statute the term "bonds of the United States" is used. As we understand Home Owners' Loan Corporation Bonds, they are not strictly denominated United States Bonds; hence, by a strict construction of the two above quoted sections, we are compelled to say that they are not acceptable as collateral or security for state funds or county deposits because they are not included and set forth in said sections as being acceptable. However, the last session of Congress has apparently broadened the scope of Home Owners' Loan Corporation Bonds, and we believe by amendments to the original Act has made these bonds equivalent to United States Bonds.

Sub-section (c) (1) of Section 4 of the Home Owners' Loan Act of 1933 as Amended provides:

"The Corporation is authorized to issue bonds in an aggregate amount not to exceed \$3,000,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds

for carrying out the purposes of this section or for the redemption of any of its outstanding bonds called in for retirement; and the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so called in and retired. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security for all fiduciary, trust and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder."

The question of United States Bonds and an interpretation of Section 12187, R.S. Mo. 1929 was before the Supreme Court of Missouri in the case of Huntsville Trust Co. v. Noel, 12 S.W. (2d) 1.c. 753-754, wherein the learned judge said:

"The original County Depository Act, including what is now section 9585, was passed in 1889 (Laws 1889, p. 81). The section has undergone amendment from time to time, but is in substantially the same form as originally enacted, with the exception of two major amendments. In 1891 there was inserted, as it now appears, this proviso: 'Provided, that the court may accept in lieu of real estate as security bonds of the United States or of the State of Missouri, which said bonds shall be deposited as the court may direct.' Laws 1891, p. 104. In 1915 (Laws 1915, p. 249), the words 'or with a surety or trust company authorized by the laws of this state to execute bonds as surety' were inserted in the place where they now appear. The amendment of 1891 is the one with which we are concerned. What did the Legislature intend when it said that 'the court may accept in lieu of real estate as security bonds of the United States'? This language unquestionably refers to the preceding provision that, in addition to the principal, the bond shall be executed by 'not less than five solvent sureties who own unencumbered real estate in this State of as great value as the amount of the bond.' As respondent construes the proviso, it does not dispense with either bond or sureties, but merely permits the court to accept sureties who do not own real estate, if they, the sureties, will deliver to the court United States bonds 'of as great value as the amount of the bond.' This construction seems both awkward and strained. It will be noted that the section nowhere provides for the taking of real estate as security. The five sureties who own real estate do not, by signing the bond, place a lien or charge upon their real estate. The security afforded by the bond and the only security afforded by it, is the joint and several personal liability of sureties who own real estate. It is in lieu of that security that the statute authorizes the taking of bonds of the United States. It would follow, therefore, that the proviso authorizes the court to take government bonds in lieu of the security afforded by a bond signed by sureties who own real estate.

Subsection (c) (2) of Section 4 of the Home Owners' Loan Act of 1933 as Amended is as follows:

"The amendments made by subsection (c) (1) of this section (except with respect to refunding) shall not apply to any bonds heretofore issued by the Home Owners' Loan Corporation under such section 4 (c), or to any bonds hereafter issued in compliance with commitments of the Corporation outstanding on the date of enactment of this Act. \*\*\*\*\*"

The Attorney General of the United States in an opinion dated September 14, 1934, said in part as follows:

"The guaranty being stated by the statute as full and unconditional, there is no occasion to consider whether a condition should be implied. The separate provision that the Secretary of the Treasury shall pay if the corporation is unable to pay upon demand is no part of the guaranty, but merely a provision for carrying it out in the only reasonably conceivable contingency that would require such action.

Considering the foregoing, it is my opinion that if either corporation should fail, upon demand by a bona fide and accredited holder, to pay either principal or interest when due, the United States would thereupon become obligated to make such payment, and its obligation would not be conditioned upon the institution of any proceeding by the bondholder against the corporation."

#### CONCLUSION

By the terms of Section 4 (a) of the Home Owners' Loan Act as Amended, the Home Owners' Loan Corporation Board is denominated an instrumentality of the United States even though it be in the nature of a separate corporation. It appears to have the power to issue the bonds in form, denomination and price, with the approval of the Secretary of the Treasury. The bonds are unconditionally guaranteed, both as to principal and interest by the government of the United States, such guaranty

Dec. 17, 1934.

being expressed on the face of the bonds, and they "may be accepted as security for all fiduciary, trust and public funds." It is therefore the opinion of this department that Home Owners' Loan Corporation Bonds issued under the Amended Act of June 27, 1934 are eligible as security or collateral for state funds or county deposits in the State of Missouri.

The bonds of the series outstanding, which you mention in your letter, do not show the date of issuance; therefore, we cannot determine which series and in what amounts they were issued after the Act became effective. In view of the terms of subsection (c) (2) of Section 4 of said Act, we are of the opinion that bonds issued prior to the effective date of the Amended Act are not of the same status as those issued after the effective date; hence, we are of the opinion that the bonds issued prior to said effective date would not be acceptable as security or collateral for state funds and county deposits unless they have since received the same guaranty and placed on equal parity with the new bonds.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH



PUBLIC NOTICES: So long as Republican newspaper complies with Sec. 13773, R.S. 1929, County Clerk must make publication of election notices in same.

10-9  
October 2, 1934

Hon. C.D. Perry,  
Clerk of County Court,  
Barton County,  
Lamar, Missouri.



Dear Sir:

This department is in receipt of your request for an opinion relative to the publication of the nominations to office certified to by the Secretary of State.

Section 10249, R.S. Mo. 1929 provides as follows:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election. Provided, that no higher rates shall be paid per inch, than is provided by section 13773, chapter 114, R.S. 1929 as amended."

It appears from your letter that the Republican paper in your county intends to charge the maximum rate allowed by Section 13773, R.S. Mo. 1929, and you now desire an opinion from this office as to whether or not it is possible to publish this notice in a Democratic or an Independent paper instead of in



the Republican paper by reason of a more favorable price being obtainable from said Democratic or Independent paper.

It will be noticed that Section 10249, supra, requires the publication to be published in two newspapers, representing each of the two major political parties, and the only exception to this command of the Legislature is in a case where there are not two such newspapers; however, it appears from your letter that in Barton County there is a Republican paper and a Democratic paper and by express provision of the statute above referred to the publication must be made in both of these papers.

The legislature has seen fit, however, to provide that no higher rate shall be paid per inch than is provided by Section 13773, R.S. Mo. 1929, and it is the opinion of this department that so long as the Republican newspaper in question complies with Section 13773 with respect to price, it is mandatory upon the county clerk to make publication in said paper.

The intention of the Legislature with respect to a similar statute was clearly set forth by the Court in the case of Columbus v. Barr, 27 Ohio, l.c. 268:

"The kind of newspaper is predetermined by an established party allegiance, which denotes its politics and which the council is not at liberty to ignore.

An independent paper, which refuses to be bound by the ties of party allegiance, is not within the classification, for the reason that, compared with any other paper, it may be of opposite politics on one question, and of the same politics on another, at one and the same time; of opposite politics today and of the same politics tomorrow, evading the provision of the statute at will.

The purpose of the legislature was to provide for the widest publicity of the public acts of the municipal council, under a general law. It is common knowledge that this purpose would be best subserved as a general rule, by publication in the newspapers of opposite party politics, for the reason that when applied to all municipalities, they are the local papers that generally reach the most people. The independent newspaper, as a rule, is confined to the larger cities. It may best subserve the purpose of the statute in a few cities, but it is the exception that must fail under a general law.

Oct. 2, 1934.

The legislature did not undertake to cheapen the publication by competition. The competitive bidding resorted to in this case is the policy of the city, and, as is expressed in the ordinance providing for the same, is not to be used to annul the statute. It may be that this interpretation opens the door to political aggrandizement, but it still remains that extended publicity is the governing purpose of the statute, and must be kept to the fore when seeking to discover the legislative intent. No useful public purpose could be subserved by holding that this language should receive a more liberal construction, unless it be that it would provide competition, but that must yield if it would narrow publicity."

While we recognize that the enforcement of this law may result in some economic loss to Barton County by reason of the fact that there is but one Republican newspaper in the county, nevertheless, the facts cannot render a law invalid or justify this department in nullifying the law. The propriety, wisdom and expediency of legislation is exclusively a matter for the legislature.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH

✓ TAXATION: Cities special charter provision for collection of delinquent taxes prevail over general statutes.

October 8, 1934. 10-20



Hon. George W. Petty  
Collector of Revenue  
Clay County  
Liberty, Missouri

Attention: Mr. Clifford T. Halferty.

Dear Mr. Halferty:

Acknowledgment is herewith made of your recent communication requesting an opinion of this office on the following matter:

"Certain officers of the City of Liberty have repeatedly stated to this office that they believe the City Treasurer of such City should proceed under Section 9970 as amended in the Laws of 1933, page 450, to place delinquent city taxes in the hands of this office and that we should proceed to the collection of the same under Article 10, Chapter 59 Revised Statutes of 1929.

The City of Liberty is located in Clay County, Missouri, with an official population 3084 according to census figures and operates under a special charter, Section 1 of Article III of which is in part as follows:

'The City Council shall have power within the City, by ordinance: 1st.- to levy and collect taxes not exceeding 1½ per centum per annum upon the assessed value of all property made taxable by law for state and other purposes, and also to provide for the collection of the same by the sale of all real estate and personal estate within the city in such manner as this Act or the Council of the City by ordinance shall provide.'

It was our impression that said Article 10 only applied to cities of the fourth class, but it ✓

appears that we shall be compelled to decide whether it applies to the City of Liberty and in this connection we respectfully ask the assistance of your office in giving us an opinion as to such application."

## I.

**DELINQUENT TAXES IN CITIES OF  
THE THIRD CLASS COLLECTED UNDER  
PROCEDURE ESTABLISHED BY SENATE  
BILL 94 BY CITY COLLECTOR.**

Under the general statutes applicable to municipal corporations, the City of Liberty, Missouri would be a city of the third class. The general provisions respecting the collection of delinquent city taxes in cities of the third class are found in Article IV, Chapter 38 R. S. Mo. 1929. Senate Bills 94 and 96 as found at pages 425 and 450 Laws of Missouri, 1933, did not amend or repeal any of the provisions set out in the aforementioned article. These two bills dealt entirely with the provisions of Chapter 59, which concerns "Taxation and Revenue." The changes made by these two new acts were confined entirely to that chapter. No change was made in Section 6781, which prescribes the duties of the city collector concerning the collection of delinquent city taxes. This section provides in part:

"The city council shall cause the land and lot delinquent list and the personal delinquent list to be returned to the city collector, who shall be charged therewith and who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal property for State and County purposes.

. . . . .

By reason of this special provision found in the law pertaining to cities of the third class, the city collectors are directed to collect the delinquent taxes of cities of the third class in the same manner and under the same procedure as was then or might thereafter be provided for the collection of state and county taxes. When Senate Bills 94 and 96 were enacted no change was made in this section and it remains the controlling provision respecting the collection of delinquent city taxes in cities of the third class.

October 8, 1934.

Section 9970, which provides that the collectors of all cities and incorporated towns shall certify their delinquent taxes to the county collector to be collected by such collector, has heretofore been construed by our Courts as applying only to towns and villages. It has heretofore been the opinion of this office that such section as reenacted and amended still applies only to towns and villages and does not effect the collection of delinquent city taxes in cities of the third class. (Opinion to State Tax Commission, August 8, 1933.)

We are therefore of the opinion that no duty devolves upon you as county collector to collect the city taxes of the City of Liberty, Missouri, but that the City Collector should proceed in the same manner as is now prescribed by law for the collection of delinquent state and county taxes and collect the delinquent city taxes.

## II.

### SPECIAL CHARTER PROVISIONS TAKE PRECEDENCE OVER GENERAL STATUTE.

It is noted from your request that the special charter granted the City of Liberty authorizes such city to provide for the collection of its taxes by sale of all real estate and personal property in such manner as the charter or the council of the city by ordinance may provide.

It is a generally recognized rule that special charter provisions takes precedence over the general statutes, especially in matters of procedure, and where fundamental principles are not involved. This is clearly stated in the case of *Kansas City vs. Marsh Oil Company*, 140 Mo. 458. The problem there confronting the court is stated, l. c. 488:

"The inquiry then is, whenever a charter so framed comes under judicial review, is it in harmony with and subject to the laws and Constitution of the State? It is to be observed in this connection that the permission to frame a charter necessarily carries the privilege of providing a system different from that adopted for the State at large, provided it shall not override or collide with the constitutional guarantees and restrictions, and shall not be out of harmony with the general laws of the State. It must be borne in mind that



October 8, 1934.

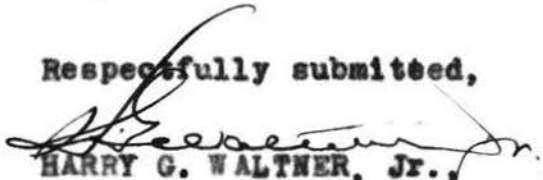
the grant of the right to frame a charter of its own would have been utterly without force and meaningless, if the convention which framed the Constitution and the people who adopted it meant that such a charter should be in all respects exactly like the general charters framed by the general statutes for the class to which it would have belonged but for that privilege. We are forbidden by the rules of fair construction to ascribe such a restricted meaning to words in so important a document as the Constitution of the State. As was said in *State v. Field*, supra: 'Charters thus adopted will of necessity be more or less at variance, and that they will be unlike in many respects, is within the contemplation of the Constitution.' \* \* \*

The Court concludes respecting this issue, l. c. 472:

"We think it was properly ruled that the special charter superseded the general statutes where the two conflicted as to a mere municipal regulation, and we hold that condemnation proceedings to acquire lands for streets, parks, waterworks, sewers and the like, clearly fall within municipal regulation. It follows that notwithstanding the charter did not follow the civil practice as prescribed in the code of practice, it was not for that reason out of harmony with the Constitution or laws, and the special provisions thereof must control, and defendant has no just ground of complaint on that ground." \* \* \*

It therefore appears that if by other provisions of the charter or if by ordinance duly enacted by the City Council, other definite and certain methods for the collection of delinquent city taxes have been prescribed, such provisions should be followed in the collection of the delinquent city taxes, they taking precedence over the general provisions found in Article IV, Chapter 38 R. S. Mo. 1929.

Respectfully submitted,

  
HARRY G. WALTNER, Jr.,  
Assistant Attorney General

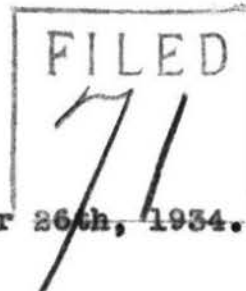
APPROVED

\_\_\_\_\_  
ROY McKITTRICK,  
Attorney General



54  
County officers.

Term of office prescribed  
by statute may be terminated  
by amendment of statute.



12-27

Mr. R. S. Peterman,  
Prosecuting Attorney of Bollinger County,  
Marble Hill, Missouri.

Dear Sir:-

We have your letter of November 19, 1934, in which an  
opinion is requested as follows:

"I am asking your office for an opinion on the  
following set of facts.

"The county court of Bollinger County meet for  
an adjourned term of court during September, 1932 and acting  
under Section 9025 of the Revised Statutes of Missouri, 1929  
hired a Deputy Commissioner of Health. The only agreement  
entered into or only statement was as follows: the minutes  
of the county court show that Dr. ----- was hired for a  
period of three years as Deputy Commissioner of Health.

"Since that time Section 9025 has been amended  
making it optional whether or not the county court shall  
hire such an officer. The county court want to know whether  
or not they are bound to pay this doctor for the third year  
under the minutes of the court."

Section 9025, Revised Statutes of Missouri, 1929, pro-  
vides as follows:

"Sec. 9025. Deputy state commissioners of health  
for counties and cities.--At the first regular February term  
of the county court in each county of the state after this  
article becomes effective and at the regular February term  
of said county court every third year thereafter said court  
shall appoint a reputable physician as a deputy state com-  
missioner of health for that county for a term of three years.  
In case of a vacancy in the office of the deputy state com-  
missioner of health of a county, the county court shall at  
its next regular term of court appoint a reputable physician  
for the unexpired term. If the county court fails to appoint  
a deputy state commissioner of health as above provided at the  
February term of said court or at the next term following a  
vacancy, the state board of health shall appoint a reputable  
physician as deputy state commissioner of health for that  
county who shall serve until the county court of such county

makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the state board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

Section 9025, Revised Statutes of Missouri, 1929, as repealed and reenacted, Laws 1933, page 271, provides as follows:

"Sec. 9025. Deputy state commissioners of health--appointment--term--salary.--At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

The legal effect of the reenactment of the above section is the same as if the office in question were abolished by act of the legislature. At least since the reenactment it is no longer mandatory on the county court to appoint such officer but is merely optional or discretionary; and the three year term is abolished in favor of the one year term when an appointment is made. The office being purely a creature of statutory enactment, and the officer deriving his power solely from the statute, the legislature may at any time modify, change or abolish said office. In other words, the officer has no vested right in the office, holding it merely at the pleasure of the legislature.

The law of the state of Missouri is well settled on this point. We refer you, however, to one or two cases as being particularly illustrative.

For instance, in the case of Sanders vs. Kansas City, 175 Mo.App. 367 the court, at page 371-2, stated as follows:

"In this State our courts always have recognized and applied the doctrine supported by the great weight of authority in America that no one can acquire a vested right in an office established by the legislative department of a State or municipality. All offices are created for the public good and the rights of their incumbents are subordinate and inferior to that prime object. The power to create, unless restrained by law, includes the power to abolish and an officer elected or appointed even for a definite term, takes office with the implied understanding that the power which created the office may abolish it before the expiration of his term, in which event he will find himself out of office. As is well said in City of Hoboken v. Gear, 27 N. J. L. 265, quoted with approval by our Supreme Court in Gregory v. Kansas City, 244 Mo. 549:

"The appointment of a public officer for a definite term with a fixed salary bears no analogy to a private contract between individuals for service. The private contract is purely voluntary. Both parties are bound by its stipulations. The employer can neither alter the time or mode of payment, nor vary the service to be rendered, nor abridge the time of service. Each is liable to the other for breach of contract on failure to perform. But an appointment to a public office during a term of years, and the acceptance of such office, is not a contract between the government and an individual that the officer will serve or that the government will pay during that period. The acceptance may not be a matter of choice but of compulsion; and where the acceptance is voluntary, the officer is not bound to serve during the term. He may remove from the State or resign, or otherwise determine his official relation without a violation of contract. . . . And on the other hand the government may abolish the office and thereby terminate the service without a violation of contract."

And again, in the often cited case of State ex rel. v. Davis, 44 Mo. 129, the court, at page 131, stated as follows:

"It proceeds upon the theory that a person in the possession of a public office created by the Legislature has a vested interest, a private right of property, in it. This is not true of offices of this description in this country; they are held neither by grant nor contract. A mere legislative office is always subject to be controlled, modified or repealed by the body creating it. In England, offices are considered incorporeal hereditaments, grantable by the crown, and a subject of vested or private

Mr. R. S. Peterman

-4-

December 26, 1934.

interests. Not so in the American States; they are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact."

In view of the above, therefore, it is our opinion that if the county court does not desire to employ a deputy commissioner of health for the coming year, they are not obligated under the minutes of the court or under the statute to pay for the third year in question.

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

CMHJr:LC

APPROVED:

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Attorney General.

RAILROADS: Railroad Company may eject an intoxicated person on train.

3-5

March 2, 1934.



Hon. John S. Phillips,  
Prosecuting Attorney,  
Poplar Bluff, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion dated February 12, 1934 upon the following state of facts:

"I have an inquiry from a railroad company in regard to handling intoxicated persons on their trains. In the Revised Statutes of Missouri for the year 1919, Sections 3495 to Section 3497, there was a provision made by which the railroad companies could handle intoxicated persons. The penalty for entering the train was a misdemeanor. I notice in the 1929 Statutes that this section was dropped.

I would like to know whether or not there has been any section or sections passed since that time which takes care of this condition, or in what manner the railroad may proceed in taking care of persons of this kind."

I.

An intoxicated person may be ejected  
by railroad company.

Sections 3495-3497, R.S. Mo. 1919 dealing with the power of railroad companies over intoxicated persons have been dropped; however, Section 4708, R.S. Mo. 1929 provides:



"If any passenger shall refuse to pay his fare, or shall behave in an offensive manner, or be guilty of repeated violations of the rules of the company, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling house, as the conductors shall elect, on stopping the train."

The early case of *Eads v. Metropolitan Street Ry. Co.*, 43 Mo. App. 536 clearly sets out the relationship between passenger and carrier. *Ellison, J.*, said (l.c. 542, 546):

"It is everywhere agreed that carriers must treat their passengers with respect and must endeavor to protect them from injury or insult, not only by their employes but from strangers and fellow passengers. *Spohn v. Railroad*, 87 Mo. 74.

\* \* \* \* \*

The testimony for defendant tends to show that plaintiff occupied the relation of passenger which he afterwards forfeited by his misbehavior, and thence, on to the close of the difficulty, occupied the relation of a stranger. So when plaintiff, by his conduct, unfitted himself to be a passenger in defendant's car, it became the duty of defendant, a duty it owed to other passengers, to remove him."

In the case of *Parris v. Deering Southwestern Ry. Co.*, 208 S.W. 97, the Court said (l.c. 98):

"The law is well settled in this state, as held in numerous opinions cited by both appellant and respondent, that it is not only the right, but the duty,



March 2, 1934.

of the agents and servants in charge of a train to put a stop to disorderly and violent conduct of passengers on trains who transgress the rules of the company and interfere and disturb the peace of other passengers. The only remedy, however, which we have been able to find applicable to such conduct is the right to expel or eject such passenger from the train, and in doing this the conductor and servants have a right to use only such force as is necessary to make the ejection, and with this necessarily goes the right of such servant in performing this duty to use such means as are necessary in the defense of his person against the attacks and unlawful acts of a disorderly passenger in resisting ejection."

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that by reason of the authority granted in Section 4708, R.S. Mo. 1929 a railroad company may eject any passenger intoxicated to such a degree as to be guilty of behaving "in an offensive manner" or violating "the rules of the company".

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

**COUNTY BUDGET ACT:**

- (1) Priority of classifications.
  - (2) Treasurer required to keep records and apportion money according to classifications of Section 2.
  - (3) Surplus money of county on hand January 1, 1934 to be classified, apportioned and paid out according to the County Budget Act.
- 

March 7, 1934

3-9

Honorable John S. Phillips  
Prosecuting Attorney  
Poplar Bluff, Missouri

FILED

72

Dear Mr. Phillips:

This Department acknowledges receipt of your letter dated February 9, 1934, as follows:

"It seems there is some question among the county officials here in regard to the budget law which was passed by the legislature, and there are a couple of questions which I would like to have answered which I am unable to find in the statutes or in the special laws.

1. Is it the duty of the County Treasurer to apportion the cash received in various classes the same as the county clerk apportions the anticipated revenue of the county? And in case that he does have to so apportion the cash, then does the first class, to-wit, the Eleemosynary Institutions, have to have their quota filled first and then the second class next and so on down the line, or does he take the cash received and apportion it to the six different classes in their respective amounts? It seems to me off hand that the latter would probably be the more logical solution, because if the first class has their portion filled first, it would be

March 7, 1934

quite a time before the sixth class would have any money or any portion of their money at all.

2. Does this budget law apply in any way to any money that was received in 1933? In other words, say that a county has a surplus at the end of the year 1933, then is it necessary to take this surplus and apportion it according to the budget law in with the money received in 1934, or does the budget law refer only to the money which is received after that law was passed, or in other words, will the apportionment this year apply only to the 1934 revenue?

I would appreciate an early reply to this inquiry as I am asked about this by the county officials almost every day, and I am at a loss as to what to tell them."

We are assuming that your county has a population of fifty thousand inhabitants or less and is therefore governed by Sections 1 to 8, both inclusive, Laws 1933 page 340.

1.

We are inclosing you herewith copy of an opinion of this office dated September 7, 1933, holding that Section 2 of Laws 1933 page 341 creates five priority classifications in the order in which the classes are numbered in the section.

The amounts payable under any classification should be paid before any amount is paid under the succeeding classification.

2.

Section 1 of the above laws in part provides:

"The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare

and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31."

It being further provided in the section that:

"The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

Section 8 above referred to provides in part:

"\* \* \* The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the state auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. Immediately upon receipt of the estimated budget the state auditor shall send to the county clerk his receipt therefor by registered mail.

Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any

county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

So a certified copy of the budget estimate is required to be filed with the county treasurer for which he must give his receipt, and accordingly he would have full knowledge of the contents thereof and of the classifications provided for by the law. The county treasurer is prohibited from paying or entering protest on any warrant for any current year until such budget estimate shall have been filed with him, for a violation of which he is liable on his official bond.

While the act does not specifically so say, as a practical matter and in order to carry out the purposes of the budget act, we are of the opinion the county treasurer should keep his books and apportion the moneys in his hands in accordance with the classification of expenditures as set out in Section 2 of the county budget law. In no other way would he know when warrants would be properly payable out of any succeeding priority classification.

3.

Sections 1 to 8, both inclusive, of the county budget law do not specifically provide that the Act shall apply to a surplus on hand at the beginning of the year 1934. However, referring to the estimated receipts required to be filed by the county court with the county treasurer, as above set out, Section 1 further provides:

"The receipts shall show the cash balance on hand as of January 1st and not obligated \* \* \*."

While Section 14 of the Act does not apply to your county yet the intention may be ascertained from that part of the section dealing with surplus at the end of any fiscal year in counties having over fifty thousand inhabitants. The section in part reads:

March 7, 1934

"Any cash surplus at the end of any  
fiscal year shall be carried forward  
and merged with the revenues of the  
succeeding year."

The surplus moneys on hand on January 1, 1934 would be moneys belonging to the county and as to which it would be the duty of the county court to cause to be disbursed in the transaction of the business of the county. Such moneys could only be disbursed according to the provisions of the county budget act.

We, therefore, are of the opinion that the surplus moneys of your county on hand on January 1, 1934 should be handled, classified and apportioned in the same manner as moneys received during the year 1934.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

Inclosure



SCHOOLS:

SCHOOL DISTRICTS:—Surrendering of \$50.00 warrant which cannot be paid in full for lack of funds, in exchange for smaller warrants would be in effect making partial payments upon outstanding warrants, in violation of Section 9312, R. S. Mo. 1929.

3-14  
March 13, 1934.



Mr. John S. Phillips,  
Prosecuting Attorney, Butler County,  
Poplar Bluff, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"There is a school board in my county which has a debt against it in the sum of \$100.00, which is made in two warrants of \$50.00 each. These two warrants are held by one man who taught school for them in 1929 and 1930. The school board has some money in the treasury for the payment of that year's debts, but does not have enough to pay the amount which he holds against them.

I would like to have your opinion as to whether or not it is possible for them to issue new warrants for a smaller amount so that he can cash these later warrants and get as much as he can out of the treasury."

Section 9312, R. S. Mo. 1929, dealing with school warrants for common schools, among other things, provides:

\*\*\*"No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant:\*\*\*\*."

The above section prohibits the making of any partial payment upon a school warrant. You state in your letter that this teacher holds two warrants of \$50.00 each against this district and that he has been unable to get them paid because there is not \$50.00 to the credit of the year for which the warrant was drawn. The obvious purpose of surrendering these \$50.00 warrants and taking smaller warrants is that the smaller warrants may be paid out of

the funds on hand. The \$50.00 warrants cannot be paid because of lack of funds and if they are surrendered and smaller warrants issued in exchange therefor, it appears to us that it is an attempt to circumvent the statute and in legal effect is the making of partial payments upon the original indebtedness. The original indebtedness is \$50.00 in each instance and the district would have no right to pay \$10 or \$15 in cash on either of these warrants. To permit them to issue warrants of smaller denomination it seems to us would be to permit them, by indirection, to do what they cannot do directly. The obvious purpose of such a plan is to make partial payments upon the warrants and indebtedness now existing, and we believe that such action on the part of the district would be deemed to be in violation of the statute, because the evident purpose and effect by such course is to make partial payments upon warrants already outstanding which were issued for an indebtedness existing several years ago.

It is the opinion of this Department, therefore, that the proposed plan to issue warrants of smaller denomination in exchange for the \$50.00 warrants would in legal effect be the same as making partial payments upon the already existing indebtedness and outstanding warrants, and that such a course would be in violation of the above section.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

4-9  
April 4, 1934.



Honorable John S. Phillips  
Prosecuting Attorney  
Butler County  
Poplar Bluff, Missouri

Dear Sir:

We have your request of March 23d requesting an opinion from this office upon whether or not two games, called the "Rocket" and "Sportsman", constitute a gambling device under the state law. For convenience, we will subdivide the opinion and treat each machine separately.

The "Rocket" Machine

From the pamphlet furnished us, we quote the following excerpts relative to the "Rocket" machine:

"6 Payouts Possible On 1 Coin"

"And think of the thrill of getting 6 PAYOUTS ON 1 COIN. . . 6 SEPARATE PAYOUTS WHILE 1 GAME IS BEING PLAYED . . . payouts that increase in value as the player shows more and more skill . . . payouts that are PAID AUTOMATICALLY . . . practically dropping into the player's hand!"

"The minute the player makes the lowest possible winning score . . . zowie! Out pop 2 coins!"

"And, last but not least, a perfect score . . . the highest possible score on the board . . . releases AN AUTOMATIC JACK-POT OF 14 COINS! This thrilling Jack-Pot can be won only on the very last ball . . . and is, therefore, the grand climax, the thrill supreme that keeps players pouring money back into the machine . . .

#2 - Honorable John S. Phillips

hour after hour . . . day after day . . .  
month after month . . . earning SLOT MACHINES  
PROFITS with a LEGAL GAME OF SKILL!"

"The clever cabinet design of ROCKET enables you to operate this revolutionary profit-producer anywhere . . . in "open" or "closed" territory. Turn to last page of circular for complete details of this amazing "closed" territory feature."

"Location owner may be given key to payout door. Rewards are then made from one of the two score cards (numbers and color combinations) furnished with each machine. Merchant pays out merchandise or other awards and reimburses himself at the end of each day by opening up payout box."

From the above and foregoing, it is apparent that this machine is a device, designed for gambling, and comes partly within the criminal offense defined in part by Section 4287 R. S. No. 1929 as follows:

"Every person who shall set up or keep any table or gaming device \* stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property \* shall, on conviction, be adjudged guilty of a felony, \* \* "

The "Rocket" machine has all the gambling elements of lottery, namely, consideration, chance and prize. State v. Emerson, 1 S. W. (2d) 109, (1927).

With reference to the operation of this machine in "closed" territory, the payoff is transferred from the machine to the operator or owner of the place where the machine is operated, and the merchant or operator pays off with merchandise, and obtains his reimbursement of the costs of such merchandise

**#3 - Honorable John S. Phillips**

by taking from the machine the coins that accumulate in the locked payoff chamber. In other words, the "closed" territory in the machine is so devised and designed that the winning coins may be collected in a locked box by the merchant or operator who pays the winning scores with merchandise, and keeps the winning coins taken from the payoff box. It is immaterial in this state whether the machine pays off or whether a payoff is made directly by the operator or merchant in whose place of business the machine is located. If the operator or merchant makes the payoff, it is nevertheless a gambling device. State v. Pollnow, 14 S. W. (2) 574, (1928).

It is, therefore, the opinion of this office that the "Rocket" machine is a gambling device and cannot be operated without violating the gambling laws of this state.

**The "Sportsman" Machine**

An examination of the circular relating to the "Sportsman" machine reveals the following statements concerning its operation:

**"Payout Pin Table"**

**"With Perfect Automatic Payout"**

**"The payout combinations are made by shooting balls into holes representing two or more birds or fowl of the same kind."**

**"The payout varies from 3 to 27 amusement tokens and only three skillful shots are required to pick a winner."**

**"Unrivaled profits"**

It is apparent from an examination of the circular relating to this machine that it, too, is a gambling device and comes within the prohibition of the criminal law and part of Section 4287 R. S. No. 1929, as above set out.

**#4 - Honorable John S. Phillips**

It is, therefore, the opinion of this office that the "Sportsman" machine is a gambling device, the use of which is unlawful and is prohibited by the law of this state.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE



TAXATION: Collection of delinquent/<sup>city</sup>taxes under Senate Bill 94.

6-8  
June 8, 1934.



Hon. Henry M. Phillips  
Prosecuting Attorney  
Bloomfield, Missouri

Dear Mr. Phillips:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

"I am writing to you for an opinion relative to the taxation and revenue law, same being page 425 et seq. Missouri Laws 1933.

Query: In cities under five thousand inhabitants, which have a city collector, is it the duty of the city collector to prepare the "back tax book" and forward same to the County Collector or is it the duty of the county collector to prepare same, also is it the duty of the County Clerk to sell or add the delinquent city tax to the delinquent county tax and sell for both taxes at the same time."

The provisions for the collection of delinquent city taxes are found in Chapter 38 R. S. Mo. 1929. Cities of under five thousand inhabitants may be cities of the third class or cities of the fourth class depending upon the population. In Articles IV and VIII of Chapter 38, specific provisions have been made for the collection of delinquent city taxes. The legislature in enacting Senate Bill 94 found at page 425 et seq. Laws of Missouri 1933, did not repeal any part of the law as found in these articles. However, by referring to Sections 6781 and 6996 we find that taxes in cities of the third and fourth classes are to be collected by the city collectors

"who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes."

Hon. Henry M. Phillips

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June 6, 1934.

It would therefore appear certain that the mode of procedure for the enforcement of delinquent state and county taxes can be followed by the City Collectors in the enforcement of delinquent taxes but that the duties of the city clerk and the city collector in preparing the tax books are to be governed by the specific provisions found in Chapter 38 which may apply to the city under discussion.

There is no provision in this Chapter for the transferring of the duty of enforcing payment of delinquent city taxes from the city officials to the county officials, and it has been our position that the reenactment of Section 9970, page 451 Laws of Missouri 1933 with a slight modification made by the 57th General Assembly does not affect the provisions of Chapter 38.

This matter has been gone into heretofore and the relation of Senate Bill 94 to the collection of city taxes has been discussed in an opinion of this office to the State Tax Commission. I herewith enclose to you the portion of that opinion having a bearing upon your inquiry.

Respectfully submitted,

HARRY G. WALTNER, Jr.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM  
Enc.

ELECTIONS; ABSENTEE VOTER: County Clerk can have Absentee Ballots printed ~~not~~ more than ten days before the primary election. A qualified voter must apply in person to the county clerk, board or election commissioners of the county in which he claims residence for an absentee ballot.

June 14th, 1934



Hon. Henry M. Phillips  
Prosecuting Attorney,  
Stoddard County,  
Bloomfield, Missouri.

Dear Sir:

This Department acknowledges receipt of your letter of June 9th, wherein you request an opinion regarding several questions which have arisen under the new Absentee Ballot Law. Your letter is as follows:

"Some questions have been asked me by the Clerk of the County Court of this County relative to the manner of voting Absentee Ballots as prescribed by the 1933 Laws of Missouri on page 219 and following pages of the Session Acts thereof which are not clear to me, and for which I will thank you for your opinion as to the correct method of voting an Absentee Ballot.

If you will note this new law provides that any person expecting to be out of their County on Election day shall make application to the Clerk of the County Court in their County for a ballot and at the same time prescribes that they can do this not more than thirty days nor less than five days before the Election.

Some of the questions that are confusing are these: The General Statute provides that the County Clerk cause the ballots for the Election to be printed not more than ten days before the election. Therefore, will it be possible for the Clerk to furnish an Absentee Ballot thirty days before the Election?

If a voter has been absent from his home County for more than thirty days can he make application for an Absentee Ballot in any other County than his own?

June 14th, 1934

If it is possible for you to give me your opinion outlining the method of voting an Absentee Ballot according to the provisions of this new law. The same will be appreciated very much."

I

County Clerk can have  
Absentee Ballots printed  
more than ten days before  
the primary election.

We again restate your first question:

"Some of the questions that are confusing are these: The General Statute provides that the County Clerk cause the ballots for the Election to be printed not more than ten days before the election. Therefore, will it be possible for the Clerk to furnish an Absentee Ballot thirty days before the Election?"

The General Statute relating to the printing of the primary ballot is Section 10265, which Section, omitting the parts which are not pertinent, is as follows:

"On or before the 10th day before the holding of any primary election the county clerk shall correct any errors or omissions in the ballots, cause the same to be printed and distributed, as required by law in the case of ballots for the general election, except that the number of ballots to be furnished to each precinct shall be one and half times the number of votes cast by any party in the last preceding election and having nominees and tickets at such primary election."

The new Statutes, Sections 10181 and 10182, Laws of Missouri, 1933 p. 219, which apparently present the conflict are, respectively, as follows:

"SEC. 10181. Who may cast absentee ballot.-- Any person being a duly qualified elector of the State of Missouri, who expects in the course of his business or duties to be absent from the county in which he is a qualified elector on the day of holding any special, general or primary election at which any presidential preference is indicated or any candi-

dates are chosen or elected, for any congressional, state, district, county, town, city, village, precinct or judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter provided."

"SEC. 10182. May apply for official ballot.-- Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of such election may, not more than thirty nor less than five days prior to the date of such election, make application in person, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for said precinct to be voted at such election."

The question arises by a close scrutiny of the three Statutes herein quoted as to how the qualified elector is to obtain the absentee ballot within the full thirty days of the primary when, as a matter of fact, the county clerk is not required to print the ballots until ten days before the primary. The Legislature repealed the old Statutes relating to absentee ballots and enacted Sections 10181 to 10188, inclusive, in lieu thereof. Section 10183 being designated, "Affidavit for ballot--form--printing of ballot" after setting out the form of the affidavit, contains the following provision at the close, p.221:

"\* \* \*Provided, that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records, or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote as by this act authorized who is not lawfully entitled to vote, and if the applicant for ballot or ballots is entitled to receive same, the county clerk or the board of election commissioners, if any, or other official charged with the duty of furnishing such ballots immediately upon receipt of the printed ballots shall send by registered mail postage prepaid, or deliver in person an official ballot or ballots if more than one are to be used and voted at said election to such applicant. The official charged by



law with printing and supplying ballots under the general election laws of this state, shall cause to be printed and supplied a sufficient number of ballots to have printed at the top of such ballots the words 'official absentee ballot' to be furnished such absentee voters under the provisions of this act."

We call your attention to that portion of the quoted Statute, "The official charged by law with printing and supplying ballots under the general election laws of this state, shall cause to be printed and supplied a sufficient number of ballots to have printed at the top of such ballots the words 'official absentee ballot' to be furnished such absentee voters under the provisions of this act."

There is no time designated for the printing of such official absentee ballots therefore we are of the opinion that such official absentee ballots may be printed more than ten days before the primary election and may be printed in ample time so that a person applying for an absentee ballot can have the privilege as stated in Section 10182, of applying within the full time of thirty days before the primary election.

## II

A qualified elector must apply in person to the county clerk, board or election commissioners of the county in which he claims residence for an absentee ballot.

The next question presented by your letter is as follows:

"If a voter has been absent from his home County for more than thirty days can he make application for an Absentee Ballot in any other County than his own?"

Section 10182 quoted, supra, contained the phrase:

"\* \* \* not more than thirty days nor less than five days prior to the date of said election, make application in person to the county clerk, or, where existing, to the board or election commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, \*\*\*."



Hon. Henry M. Phillips

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June 14th, 1934

We are of the opinion that the Statute is plain in its terms in that it compels the qualified elector to appear in person before the county clerk or other persons charged with the duty of furnishing ballots and that he must appear before such officials in his voting precinct, and hence a qualified elector cannot apply for an absentee ballot in any other county other than his own.

Your last question, being general in its terms relating to the provisions of the new law, we are enclosing a recent opinion relating to this subject rendered General H. W. Brown, Jefferson City, Missouri, which we believe correctly sets out the manner and procedure of one desiring to cast an absentee ballot.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney-General

AP PROVED:

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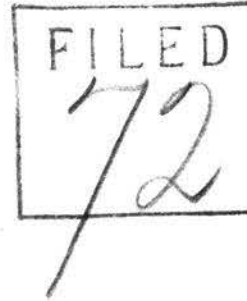
ROY McKITTRICK  
Attorney-General

OWN/mh

COUNTY HIGHWAY ENGINEER - Right to appoint assistant.

COUNTY COURT - Right to fix compensation of assistant appointed by County Highway Engineer;  
right to reimburse County Highway Engineer for gasoline and oil purchased by him and used in performing his duties; right to pay County Highway Engineer monthly sum for use of his privately owned auto- September 12, 1934  
mobile in performing his duties.

Honorable John S. Phillips,  
Prosecuting Attorney, Butler County,  
Poplar Bluff, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of August 20, 1934, such request being in the following terms:

"I am writing your office for an opinion as to the authority of the County Court.

Now sometime ago there was filed in the Circuit Court of Butler County, Missouri, a lawsuit upon the petition of one hundred and ninety-eight, (198), taxpayers of Butler County against the County Court and Highway Engineer charging various violations, and requesting the Circuit Court to restrain them from further performance of such acts.

One of the counts in the petition charged that they were wrongfully and illegally paying for a stenographer in the County Highway Engineer's office. Also, that they were wrongfully and illegally paying to the County Highway Engineer \$30.00 monthly for the use of his privately owned automobile. Also, furnishing gas and oil for the use of said automobile.

Among a number of other counts, which are not in issue at this time, this was submitted to the Circuit Court for trial, and after hearing the testimony the Court found as to each of the above items that no order of the County Court had ever been made authorizing or approving the appointment of any stenographer, nor fixing the salary of same, and the Court therefore found and restrained the further payment of any moneys out of the public funds of Butler County for this purpose until such time as a proper and LEGAL order had been made by the County Court approving the appointment and fixing the salary.

2. Honorable John S. Phillips.

September 12, 1934.

"Now the Court also found that no County Court order had ever been made authorizing the spending of \$30.00 per month for the use of the County Highway Engineer's privately owned automobile and restraining the County Court from the further payment of this item until such time as the County Court had made a proper and LEGAL order authorizing the payment of this amount.

The above opinion was handed down on August 1st, 1934, by the Circuit Court and properly served upon the defendants. On the 8th day of August, 1934, the County Court in regular session met and made two orders a copy of each is hereto attached. One applying to the appointment of a stenographer which they term in their order as an 'Assistant' claiming for authority under Section 8011 R.S. 1929. The other order refers to the \$30.00 for the use of car and includes gas and oil.

I am requesting that you give to me at your earliest date an opinion as to whether or not the County Court has authority to make these orders, or either of them."

The orders of the County Court enclosed with your request are as follows:

"Now at this time J. F. Carey, County Highway Engineer, having submitted to the Court in writing his appointment of Claudia Harrington as one of his assistants under the provisions of Section 8011 R. S. Missouri, 1934, and the Court being of the opinion that the duties of the said office of County Highway Engineer cannot be properly performed without the aid of an assistant, it is therefore ordered by the Court that the appointment of Claudia Harrington as an assistant be approved and the Court fixes her compensation at the sum of \$2.00 for each day so employed in said office."

"The Court being of the opinion that the County Highway Engineer in order to properly perform the duties of his office requires the use of an automobile and the finances of the County being such that an expenditure for the purchase of said automobile would not be justified and it further appearing that the County Highway Engineer, F. J. Carey, is the owner of an automobile suitable for the use of said official, therefore, it is ordered by the Court that, in lieu of the purchase of a car for the use of the said Highway Engineer, the Court pay to said Highway Engineer the sum of \$30.00 monthly for the use of said official's privately owned automobile in connection with the duties of his office together with the gas and oil

3. Honorable John S. Phillips.

September 12, 1934

"used in said car while being operated for County Highway work."

## I

### RIGHT TO APPOINT ASSISTANT.

Revised Statutes Missouri 1929, Section 8011, provides in part as follows:

"In the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

There is nothing in such statutory provision which imposes any particular qualifications on such assistant and therefore the County Highway Engineer would seem to be justified in appointing an assistant to assist him by performing clerical and stenographic work to the same extent that he would have authority to appoint an assistant to do any other type of work for him. That part of the statute above quoted authorizes the engineer to appoint and the County Court to fix the compensation of the appointee, and the order which has been made by the Court as furnished by you seems to follow the statutory procedure.

## II

### RIGHT TO PAY COUNTY HIGHWAY ENGINEER FOR USE OF HIS AUTOMOBILE AND FOR GAS AND OIL CONSUMED THEREIN.

A. Whether or not the duties of the County Highway Engineer reasonably require automobile travel by him is a question of fact and it would seem that the determination by the County Court that an automobile is necessary to the County Highway Engineer "in order to properly perform the duties of his office", if supported by evidence, would be proper and final in the absence of an appeal. The duties of a County Highway Engineer would seem to furnish a justification for such finding. Thus Revised Statutes Missouri 1929, Section 8014, provides as follows:

"The county highway engineer shall personally, or by deputy, inspect the condition of the roads, culverts and bridges of each district as often as practicable, and, upon the written complaint of three freeholders in any such district, of the bad or dangerous condition of the roads, culverts or bridges of such district, or of the neglect of

"duty by any road overseer of any such district, or of neglect of any contractor on roads let by contract, it shall be the duty of the county highway engineer to at once visit said road and investigate the complaint, and, if found necessary, to at once cause such road to be placed in good condition."

and Section 8009 provides in part as follows:

"If any county highway engineer shall fail, refuse or neglect to visit and inspect, in person or by deputy, the roads, bridges and culverts in each road district in the county, at frequent and regular intervals, \* \* \* he may be removed from office by the county court,"

In view of these statutes and the facts as furnished in your letter including the absence therefrom of any intimation that the use of an automobile is not reasonably necessary for the County Engineer to perform properly his duties, it may be assumed that the necessity for automobile transportation for the County Highway Engineer does exist.

B. The County Court by statute (Section 2078) is given the "control and management of the property, real and personal, belonging to the County \* \* \*" and the County Court in the case of Kansas City Disinfecting and Manufacturing Co. v. Bates County, 273 Mo. 300, 201 S. W. 92 (1919), is called "the general statutory contracting, auditing and fiscal agency of the County". (273 Mo. 306). Revised Statutes Missouri 1929, Section 12107, provides that "the county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings or for any other purpose authorized by law." While the County Court is a statutory body with no powers except those conferred upon it by statute (State ex rel, and to Use of Broughton v. Oliver, 202 Mo. App. 527, 208 S. W. 112 (1919) ), nevertheless where a duty is delegated by statute to a county officer, such statute impliedly authorizes the County to pay the expenses necessary to the performance of such duty. In the case of Blades v. Hawkins, 133 Mo. App. 328, 112 S. W. 979, affirmed 240 Mo. 137, 144 S. W. 1198 (1911), it was held that a County Court was authorized to employ and pay an accountant to audit the public records of the County, even though there was no statute authorizing specifically such employment or audit. The Court at 240 Mo. 138-6 stated the problem as follows:

"public corporations never have been deemed to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county



courts and commissioners, as well as to the governing bodies of other subordinate political corporations. There is in our statutes no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created. Therefore, in determining whether or not the county court of Stone County had authority to employ an expert to look over official books and accounts, we must call to mind the duties of such a court. A county court is the general fiscal agent of the county, and is possessed of a supervisory power over the collection and preservation of its funds."

and at page 197 expounded the reasons for implying this power as follows:

"responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations, is imposed on county courts. The question for decision is whether the express delegation of these powers and duties by the Legislature carried with it the authority to employ an expert to look over books and documents in order to ascertain whether officials and other persons chargeable with public moneys had rendered correct and faithful accounts, and had made just settlements with the court. In our opinion this question ought to be answered in the affirmative. While it is true the law is strict in limiting the authority of these courts, it never has been held that they have no authority except what the statutes confer in so many words. The universal doctrine is that certain incidental powers germane to the authority and duties expressly delegated, and indispensable to their performance, may be exercised."

Thus, if the purchase of an automobile by the County and the purchase by the County of gas and oil to operate such automobile was found to be reasonably necessary to enable the County Highway



Engineer to carry out properly his official duties, it would seem that the County Court would be authorized to make such purchase with County funds. In *Scott County v. Advance-Rumley Thresher Co.*, 288 Fed. 739 (Circuit Court of Appeals, 8th Ct. 1923) the Court held that the County Court as a part of its duty and right to keep up the roads of the County was impliedly authorized to purchase the machinery reasonably necessary for such maintenance.

C. It has been demonstrated above that the statutes of Missouri would justify a finding by a County Court that the use of an automobile was necessary for the County Highway Engineer in order properly to perform his duties and that the County Court, if it made such a finding, would be authorized to purchase such an automobile and to buy gas and oil to be used therein. Assuming that the County Court did not buy such an automobile, it would seem that a County Court which had found that automobile travel by the County Highway Engineer was necessary, would be warranted in paying expenses for automobile transportation actually paid out by the County Highway Engineer in the necessary performance of his duties and that his expenses for gasoline and oil used in an automobile on exclusively county highway business could be refunded to him. If the County Court could purchase directly the gasoline and oil, it would seem to be equally authorized to reimburse the County Highway Engineer for money spent on gasoline and oil used solely in performing the duties of his office, providing the price at which such gasoline and oil was purchased by him was reasonable. Where a statute imposes certain duties on a public officer he is impliedly authorized to spend his own money insofar as it is necessary properly to perform such duties and to be reimbursed by the state or municipality of which he is an officer. Thus in the case of *State ex rel Bradshaw v. Hackman*, 276 Mo. 600, 208 S. W. 445 (1918) the Court, although it held that the State Warehouse Commissioner could not recover moneys spent by him in traveling on official business outside of the state on the ground that his statutory duties did not authorize him to go outside of the State, indicated that if his traveling expenses had been incurred while traveling in the State in carrying out the duties imposed upon him by statute, that such expenses could be recovered. The Court said:

"Looking then to the above act to ascertain the duties incumbent on the Warehouse Commissioner and his official family, we note that it is only pursuant to Sections 33, 37, 41, 51 and 52 thereof that duties are prescribed which, either expressly or by implication, require the incurring of expenses for travel. Examining the above sections seriatim (but with an eye single to the facts before us in this case) it will be seen that Section

"33, supra, Laws 1913, p. 365, permits, and whenever necessary requires, the examination of 'all property in any public warehouse or elevator in this State.' Travelling expenses may of course be incurred whenever in the opinion of the Warehouse Commissioner it is necessary to the performance of the above duty."

The principle of State ex rel Bradshaw v. Hackmann, supra, is limited to reimbursement for out of pocket expenses and is the only principle which we have been able to discover which might authorize the payments here in question. Such principle could not apply to sums paid out monthly to the County Highway Engineer for the use of his private automobile. As appears from Revised Statutes Missouri 1929, Section 12107, quoted above, the contracts which the County Court may make are limited to contracts for purposes "authorized by law" and we find no legal justification or authorization for a County Court entering into a contract with a county official by which it pays him a regular fixed sum for the use of his own property and we believe that a statute would be necessary for such authorization. A statute of the United States has been discovered presenting an analogous situation, this being "an act to authorize the Postmaster General to hire vehicles from village delivery carriers", approved June 18, 1930 (46 Stat. 782; U.S.C., Supp. VI, Title 39, Section 52) as amended by Public No. 452, 73rd Congress, approved June 22, 1934, which contains the following:

"Provided, That beginning with the fiscal year 1928, and thereafter, the Postmaster General may hire vehicles from postal employees, not filling supervisory positions, for use in the city delivery and collection service, and in the village delivery and collection service, either under an allowance or on a contract basis."

This statute would seem to indicate that Congress felt that a specific statute was necessary to authorize the hiring of a vehicle from one of its employees.

In conclusion, it is our opinion that the order of the County Court set out above which fixes the compensation of an assistant to the County Highway Engineer appointed by him, is valid, and that the other order of the County Court above set out is valid insofar as it authorizes payment to the County Highway Engineer of sums actually expended by him for gasoline and oil consumed solely in performing the duties of his office, to the extent that such use was necessary in properly performing the duties of his office, provided that the gasoline and oil is pur-

8. Honorable John S. Phillips.

September 12, 1934

chased at reasonable prices, but that such order is invalid as a matter of law to the extent that it authorizes a payment of \$30.00 per month to such County Highway Engineer for the use of his automobile.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

APPROVED:

  
(ACTING) ATTORNEY GENERAL

OFFICERS: Cities of the Fourth Class shall elect and qualify for Mayor and Aldermen in the following manner:

4-20  
April 17, 1934.



Honorable Leo A. Politte  
Prosecuting Attorney  
Franklin County  
Union, Missouri

Dear Sir:

We hereby acknowledge your letters of April 10, 1934, requesting an opinion of this office. Your first letter reads as follows:

"I respectfully request an opinion on the following proposition.

"In the recent city election in Pacific, in Franklin County, Missouri, a mayor and two aldermen were elected by a large majority in said town. Each one of these parties were denied a seat in their particular office, because they were delinquent in the payment of city taxes.

"The man elected mayor was delinquent, at the time of the election, but paid his taxes before the day he was to be seated.

"The aldermen have not, as yet, paid their delinquent taxes. All of the taxes that one of the alderman owes, at this time, is merchant's license.

"They have been denied the right to hold office under Section 6969, Revised Statutes of Missouri, 1929, and said City of Pacific is a fourth class city.

"Please let me have the benefit of your opinion as to whether or not any of these parties are, at this time, eligible to hold office, and, if they should be eligible, in case their taxes should immediately be paid."

April 17, 1934.

Your second letter reads as follows:

"In connection with my letter of even date inquiring an opinion as to the qualification of certain individuals who received majority vote for offices in the City of Pacific, I would like to submit a second question, namely, if these officers are not qualified, will the present officers hold over until another election date, or is the mayor required to call a special election for the purpose of filling these offices.

"In other words, if the officers receiving a majority vote are not qualified to hold office, will the person receiving the next highest vote be considered elected, or will the present officers hold over until the next city election, or will a special election have to be called to fill these offices."

Section 5, Article XIV, of the Constitution of Missouri provides as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

You state that the City of Pacific is a city of the Fourth Class, and Section 6951, R. S. Mo. 1929, relating to elective officers in cities of the Fourth Class provides:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: Mayor, marshal, collector and



board of aldermen, and the board of aldermen may provide by ordinance that the same person may be elected marshall and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successor shall be elected or appointed and qualified."

Section 6952, R. S. No. 1929, provides:

"No person shall be mayor unless he be at least twenty-five years of age, a citizen of the United States and a resident of the city at the time of and for at least one year next preceding his election. When two or more persons shall have an equal number of votes for the office of mayor, the matter shall be determined by the board of aldermen."

Thus we see that in cities of the Fourth Class the Mayor is elected for <sup>two</sup> one year and none of the prerequisite specific qualifications refer to delinquent taxes due from him to the city. The elected mayor is to hold office until his successor is elected and qualified.

Section 6963, R. S. No. 1929, provides:

"The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, at the first election for aldermen in cities adopting the provisions of this article. At such election for aldermen, the person receiving the highest number of votes in each ward shall hold his office for two years, and the person receiving the next highest number of votes shall hold



his office for one year; but thereafter each ward shall elect annually one alderman, who shall hold his office for two years."

Section 6964, R. S. Mo., 1929, provides:

"No person shall be an alderman unless he be at least twenty-one years of age, a citizen of the United States, and an inhabitant and resident of the city for one year next preceding his election, and a resident of the ward from which he is elected. Whenever there shall be a tie in the election of aldermen, the matter shall be determined by the board of aldermen; so, also, in case the election of an alderman be contested."

Thus we see that in cities of the Fourth Class the aldermen are elected for two years and none of the prerequisite specific qualifications refer to delinquent taxes due from him to the city.

Under 6969, R. S. Mo., 1929, providing the prerequisite qualifications for holding an office in a city of the Fourth Class, provides in part as follows:

"\* \* \* No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office, or who is not a resident of the city."

Thus we see that neither the elected mayor nor the aldermen at Pacific, Missouri, who are delinquent in any city tax, including city merchant's tax, can legally take the prescribed oath as long as his tax remains delinquent.

If any elected officer has illegally taken his oath of office, that is, taken the oath of office while delinquent in his city tax, his oath has availed him nothing for under the constitution and statutes written pursuant thereto, the prior officer holds over until his successor has been duly elected and qualified. In other words the elected officer is in no position to qualify for the office until his city tax is paid, the payment of which is a condition precedent to his right to take the oath of office.

Section 6970, R. S. Mo., provides as follows:

"Every officer of the city and his assistants, and every alderman, before entering upon the duties of his office, shall take and subscribe to an oath or affirmation before some court of record in the county, or justice of the peace in the township, or the city clerk, that he possesses all the qualifications prescribed for his office by law; that he will support the Constitution of the United States and of the state of Missouri; the provisions of all laws of this state affecting cities of this class, and the ordinances of the city, and faithfully demean himself while in office; which official oath or affirmation shall be filed with the city clerk. Every officer of the corporation, when required by law or ordinance, shall, within fifteen days after his appointment or election, and before entering upon the discharge of the duties of his office, give bond to the city in such sum and with such sureties as may be designated by ordinance, conditioned upon the faithful performance of his duty, and that he will pay over all moneys belonging to the city, as provided by law, that may come into his hands. If any person elected or appointed to any office shall fail to take and subscribe such oath or affirmation, or to give bond as herein required, his office shall be deemed vacant. For any breach of condition of any such bond, suit may be instituted thereon by the city, or by any person in the name of the city to the use of such person."

Section 7, Article XIV, of the Missouri Constitution provides:

"The General Assembly shall, in addition to other penalties provide for the removal from office of county, city, town and township officers, on conviction of willful, corrupt or fraudulent

April 17, 1934.

violation or neglect of official duty. Laws may be enacted to provide for the removal from office, for cause, of all public officers, not otherwise provided for in this Constitution."

Section 6957, R. S. Mo., 1929, provides as follows:

"The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office, for cause shown, any elective officer of the city, such officer being first given opportunity, together with his witnesses, to be heard before the board of aldermen sitting as a board of impeachment. Any elective officer, including the mayor, may in like manner, for cause shown, be removed from office by a two-thirds vote of all the members elected to the board of aldermen, independently of the mayor's approval or recommendation. The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office any appointive officer of the city at will, and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the board of aldermen, independently of the mayor's approval or recommendation. The board of aldermen may pass ordinances regulating the manner of impeachments and removals."

Thus we see that pursuant to the Constitution, the Legislature did pass a law making it possible for the mayor and board of aldermen, sitting as board of impeachment to remove from office, for cause shown, any elective officer. The method provided in this section is exclusive, in removing officers in cities of the Fourth Class who have qualified and been sworn in office and afterwards made themselves subject to impeachment.

#### CONCLUSION.

From the facts presented in your letter it is our opinion that the problem at Pacific, Missouri, is not a

Honorable Leo A. Politte

-7-

April 17, 1934.

problem of impeachment of city officers leaving their office vacant and necessitating a special election to fill their office. It is our opinion that the old officers hold over until such a time as their successors have qualified and are sworn in, and should they never qualify, by paying their delinquent tax, and take the oath, then the old officers hold over until the next general city election. We fail to find any provision in the Statutes allowing those persons receiving the next highest vote to qualify as officers in cities of the Fourth Class, as suggested in your letter.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.

WOS:H

22  
TAXATION: Duties of County Clerk under Senate Bill 34, page 419,  
Laws of Missouri, 1933.

May 10, 1934.

5-14



Hon. John E. Powell  
Prosecuting Attorney  
Mercer County  
Princeton, Missouri

Dear Mr. Powell:

Acknowledgment is herewith made of your request for  
an opinion of this office reading as follows:

"Referring to Section 1, page 419 of the  
Laws of 1933, I desire to ask some information.

I note this law was passed March 18, 1933,  
and did not take effect until after June  
1, 1933, and our County Clerk seems to have  
a different opinion as to what shall be done  
as to what is being done over in Gentry  
County and I have advised the County Clerk  
here that I would prefer to have an analysis  
of Sections one and two, above referred to,  
especially do I have reference to Section 2,  
in other words our County Clerk, as well as  
myself, in advising him, is slow to charge  
off benefits under Section 2 and report the  
same for fear that he will make deductions  
which ought not to be made."

Senate Bill 34 referred to above places certain duties  
upon the County Assessors and the County and State Boards of  
Equalization and Appeals respecting the equalization of land  
values for taxation purposes, and places certain duties upon  
the County Clerks in obtaining information and supplying the  
same to these various agencies so as to expedite the assessment  
and equalization of land values. For the purpose of this  
opinion I herewith quote certain portions of this act:

"SECTION 1. That in determining the assessed valuation of lands\* \* \*on which benefit assessments have been levied\* \* \*the county assessors\* \* \*state tax commission, the state and county boards of equalization and appeals, shall ascertain and determine the amount\* \* \*of then existing benefits assessed\* \* \*and for which\* \* \*no levy\* \* \*for principal has been paid, exclusive of delinquent levies\* \* \*and take into consideration the amount thereof in determining the value of such lands\* \* \*for assessment for taxation for general purposes, and the difference,\* \* \*between the value of such lands\* \* \*taking into consideration the drainage or levee improvements and amount of the\* \* \*benefits assessed\* \* \*and for which\* \* \*no levy\* \* \*for principal has been paid, exclusive of delinquent levies\* \* \*shall be and become the assessed valuation\* \* \*which such lands\* \* \*shall be taxable for all general purposes\* \* \*.

\* \* \*And it shall be the duty of the county\* \* \*assessors and the county board of equalization and appeals\* \* \*in assessing equalizing and adjusting the value of such lands\* \* \*to conform to the provisions of this act.

SECTION 2. It is hereby made the duty of the clerks of the county courts to ascertain\* \* \*the aggregate amount\* \* \*of the portion of\* \* \*benefits assessed\* \* \*against lands\* \* \*within\* \* \*drainage or levee districts\* \* \*in their respective counties and for which\* \* \*no levy\* \* \*for principal has been paid, exclusive of delinquent levies\* \* \*and shall also certify the aggregate amount\* \* \*of then existing benefits\* \* \*for which\* \* \*no levy\* \* \*for principal has been paid, exclusive of delinquent levies\* \* \*, together with any other information that may be necessary or required in order that the provisions of this act may become effective and the equalizing of the valuation of lands\* \* \*within drainage or levee districts\* \* \*for taxation for general purposes may be expedited,



May 10, 1934.

and to\* \* \*make out and forward\* \* \*the information above referred to, to the state auditor to be laid before the state board of equalization. It is hereby made the \* \* \* duty of the\* \* \*clerks\* \* \*to retain a copy of the information, matters and things\* \* \* to be laid before and for the use of the county boards of equalization and appeals."

A careful examination of the foregoing act reveals that there is no duty placed upon the County Clerk to charge off any benefits allowable under this Law. The only duty placed upon the County Clerk is to obtain the necessary information as to the amount of unpaid benefits levied and assessed against land in drainage and levy districts exclusive of delinquencies, and report these amounts to the County Boards of Equalization and Appeals and the State Board of Equalization. It is then the duty of these bodies acting upon this information and upon any other information that may come to their knowledge to give full force and effect to this law equalizing the valuations of lands in drainage and levy districts in accordance with the provisions of this law.

It is therefore the opinion of this office that your County Clerk is merely the agency through which this information is compiled and that it is the duty of the Assessor and the State and County Boards of Equalization and Appeals to make any deductions necessary to equalize the valuation of lands in drainage and levy districts.

Respectfully submitted,

HARRY GL WALTNER, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

CITIES OF THE FOURTH CLASS - Candidate in arrears on city taxes on day of election cannot be elected to office.

5-14

May 11th, 1934.

Honorable Leo A. Politte  
Prosecuting Attorney  
Franklin County  
Union, Missouri



Dear Sir:

Your request for a supplemental opinion from this office, enlarging upon the opinion of this office dated April 17, 1934, is as follows:

"I acknowledge receipt of your opinion dated April 7, 1934, concerning the qualification of city candidates receiving the highest amount of votes in Pacific, Missouri.

Since this opinion was requested, these officers have paid their taxes. Your conclusion in this opinion seems to infer that these officers would be qualified to take the oath of office and serve as such city officers, if the payment of these delinquent was made.

Section 6969, Revised Statutes of Missouri, 1929, as quoted in your opinion, seems to forbid the election of anyone to office who shall, at the time, be in arrears for any unpaid city taxes.

Will you kindly supplement this opinion by stating whether or not an officer may qualify after election by paying city taxes in arrears at time of election."

#2 - Honorable Leo A. Politte

The pertinent part of the statute under consideration, relating to the election of officers in a city of the fourth class, is the following portion of Section 6969, Revised Statutes of Missouri, 1929,

"No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, "

The statute uses the term "elected". This means that he is not eligible to be voted for on election day. The mere casting of a majority of votes for him on election day is a nullity. The election is fixed for a day certain, and it appears that the term of office begins immediately following the election. - Sections 6949, 6951, Revised Statutes of Missouri, 1929. The election is to be held on the first Tuesday in April, - Section 6949, Revised Statutes of Missouri, 1929, and when this statute fixing the date of the election is construed with Section 6969, the two mean that no person can be elected on the first Tuesday in April who is in arrears with city taxes on the first Tuesday in April. On this one day he must meet the qualification of the statute.

Article II, Section 19 of the Constitution of Missouri provides that,

"no person who is now or may hereafter become a collector or receiver of public money, or assistant or deputy of such collector or receiver, shall be eligible to any office of trust, \* in the State of Missouri \* \* "

The court in that case held that such collector or deputy collector could not be elected treasurer. State ex rel. McAllister v. Dunn, 277 Mo. 38. We must therefore determine the exact meaning of the term "elected", as used in Section 6969, supra. In this matter we must bear in mind State ex rel. v. Carr, 178 Mo. 229, l.c. 233,

"It is one of the cardinal rules for the construction of statutes, that the spirit

#3 - Honorable Lee A. Politte

and purpose of the enactment is an invaluable guide to the meaning thereof, for the letter of the law often killeth, while its spirit maketh alive."

Again, in State ex rel. v. Insurance Co. 224 Mo. 84, l.c. 92:

"The prime effort of all judicial interpretation is to ascertain what the Legislature really intended in using the particular language."

A close examination, Section 6969, at once reveals that the spirit and purpose of the act under consideration was to prevent a delinquent tax payer from being elected to a city office, wherein, in his official capacity, in some way he might pass upon the question of delinquent taxes in general. This is manifest from the use of the term "elected". If the Legislature has intended that no city official should take office so long as he was a delinquent tax payer of that city, appropriate language could have easily been found to express that intention. Here the act states that no such person can be elected on the first Tuesday in April who is in arrears for any unpaid city taxes, and Section 6969 further provides that such person cannot be elected "who shall at the time" of election, namely, the first Tuesday in April, be in arrears for any unpaid city taxes.

It is, therefore, the opinion of this office that any person or candidate for public office in a city of the fourth class who on election day is in arrears for unpaid city taxes is ineligible to be elected, and incapable of gaining such public office by election. The subsequent payment of city taxes by the elected official does not remove this disqualification from him which he possessed on election day.

Respectfully submitted,

APPROVED:

FRANKLIN E. REAGAN  
Assistant Attorney General

ROY McKITTRICK  
Attorney General

PER:ER

2 1 1/2  
5-21  
TAXATION AND REVENUE: Method of Transferring and Paying Out Funds Collected by County Collector, as School Taxes.

May 14, 1934.



Honorable E. H. Pittman,  
Treasurer Clinton County,  
Plattsburg, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of April 25, 1934, in the following terms:

"Will you please give us a ruling on the following.

Taxes collected by County Collector for Town Schools and Consolidated School Districts, meaning organized districts where they have their own Treasurer, in the collector disposing of this money, should he pay this money direct to the Treasurer of the above mentioned schools or should the Collector pay to me this money, taking my receipt for same and this office making the payments to the various Treasurers of the schools mentioned, thanking you for this information, I remain."

Article 2 of Chapter 57 of the Revised Statutes of Missouri of 1929 is entitled "Laws Applicable to All Classes of Schools." In said Article is Section 9265, which provides as follows:

"Sec. 9265. Collections of delinquent taxes.--The collector shall, at the time of returning the land delinquent list for state and county taxes, return therewith all land school taxes herein provided for which shall remain unpaid, and when so returned, the same shall be a lien on such real estate, and be collected in the same manner that other delinquent taxes on land are collected; and when so collected, shall be paid over to the county treasurer as other school taxes."

Section 9266 in the same Article provides in part as follows:

"The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law, \* \* \* \*"

It is, therefore, our opinion that it is the duty of the County

2. Honorable E. H. Pittman

May 14, 1934.

Collector to turn over money collected for school taxes to his County Treasurer and not directly to the Treasurers of the School Districts and that you should pay out the money on warrants drawn by the proper school district officials.

Yours very truly,

EDWARD H. MILLER

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ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

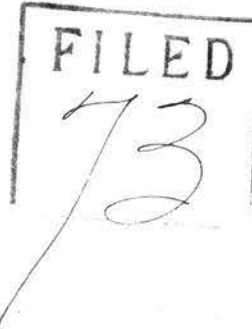


2 ✓  
TAXATION - How to place omitted property on assessment rolls.  
Information on perjury for making false tax return.

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5-26  
May 24th, 1934.

Honorable John E. Powell  
Prosecuting Attorney  
Mercer County  
Princeton, Missouri



Dear Sir:

This acknowledges receipt of your request of  
May 3, 1934 for an opinion upon the following facts:

"The County Board of Equalization  
has met and finally adjourned and  
the appeal board has met and finally  
adjourned, and we have found, by in-  
vestigation, certain persons who hold  
notes, secured by mortgages, who have  
not given in any tax list at all, and  
what I would like to do would not only  
be to prosecute but get them on a tax  
list, and trebble the tax, if possible.

Will your office kindly prepare for me  
the form of a proper information, that  
will stand up, one for making a false  
list and one for not making any list at  
all.

May I ask about another matter; The  
proper method of procedure in determining  
the amount of money in postal savings ac-  
counts, as it is my information that  
people in this town have money deposited  
in post offices outside of the County,  
and not paying any tax on such money."

#2 - Honorable John E. Powell

I.

PROPERTY OMITTED FROM ASSESSMENT.

When taxable property is omitted from the assessment rolls, and subsequent to the final judgment of the County Board of Equalization, and such omitted property is discovered, then by statutory authority, it is made the duty of the State Tax Commission to add such omitted property to the assessment rolls. Subdivisions (3) and (7) of Section 9854, Revised Statutes of Missouri, 1929, provide:

Subdivision (3):

"To receive all complaints as to property liable to taxation that has not been assessed, or that has been fraudulently or improperly assessed, to investigate the same and to institute such proceedings as will correct the irregularity complained of, if any irregularity be found to exist."

Subdivision (7):

"To cause to be placed upon the assessment rolls omitted property which may be discovered to have, for any reason, escaped assessment and taxation, and to correct any errors that may be found on the assessment rolls and to cause the proper entry to be made thereon."

A notice from you, or any taxpayer of your county to the State Tax Commission relating to any omitted property subject to taxation, is sufficient notice for the State Tax

#3 - Honorable John E. Powell

Commission to investigate and place on the assessment rolls for taxation purposes all such omitted taxable property. - Section 5455, Revised Statutes of Missouri, 1929. This authority of the State Tax Commission has been upheld by the courts. - State ex rel. Thompson v. Jones, 41 S. W. (2d) 393 (1931); State ex rel. Thompson v. Collier, 41 S. W. (2d) 400 (1931).

We know of no short cut method to ascertain the amount of postal savings accounts omitted from the taxable assessment rolls. If a taxpayer fails to turn in a list of his taxable property to the assessor (including deposits in postal savings accounts), Section 9760, Revised Statutes of Missouri, 1929, provides:

" \*the assessor shall himself make out the list, on his own view, or on the best information he can obtain;\*" "

We assume that you had in mind ways and means that the assessor could use to ascertain the amount deposited in postal savings accounts at the time he made the assessment. If he is unable to ascertain the exact amount from the postal authorities, then he may list the taxpayer with such amount in the savings account as he thinks proper. The assessor may double the amount of the assessment of any omitted property. - Section 9761, Revised Statutes of Missouri, 1929.

## II.

### INFORMATION FOR PERJURY.

Section 9762, Revised Statutes of Missouri, 1929, provides that a taxpayer who furnishes a false list of property for taxation purposes shall be guilty of perjury.

I enclose herewith a form of Information which I think will meet the requirements of perjury under this sec-

#4 - Honorable John E. Powell

tion. The Information is modelled after the general perjury Information set out in State v. Bradford, 285 S. W. 496. The Bradford was was not a tax case, but I have been unable to find an approved Information in a tax case.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

**TAXATION AND REVENUE:** Method of transferring and paying out funds collected by County Collector as school taxes.

July 14, 1934.



Honorable Sam J. Porter,  
County Clerk, Clinton County,  
Plattsburg, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of June 12, 1934, such request being in the following terms:

"In reference to your opinion to E. H. Pittman, County Treasurer of Clinton County under date of May 14th, 1934, in reference to the payment by the collector of school moneys to the County Treasurer.

Mr. Pittman took the matter up with the County Court and upon due consideration referred Mr. Pittman to Section 9340 R. S. 1929. Kindly advise me as to your opinion in regard to this section. Trusting that I may hear from you at your earliest convenience."

In our opinion to Honorable E. H. Pittman, Treasurer of Clinton County, we stated it as our opinion that it is the duty of the County Collector to turn over money collected for school taxes to his County Treasurer and not directly to the Treasurer of the school districts, and that the County Collector should thereafter pay out the money so turned over to him on warrants drawn by the proper school district officials.

Our opinion as so furnished to Mr. Pittman remains unchanged for the reasons which are more fully set out below.

Revised Statutes Missouri 1929 Section 9264 provides as follows:

"Sec. 9264. Collector's receipts and compensation.--It shall be the duty of the county clerk to take a receipt from the county collector for the school taxes by him placed on the general tax books; and the collector shall proceed to collect the same in like manner as the state and county taxes are or may be collected, and he shall receive, as full compensation for his services on the amount collected and paid over by him, the same per cent. as is allowed by law to collector for collecting other taxes; and he shall pay over monthly, to the county treasurer, all such taxes collected and take his receipt therefor."

and Section 9340 provides as follows:

"Sec. 9340. Duties of collectors.--The county or township collector shall pay over to the treasurer of said board of

July 14, 1934.

education all moneys received and collected by him to which said board is entitled at least once in every month; and upon such payment he shall take duplicate receipts from said treasurer, one of which he shall file with the secretary of said board of education, and the other shall be filed in his settlement with the county court."

These two statutes would seem to be in conflict, one of them requiring the Collector to turn over school taxes collected by him to the Treasurer of his county, and the other requiring him to turn them over directly to the Treasurers of the school districts. The question then in issue is whether or not one of these statutes makes the other inoperative, entirely or to any extent, and, if so, which of the two statutes becomes inoperative. There are no Missouri cases in which this question has been raised, and since the question involves solely a matter of statutory construction, decisions from other jurisdictions bearing on the proper disposition by the Collector of school taxes are of little or no value, and this problem must be solved by an examination of these and related statutes.

### I.

#### LEGISLATIVE HISTORY

Section 9264 was enacted as Laws of 1874, page 162, Section 68. Section 9340 was enacted as Laws of 1877, page 409, Part No. 7, and no substantial changes have been made in either of these two sections since their enactment. Thus, Section 9340 is the more recent statute. However, in 1897 what is now Revised Statutes Missouri 1929, Section 9337 was enacted (Laws of 1897, page 233) which provides in part as follows:

"Whenever any state or county school money apportioned to any town, city or consolidated school district shall have been paid to any county or township treasurer, as now provided by law, \* \* \* "

Thus it would seem that in 1897 the Legislature thought that the law as it then existed contemplated that school money should be turned over to the County Treasurer, and this is the most recent new legislative enactment shedding light on the intention of the General Assembly.

### II.

#### RELATED STATUTES

No other statute has been found indicating that the statutory scheme for the disposition of school taxes contemplates that the Treasurer of the County should not receive such money from the Collector and in fact several statutes indicate the contrary. Thus, Revised Statutes Missouri 1929, Section 9265, provides as follows:



July 14, 1934.

"Sec. 9265. Collections of delinquent taxes.--The collector shall, at the time of returning the land delinquent list for state and county taxes, return therewith all land school taxes herein provided for which shall remain unpaid, and when so returned, the same shall be a lien on such real estate, and be collected in the same manner that other delinquent taxes on land are collected; and when so collected, shall be paid over to the county treasurer as other school taxes."

Likewise, Section 9266 provides as follows:

"Sec. 9266. County treasurers and their duties - - bond required as custodian of school moneys - compensation.-- The county treasurer in each county shall be the custodian of all moneys for school purposes belonging to the different districts, until paid out on warrants duly issued by order of the board of directors or to the treasurer of some town, city or consolidated school district, as authorized by this chapter, except in counties having adopted the township organization law," \* \* \*

and likewise provides that the County Treasurer -

"shall give a separate bond, with sufficient security, in double the probable amount of school moneys that shall come into his hands, payable to the state of Missouri, to be approved by the county court, conditioned for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands;" \* \* \*

Furthermore, Section 9337 continues from the part above quoted, as follows:

"the same shall, on the application of the treasurer of said town, city or consolidated school district, be paid over to him by said county or township treasurer, and the receipt of any such school district treasurer for said money shall be a lawful voucher for the disposition of said money by said county or township treasurer, and be accepted as such by the county court or other body or person having authority by law to make settlements with said county or township treasurer."

which would seem clearly to indicate that in 1897 the General Assembly thought that the person from whom the Treasurers of the school districts in any county should receive the school moneys was the County Treasurer and not the Collector.

### III.

#### DECISIONS OF THE COURTS

As was pointed out above in no case in this state has the problem

July 14, 1934.

under consideration been raised. However, in several cases dealing with a construction of one or more of the statutes above referred to the courts seemed to take it for granted that the County Treasurer was to receive and should receive school taxes, and among these cases are the following: *State ex rel v. Cook*, 72 Mo. 496 (1880); *Sanderson v. County*, 195 Mo. 598, 93 S. W. 942 (1906); *State ex rel v. Weeks*, 92 Mo. App. 359 (1902); *School District No. 45 of Pemisnot County v. Correll*, 220 Mo. App. 322, 286 S. W. 136 (1926). If Section 9340 should be decided to govern and to exclude and render inoperative Section 9264 there would not seem to be any reason or justification for the County Treasurer receiving any of the school funds derived from taxation.

#### IV.

##### CONSTRUCTION OF WORDS

It will be observed that Section 9340 requires the Collector to pay over to the Treasurer of the Board of Education the moneys "to which said board is entitled." The use of the word "entitled" must mean entitled by some statute of Missouri for the whole procedure for the handling of school funds is statutory. As was said above, no other statute has been found entitling the school districts to receive directly from the County Collector money collected as taxes, and in the absence of any such statutory authority it might well be argued that the language of Section 9340 above referred to contemplates some further statute to support it, and in the absence of such further statute Section 9340 is in this respect not repealed or nullified but is merely ineffective for want of additional legislation to support it. To say that Section 9340 governs and requires the County Collectors to turn over all school moneys collected by them to the school districts directly would involve a construction which would nullify Section 9264 and the other statutes above referred to which support Section 9264, and it would require a ruling that Section 9340, being enacted subsequent to Section 9264 repealed by implication Section 9264, and if there is any possibility of a reconciliation between seemingly conflicting statutes the courts are extremely reluctant to declare that there has been an implied repeal.

"The repeal of statutes by implication is not favored by the courts. (36 Cye. 1071; *Road District v. Huber*, 212 Mo. 551, 562; *State ex rel. v. Bishop*, 41 Mo. 16, 24.) The question of repeal is one of intention (*Curtwright v. Crow*, 44 Mo. App. 563, 568), and the presumption is always against the intention to repeal by implication where express terms are not used. (36 Cye. 1071, 1072; *Gasconade County v. Gordon*, 241 Mo. 569, 582; *State ex rel v. County Court*, 41 Mo. 453, 459.)" (*State ex rel Moseley v. Lee*, 319 Mo. 976, 989, 5 S. W. 2d 83 (1928)).

In conclusion, it is our opinion that it is the duty of the County Collector to turn over money collected for school taxes to his County Treasurer and not directly to the Treasurer of the school districts in his County.

APPROVED:

Yours very truly,

EDWARD H. MILLER

ATTORNEY GENERAL.

ASSISTANT ATTORNEY GENERAL.

**TAXATION:**

Drainage District Bonds subject to taxation  
under the Laws of this state.

8-17  
August 17, 1934

FILED  
73

Honorable John E. Powell  
Prosecuting Attorney  
Princeton  
Missouri

Dear Mr. Powell:

Receipt of your request for an opinion dated  
July 18, 1934 is acknowledged.

Your letter is as follows:

"This county has a number of drainage districts, bonded in the usual way, and a number of local persons are the owners of a great number of the bonds, who do not pay tax on the bonds so held by them.

I am asked by the County Court of this county to get your opinion on the question as to whether such drainage bonds are taxable.

I would like to have your opinion before our County Court convenes the first of next month, if possible."

Section 6 of Article X of the Constitution of the State of Missouri, in reference to revenue and taxation of property in the State of Missouri, exempts certain property in this state from taxation. Bonds issued by drainage districts or of any subdivision or municipality of the state, are not included among the property exempted by such Section 6.

Section 7 of the above Article X, provides:

"All laws exempting property from taxation, other than the property above enumerated shall be void."

Section 9742 Revised Statutes Missouri 1929, among other things, provides:

"\* \* \* Taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743 does not undertake to exempt bonds issued by a drainage district nor bonds issued by any municipal or political subdivision of the state, from taxation.

Section 9745 in part reads:

"\* \* \* All notes, bonds and other evidences of debt made taxable by the laws of this state, held in any state or territory other than that in which the owner resides, shall be assessed in the county where the owner resides."

Section 9756, setting out the duties of an assessor, in reference to the assessment of property and providing for the assessor taking from the owner of property a list of the property owned by such person and in setting out what such list shall contain, in the ninth subdivision provides:

"\* \* \* An aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies\* \* \* ."

You will note the use of the words 'all solvent bonds' and we do not understand that the Legislature meant to include or refer only to state, county, town, city, township, incorporated and unincorporated companies' bonds, but that all bonds, including bonds issued by drainage districts, are required to be listed.

Section 9792 makes provision for the valuation to be placed on property by the assessor, as well as the arrangement of the property listed on the assessor's books. The sixth subdivision is as follows:

"\* \* \* All moneys, notes, bonds and other credits, in a separate column;  
\* \* \* \*"

In State ex rel. Union Electric Light and Power Company v. Baker 316 Mo. 853, 858, the Supreme Court of this state said:

"It is the well settled policy of our law that taxes shall be levied and collected for public purposes on all property within the territorial jurisdiction of the State, except that expressly enumerated as exempt. (Sections 1,2,3,6 and 7 of Article X, Constitution of Missouri; Sections 12752, 12753, 12754 and 12756, Revised Statutes 1919.) It is equally well settled, however, that before property may be taxed it must by law be subjected to taxation. (Valle v. Ziegler, 84 Mo. 219; Leavell v. Blades, 237 Mo. 1. c. 700; State ex rel. Am. Cent. Ins. Co. v. Gehner, 280 S. W. 1. c. 419; State ex rel. Koeln v. Lesser, 237 Mo. 1. c. 318.)"

Drainage district bonds are not only not exempted from taxation in this state, but the portions of Sections 9756 and 9792 above set out specifically require bonds to be listed by the owners, that the same shall be assessed, valued and contained in the assessor's books. No reason is apparent why drainage district bonds are not included within the meaning of the word "bonds" as used in the quoted sections of the statutes.

We are of the opinion that bonds issued by drainage districts located within this state and owned by residents

Honorable John E. Powell

-4-

August 17, 1934

of this state are subject to taxation under the general taxation laws of the State of Missouri.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



RELATING TO THE APPORTIONMENTS OF SCHOOL MONEY TO THE  
VARIOUS SCHOOL DISTRICTS IN DIFFERENT FUNDS:

10-1  
September 18th, 1934



Hon. E. H. Pittman  
Treasurer Clinton County  
Plattsburg, Missouri

Dear Sir:

We acknowledge receipt of your letter of September 6th, 1934, in which you state and inquire as follows:

"In our County on school accounts, here in the past, the various funds namely, Teacher's, Incidental's, Building, Sinking and Interest has been carried all under one heading, all in one fund, due to the fact, as the Collector makes his turnover each school is listed by number so much money, now as we are about to start the new book keeping system relative to school accounts keeping separate the various funds as I have listed above, would like to be advised as to whose duty it is to make this apportionment to the school's on the money collected by the Collector."

I.

It is the duty of the various school boards to file with the county clerks their estimates, stating clearly the amount deemed necessary for each fund, and rate required to raise said amount, and the county clerk shall extend upon the general tax books of the county for said year in separate columns arranged for that purpose the amount due each fund by each taxpayer.

Section 9214 Revised Statutes, 1929, provides as follows:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by

the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise said amount."

It appears from the above statutory provision, that it is the duty of the various school boards of the county to furnish the county clerk with an estimate, stating clearly the amount deemed necessary by the district for each fund, also the rate required to raise said amounts needed for each fund, including the building fund or fund to meet bonded indebtedness and interest, if any.

Section 9261 Revised Statutes, 1929, provides as follows:

"On receipt of the estimates of the various districts, the county clerk shall proceed to assess the amount so returned on all taxable property, real and personal, in said district, as shown by the last annual assessment for state and county purposes, including all statements of merchants in each district of the amount of goods, wares and merchandise owned by them and taxable for state and county purposes: PROVIDED, that the levy thus extended shall not exceed in any one year as follows: For building purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for school purposes, one per centum in town school districts, and not more than sixty-five cents on the one hundred dollars in other districts; for sinking fund, forty cents on the one hundred dollars' valuation, and a sufficient amount to pay interest on bonded indebtedness; all of which shall be extended by the county clerk upon the general tax books of the county for said year in separate columns arranged for that purpose; and the county clerks shall list the names of all persons owning any personal property who do not reside in any

school district, and the value thereof; also, list all lands and town lots in any territory not organized into a school district, and shall levy a tax of forty cents on the one hundred dollars' valuation on all such taxable property, said taxes to be collected as other taxes and distributed as provided in section 9257; and it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

From the last quoted statute it appears that it is the duty of the various county clerks to extend upon the general tax books of the county for the year in question in separate columns arranged for the purpose, Teachers' Fund, Incidental Fund and Building Fund.

Now when the tax books are complete in the extension of all taxes, they are certified to the county collector, and as the taxes are collected, the same are paid over to the proper authorities to be credited to each fund as collected by him.

Section 9312 Revised Statutes, 1929, provides in part as follows:

"....The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the "teachers' fund;" the money derived from taxation for incidental expenses shall be credited to the "incidental fund;" all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the "building fund;" and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the "teachers' fund" of such school district. No treasurer shall honor

any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant: ....."

Now it appears from the said last quoted section, that it is the duty of the county treasurer to open an account for each fund specified, in each school district, namely, Teachers' Fund, Incidental Fund and Building Fund, for all moneys received by him.

In view of the foregoing statutory provisions, this department holds:

FIRST, it is the duty of the various school boards to file with the county clerks their estimate, stating clearly the amount deemed necessary for each fund and the rate required to raise said amount.

SECOND, the county clerk in turn shall extend upon the general tax books of the county for said year in separate columns, arranged for that purpose, the amount due each fund by each taxpayer.

THIRD, when collections are made by the collector, and paid to the county treasurer, it is the duty of the county treasurer to open an account for each fund specified, to-wit: Teachers' Fund, Incidental Fund, and Building Fund, for all moneys received for each of said funds.

Very truly yours,

W. W. Barnes

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Asst. Attorney General

APPROVED:

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Attorney General

FOREIGN MUTUAL FIRE INSURANCE CORPORATIONS - Authority to  
accept all-cash premium.

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11-14  
November 9, 1934



Honorable Leo A. Politte  
Prosecuting Attorney  
Franklin County  
Union, Missouri

Dear Sir:

We have your request of October 19, 1934  
for an opinion upon the following facts:

"May a foreign mutual fire insurance company, licensed to do business in Missouri under Article VI of Chapter 37, R. S. 1929, (the Missouri Insurance Code), and authorized by its charter so to do, issue a non-assessable policy, that is, a policy upon which the entire premium is paid in cash in advance and to which no liability is attached for the payment of an assessment upon the happening of certain contingencies in the future, provided, such company maintains the unearned premium and other reserves required by law?"

In answer thereto, we briefly call your attention to the following general rules relative to the interpretation of insurance contracts in this state. The

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statutes of this state are written into every insurance contract. Cravens v. Insurance Company, 148 Mo. 583.

The pertinent part of Section 5796, R. S. Mo. 1929 is as follows:

" \*\* any mutual company upon a majority vote of its members present at an annual meeting, or at any special meeting called for that purpose after one week's notice by advertisement in one or more newspapers printed and published in the city or county where the chief office of said company is located, may charge and receive for the mutual benefit of all its policyholders cash in payment of premiums on such of its policies as shall be, by a majority vote of such meeting, determined upon."

The above method of collecting cash in lieu of notes has been approved in State ex rel. v. Insurance Company, 91 Mo. 311; 3 S. W. (2d) 383.

Section 5810 R. S. Mo. 1929 provides:

"The board of directors of every mutual insurance company \* shall have the power, \* in order to settle the losses insured against, and the expenses and other liabilities of the company, to make an assessment upon the premium notes given by persons affecting insurance of the company. Such assessment shall be made upon each and every note held by the company at the time of the



#3 - Honorable Leo A. Politte

assessment, and which has been in existence for one year prior to the date of the assessment, \*\* No person shall, in any case, be liable upon any premium note on account of any and all claims and assessments upon the same for an amount greater than the face of such note."

It would appear that in the payment of losses by the mutual insurance company, the above statute (5810) should be construed so as to harmonize with Section 5796. The all-cash premium therefor received for such insurance policies would be liable for the payment of losses and expenses of the company up to and including the full amount of such premium, and the unused portion, if any, returned to the policy holder. The cash premium received under Section 5796 is for,

"the mutual benefit of all its policy holders."

In State ex rel v. Insurance Company (1886), 91 Mo. 311, 1.c. 318, the Supreme Court en banc said:

"The theory of mutual insurance, as generally understood, is, that the premiums paid, or to be paid, by the members for their insurance, constitute a fund for the liquidation of losses. It is not essential that the premiums should be paid by note. They may be paid in cash, and when so paid the cash stands for the note."

Upon policies of insurance where the all-cash premium is accepted in lieu of a note, then the term "note" contained in the following part of Section 5809 should be read as "cash":

379.096  
RS No. 149  
379.095

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" \*\* said note, or such part thereof as shall remain unpaid at the expiration or termination of the policy, shall be given up to the maker of the same, provided all assessments upon such note and all liabilities of said maker to the company shall have been paid. \*\* "

From the above, it is apparent that a mutual insurance company may accept an all-cash premium, which such premium becomes a trust fund in the hands of the insurance company for the liquidation of its losses and expenses; is held for the "mutual benefit" of all its policy holders. The cash premium, upon being paid to the insurance company, does not become the absolute property of said insurance company, but is only subject to its pro rata share of the expenses, liabilities and losses of the company which must be paid from such cash premiums fund.

It is, therefore, the opinion of this office that a foreign mutual fire insurance company licensed to do business in this state may issue an all-cash premium policy, wherein the insured is no longer subject to additional assessments, but the all-cash premium so received is to be used for the purpose of paying losses and expenses of the company, and the unused portion thereof returned to the policy holders upon the termination of the insurance contract.

The opinion heretofore written on this matter under date of January 12, 1933, insofar as it may conflict with this one, is withdrawn.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

**FRATERNAL BENEFIT ASSOCIATIONS.**

City of fourth class  
has no power under  
Section 7046, Revised  
Statutes of Mo. 1929, to  
require a license tax on  
agents selling fraternal  
insurance.

11-16

November 10th, 1934.



Mr. Leo A. Politte,  
Prosecuting Attorney of Franklin County,  
Union, Missouri.

Dear Sir:-

We have your letter of September 21, 1934, in which  
is contained a request for an opinion as follows:

"Will you kindly give me an opinion on the question  
as to whether or not a city of the fourth class, under  
Section 7406, Revised Statutes of Missouri, 1929, has the  
power to require a license of insurance agents selling on a  
commission basis, fraternal insurance for companies which  
are exempt from taxation, under Article 13, Chapter 37,  
Revised Statutes of Missouri, 1929, and, also, Section 6022,  
Revised Statutes of Missouri, 1929."

Chapter 37, Article 13, Section 6022, Revised Statutes  
of Missouri, 1929, provides as follows:

"Sec. 6022. Taxation.-- Every fraternal benefit  
society organized or licensed under this article is hereby  
declared to be a charitable and benevolent institution,  
and all of its funds shall be exempt from all and every  
state, county, district, municipal and school tax, other  
than taxes on real estate and office equipment."

Chapter 37, Article 13, Section 5993, Revised Statutes  
of Missouri, 1929, provides as follows:

"Sec. 5993. Exemptions.- Except as herein provided,  
such societies shall be governed by this article and shall be  
exempt from all provisions of the insurance laws of this state,  
not only in governmental relations with the state, but for  
every other purpose, and no law hereafter enacted shall apply  
to them, unless they be expressly designated therein."

From the above two sections the clear intent of the  
legislature is to set apart fraternal benefit societies as insti-  
tutions whose operations are not to be taxed in any way. They

Leo A. Politte--#2

Nov. 10th, 1934.

operate on a general insurance plan, not, however, being regarded by the legislature in the light of insurance companies, but rather as institutions of a separate class governed by special laws. This being true, we cannot regard an agent selling fraternal certificates as an "insurance agent" in the true sense of the term. Therefore, although section 7046, Revised Statutes of Missouri, 1929, gives power to cities of the fourth class to require a license and tax of insurance agents, we do not believe that this includes the power to license and tax agents of fraternal organizations.

For the above reason then, and for the further reason that the legislature has seen fit to set these institutions apart and to exempt all their funds, and apparently all their operations, from taxation, we are of the opinion that cities of the fourth class have not the power concerning which you ask in your letter. The agent is part of the association organization and should be included in the exemption.

Very truly yours,

CHARLES M. HOWELL, Jr.,  
Assistant Attorney-General.

APPROVED:

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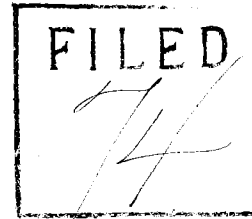
Attorney-General

CMHjr:MB

TAXATION: Discussion of cities' right to collect poll taxes  
POLL TAXES: and right of exemption.

1-15  
January 8, 1934.

Mayor H. L. Pruett,  
Centralia, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"This city is having some difficulty with citizens who claim exemption in the matter of payment of Poll Tax. I construe sections 7014 and 7885 Revised Statutes Missouri 1929, to give cities of the fourth class the right to legislate on this subject and in the absence of specific legislation the one claiming exemption would be required to show a certificate from the County Court. We have citizens who claim exemption because of minor disabilities such as the loss of one thumb or one toe. They have not been exempted as provided for by our ordinances, but some hold certificates from the County Court for such disabilities. We do not consider them sufficient for exemption but before proceeding I should like to have your opinion.

Sections 13869 R. S. Mo. 1929 provide for exemption of members of National Guards. I construe this not to affect members who have been discharged from service.

Do you know of any exemption to be allowed discharged soldiers or sailors from the United States Army or Navy? I find nothing on this and in the absence of an exemption certificate as provided for by statutes and ordinance, see no reason why they should not pay Poll Tax."

Section 7014, R. S. Mo. 1929, authorizing cities of the fourth class to collect Poll Taxes is as follows:

"All able-bodied male persons between the ages of twenty-one and fifty years, who have resided within the corporate limits of such city thirty days next preceding the levy of any poll tax

for any given year, shall be liable to work on the streets and alleys of such city not to exceed three days, or to pay such sum in lieu thereof as the board of aldermen may provide by ordinance, not to exceed four dollars, and upon failure to pay such poll tax, either in cash or by labor, when notified so to do, according to the ordinances of such city, it shall be the duty of the city collector to bring suit before some justice of the peace within the township in which such city is located or an adjoining township, and proceedings shall be had thereon the same as in other ordinary civil cases; but no property shall be exempt from seizure and sale upon any execution issued upon any judgment rendered for such poll tax. The board of aldermen are hereby empowered to levy a poll tax not exceeding four dollars upon each able-bodied male person between the ages of twenty-one and fifty years, who shall have resided within the city thirty days next preceding the levy of such poll tax. Suits under this section may be brought independently of any other tax suits against any defendant pending on back taxes, owing by any defendant at the time suits under this section are brought; and all persons residing within the corporate limits of such towns shall be exempt from working on roads without the corporate limits of said towns and from paying tax or fine relating to the same on property within such corporate limits."

Section 7885, R. S. Mo. 1929, provides for the granting of exemptions from poll taxes by the County Court, and is as follows:

"All men between the ages of twenty-one and sixty years shall be considered able-bodied unless exempted by the county court, and such exemption shall be for life or for a specified time as in the judgment of the court may be right and proper. All applicants for such exemptions shall be examined by the county physician, when required by the court, and by the members of the court, if they see fit, and after such examination the court may authorize the clerk of said court to issue to such applicant a certificate of exemption in accordance with the provisions of this section. In no event shall there be any cost charged against the applicant for such examination, if the application be granted. Where the exemptions are granted, the county



clerk shall keep a record of same and when they expire. No man shall be permitted to set up the fact that he is not able-bodied in defense of any action brought against him for nonpayment of his poll tax unless he has in force at the time the suit is brought a certificate of exemption granted by the county court. Parties who are granted exemption papers shall hereafter pay to the road overseer a poll tax of fifty cents."

Section 7880, R. S. Mo. 1929, among other things, provides:

"The county courts of all counties, except those under township organization, shall at the regular February term in each year levy, for road purposes, upon every able-bodied male inhabitant in the county over twenty-one and under sixty years of age, except persons residing within incorporated cities, a poll tax not exceeding four dollars, \* \* \*."

Under Section 7880 the county court is prohibited from levying poll taxes in incorporated cities. Section 7885 gives the right to the county to grant exemptions, and we believe that that section only applies to exemptions from poll taxes levied by the county court. Since the county has no right to exact a poll tax from inhabitants of incorporated cities, we conclude that the county would have no right to grant an exemption from poll taxes levied by incorporated cities upon their inhabitants. The question of exemption from city poll tax is governed by the ordinances of the incorporated city levying the tax. We are therefore of the opinion that the certificate of exemption granted by the county court would exempt the individual from paying poll taxes levied by the county court, but that such a certificate of exemption from the county court would not be a defense in the collection of the poll tax by an incorporated city.

We do not have before us the provisions of your ordinance covering the exemptions, but the tax <sup>is</sup> levied under Section 7014 on all able-bodied male persons between the ages of twenty-one and fifty years. Whether a person is able-bodied so as to come under the tax is a question of fact. However, we are of the opinion that such minor disabilities as the loss of one thumb or one toe would not relieve the individual from the payment of the poll tax.

## II

Section 13869, R. S. Mo. 1929, is as follows:

"Members of the organized military forces of the state shall be exempt from service upon juries, and shall not be required to pay a poll tax."

January 8, 1934.

As we construe the above section, members of organized military forces, while they are members of such forces, are exempt from paying poll tax, but when they have ceased to be a member of the military forces, then they are not entitled to this exemption. After a person has been discharged from the National Guards he is not a member of the military forces so as to entitle him to an exemption.

## III

We do not know of any provision that exempts discharged soldiers or sailors from paying poll tax. We find no Federal provision giving them exemption and no provision in the state statutes that would exempt soldiers or sailors, after having been discharged from the service, from paying a poll tax.

Very truly yours,



Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

LIQUOR CONTROL ACT: Intoxicating liquor may be sold in original package not for consumption on premises anywhere in Missouri when proper licenses are obtained.

Definition of "city" in Sec. 13-a applicable to whole Act.

County court has only power to issue licenses - cannot regulate

February 22, 1934.

2-24

Hon. Owen C. Rawlings,  
Prosecuting Attorney,  
Marshall, Missouri.



Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"I realize that this writing may be one among a great many others inquiring as to the interpretation of your office as to the new Liquor Control Act, and, with this in mind, I am reluctant in sending it. However, the County Court of Saline County is urging that I ascertain as to one point in particular in order that they may proceed at once with the matter of fixing a license fee for retail sale in the county, and the issuance of licenses thereunder.

Can package liquor be sold any where in the county, both within and without the corporate limits of a city or town, or can such sales be only within such corporate limits? Does the definition of the term incorporated city or town, as set out in Section 13A, of the Act, being lines twenty-five to twenty-eight inclusive, on page eight, properly define the term 'city' with reference to and as used in all other parts of the Act?

Can the county courts, and boards of aldermen, city councils, and other proper authorities of incorporated cities take into consideration, when issuing license for the sale of intoxicating liquor in packages, not to be opened or consumed on the premises where sold, take into consideration the question as to whether or not such applicant then has, and thereafter keeps, in his store, a stock of goods having a valuation of at least \$1500.00, as provided in Section 22 of the Act; or is such matter only a consideration to be entertained by the Supervisor of the Liquor Control?

In the matter of the requisite stock of goods, provided for in Section 22 of the Act, are sugar, flour, lard and other ingredients used in cooking or preparing food for consumption in a cafe, considered a stock of goods; or must such stock consist wholly of goods that are regularly carried for sale without any additional processing?"

I.

Section 22 of the Liquor Control Act of Missouri provides:

"Intoxicating liquor shall be sold at retail in the original package upon a license granted by the Supervisor of Liquor Control, and said intoxicating liquor so sold shall not be consumed upon the premises where sold, nor the original package opened on said premises of the vendor, except as otherwise provided in this act."

It is the opinion of this department that intoxicating liquor may be sold in the original package, not for consumption on the premises, anywhere in the State of Missouri provided the proper licenses are obtained from the City, County and State.

II.

Section 13-a of the Liquor Control Act provides:

"Provided further, that for the purpose of this act, the term 'city' shall be construed to mean any municipal corporation having a population of five hundred (500) inhabitants or more."

While this definition is contained in Section 13-a and therefore would ordinarily be referable only to Section 13-a, nevertheless the words "for the purpose of this Act" permit of no other construction than to make the definition applicable to the Liquor Control Act as a whole.

III.

Section 24 of the Liquor Control Act provides:

"The County Court in each county is hereby authorized to make a charge for licenses issued to retail dealers in all intoxicating liquor, the charge in each instance to be determined by the County Court, by order of record, but said charge shall in no event exceed the amount provided for in Section 22 of this act, for state purposes."

The only power given the county court is to make a charge for licenses. The construction of a statute similar to this was before the Springfield Court of Appeals in the case of State ex rel. v. Berryman, 142 Mo. App. 373, l.c. 374. There it was held that under the simple power to "license" no authority is given to regulate or suppress. The Court said:

"Under section 5857, Revised Statutes 1899, as amended by the Act of 1907, it appears that cities of the third class are given the authority only to levy and collect a license tax on liquor sellers. This does not include the power to suppress or regulate."

Construing Section 24 of the Liquor Control Act in the light of this decision, we must conclude that the county court has only the power to "make a charge for licenses" and that this power does not include the right to regulate.

However, a different rule obtains with reference to the cities of the state. Section 25 provides:

"The Board of Aldermen, City Council, or other proper authorities of incorporated cities may charge for licenses issued to manufacturers, distillers, brewers, wholesalers, and retailers of all intoxicating liquor, within their limits, fix the amount to be charged for such license, and provide for the collection thereof, make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits, not inconsistent with the provisions of this act, and provide for penalties for the violation thereof."

This section expressly grants authority to cities not only to license, but to regulate as well.

Feb. 22, 1934.

Section 22 of the Liquor Control Act provides in part:

"Provided however, that no license shall be issued for the sale of intoxicating liquor in the original package, not to be consumed upon the premises where sold, except to a person engaged in, and to be used in connection with the operation of one or more of the following businesses: a drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionary and/or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least fifteen hundred (\$1500.00) dollars, exclusive of fixtures and intoxicating liquors."

It will be noted that a cafe is not with the prescribed businesses that may sell liquor in the original package.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

JWH:AH



CB  
8-20  
Prosecuting Attorney:

1. County Collector must accept past due drainage bonds or coupons in payment of taxes levied for the payment of bonds or coupons of the same issue, but is not allowed to accept such in payment of any tax levied for any other purpose.

4-20  
March 28th, 1934.

Mr. Owen C. Rawlings,  
Prosecuting Attorney,  
Marshall, Missouri.

Dear Mr. Rawlings:-

We have your letter of December 27, 1933, in which is contained a request for an opinion as follows:

"Please advise as to whether the County Collector of Saline County, Missouri, can accept due and past due drainage bonds or coupons as payment of current or delinquent drainage taxes of the same district which issued these bonds. Please advise further as to whether it is imperative that the Collector accept payment of these taxes in the above manner.

"These questions are presented to my office by the County collector, and I have given my opinion thereon. However, it seems now that the further opinion of your office would greatly strengthen our opinion."

Section 9911, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 9911. What shall be received for taxes.--Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, etc. \* \* \* \*." (Underlining ours).

Mr. Owen C. Rawlings

-2-

March 28, 1934.

We believe the statutory section quoted above is a concise answer to the question contained in your letter. You do not specify for what purpose the taxes in question were levied but unless said taxes were levied for the sole purpose referred to in the statutory section, the past due drainage bonds and coupons could not be accepted in payment thereof.

If such is the case, however, the further question arises as to whether the County Collector is bound to accept payment in the aforesaid manner. The use of the word "shall", in our opinion, makes the acceptance of such payment compulsory on the Collector. Webster in his New International Dictionary defines the word "shall" in an obligatory or imperative sense, and in such sense is it generally used. From the context of the statute in question we are of the opinion that the legislature intended that meaning for the word when said statute was enacted.

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

CMHJr:LC

Approved:

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Attorney General.

Warehouses - Construction of new warehouse and Sealer laws -  
relating to form of applications to county clerk  
and to Sealer, and fees of Sealer.

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4-20  
April 11th, 1934.



Honorable Virgil L. Rathbun  
Prosecuting Attorney  
Nodaway County  
Maryville, Missouri

Dear Sir:

This acknowledges receipt of your request of  
March 7th, 1934 for an opinion upon the recent warehouse law  
enacted by the 1933 Legislature. Your request is as follows:

"Considerable confusion seems to have  
arisen in this part of the state with  
reference to the interpretation of  
Chapter 137, Laws of Mo. for 1933, Extra  
Session, and particularly with reference  
to Sections 1437b and 1437g thereof.

If an individual has grain stored in more  
than one structure, should a separate ap-  
plication for warehouse license be made  
for each structure and a separate license  
issued for each? Or should the County  
Clerk include all such structures in one  
application for license, issue one license  
for all structures, and charge one license  
fee for all?

Likewise, under Sec. 1437 g, should all  
structures of a land-owner be included  
in one application for warehouse receipt,  
one warehouse receipt issued by the  
Sealer covering all structures, and only  
one fee of \$5.00 charged for all such  
structures? Or should a separate appli-  
cation for warehouse receipt be made for  
each structure, a separate warehouse re-  
ceipt issued for each structure, and a  
fee of \$5.00 charged by the Sealer for  
each structure."

#2 - Honorable Virgil L. Rathbun

For convenience, we will subdivide this opinion into the following divisions:

I. Number of warehouses that may be included in a single application.

(a) To the county clerk.

(b) To the Sealer.

II. Separate warehouse receipts are to be issued for each warehouse.

I - (a)

To The County Clerk.

The reference herein made to sections refer to the sections of the warehouse law found in Laws Missouri, Extra Session 1933, p. 168-173 inclusive.

Section 17, containing the emergency clause, sets out that the enactment of this particular law was necessary to enable Missouri farmers to borrow money from the Federal Government. Bearing this in mind, Section 2 of the Act provides that a farmer who wishes to comply with this warehouse law "shall file with the County Clerk of the county wherein said warehouse or warehouses are located an application for a license,". In this application to the County Clerk it shall state:

1st. The exact location of the building or buildings.

2nd. The material of which the same is made.

3rd. The name or names of the owners thereof.

This application is to be made under oath, and if it appear from such application that the building or buildings are suitable structures in which to store feed and other grains, the applicant shall receive a license designating such building

#3 - Honorable Virgil L. Rathbun

or buildings as a farm warehouse, which license shall be good for a period of one year thereafter. The application must be accompanied by a fee of twenty-five cents (25¢) to the County Clerk.

It is apparent from the above and foregoing that there is no limit placed upon the number of warehouses that may be listed and described in one application made to the County Clerk for the purpose of obtaining a license to use one or more of the buildings as a warehouse.

It is the opinion of this office that the application so made to the County Clerk may contain one or more buildings to be used as warehouses.

I - (b)

To The Sealer.

After a person has procured a license to use a building or buildings as warehouses, he shall make his second application; this one he shall file with the Sealer. Section 7 states:

"Before issuing warehouse receipts, the party desiring to secure the same shall first file an application with the Sealer, which application shall state the legal description of the land whereon the warehouse or warehouses are located. The amount of the several kinds of grain in bushels contained in such warehouse or warehouses according to his best estimate, and the quality thereof;"

From the above section, it is apparent that the Legislature had in mind that any farmer could make one application to the Sealer and include in that application one or more warehouses.

The fee provided for in Section 7, to be paid to the Sealer and the number of fees that are to be paid by any farmer are to be determined by the number of applications he

#4 - Honorable Virgil L. Rathbun

makes. Section 7 provides:

"\* said application shall be accompanied by a fee of five dollars, which shall be paid to and retained by the farm warehouse Sealer as payment in full for his services and expense in the performance of the duties of his office."

You will note that Section 7 uses the singular and plural terms "warehouse or warehouses", indicating clearly the Legislative intent to fix one fee of five dollars to the Sealer for performing such duties as are by law placed upon him for each application made to him under this warehouse law.

Section 11 of the Act provides that the Commissioner of Agriculture of Missouri shall prepare and furnish the necessary forms and blanks. This we construe to mean the necessary forms and blanks for the applications above referred to. We have carefully examined the forms prepared and furnished by the Commissioner of Agriculture. These forms in substance require, under regulations of the Federal Government, that for each warehouse upon which a loan of Federal money is to be made, the farmer must make an individual application for each warehouse upon which he seeks to borrow Federal money. Under the state law, the farmer is required to pay a fee of five dollars per application to the Sealer, and since the form of application and certificate approved by the Federal Government requires one application for each warehouse upon which a loan is to be obtained, it necessarily follows that the practical effect of such is to require a fee of five dollars for each warehouse sealed.

## II.

### Separate Warehouse Receipts

### Are To Be Issued For Each Warehouse.



#5 - Honorable Virgil L. Rathbun

Regardless of whether the application to the Sealer, as explained in I (b), supra, contains one or several warehouses, warehouse receipts are to be issued for each warehouse sealed. Part of Section 8 provides:

"Certificates shall be upon forms to be prepared by the Commissioner of Agriculture, and every such certificate must embody within its written or printed terms:

\* \* \* \* \*

4. A particular description of the granary, bin, crib or other receptacle in which the grain is stored, and of the premises upon which it is located.\*\*\*"

Since the certificates or receipts to be issued must comply with the state law, as set out in the above section, then only one warehouse can be described in each certificate, and the Sealer must issue a separate certificate for each warehouse sealed.

The language of the above statute is clear and unambiguous, and under such circumstances neither this office nor any court would be justified in searching for the meaning of a law beyond the statute itself. State ex rel. v. Thompson,

5 S. W. (2d) 57.

In the preparation of this opinion we have constantly kept before us,

"The prime effort of all judicial interpretation is to ascertain what the Legislature really intended in using the particular language."

- State ex rel. v. Insurance Co., 224 Mo. 92 (1909)

#6 - Honorable Virgil L. Rathbun

It is, therefore, the opinion of this office that it is the duty of the Sealer to issue a separate warehouse receipt for each and every warehouse or building used as such upon which he places a seal in accordance with the warehouse law.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

PER:FE

BOARDING OF PRISONERS: County or state must pay cost of boarding prisoners to an adjoining county when there is no jail in the county where the crime was committed; county liable for cost in case of misdemeanor--state in case of felony under Sec. 8551, R.S. Mo. 1929.

5-21

May 8, 1934.



Hon. Owen C. Rawlings,  
Prosecuting Attorney,  
Marshall, Missouri.

Dear Sir:

This department acknowledges receipt of your request for an opinion of some time ago. The opinion was prepared but through inadvertence has been unduly delayed. However, we assume that it will still be beneficial to you. Your letter reads as follows:

"The County Court of Saline County, Missouri in October of this year, arranged for the confinement of Saline County prisoners in the county jail of Lafayette County, Missouri pending the time when a new Saline County jail could be constructed; the contract has already been let and the work is now started. The County Court in regular session had provided that 55¢ per day should be the cost to the jailor for the board of prisoners in confinement. The Saline County court, under above special agreement, is to pay 75¢ per day for the board of county prisoners, temporarily confined in the City Jail at Marshall, Missouri, and 58¢ per day for the board of Saline County prisoners confined in the Lafayette County jail.

"Is Saline County required to pay the cost of boarding its prisoners, in excess of the amount of 55¢ per day, or shall the entire cost be taxed as a part of the regular costs of the case, which costs will, in certain cases, be paid by the State.

"Should the cost of transporting prisoners from Saline County to the Lafayette County jail, after preliminary hearing, examination and commitment, be taxed as a part of the regular costs of each case, which in some cases will be paid by the State, or must such transportation cost be cared for by Saline County?"

## I.

County or state must pay cost to an adjoining county of boarding and confining prisoners when there is no jail in the county where the crime was committed.

The fact that Saline County has no jail at the present time due to a new one being constructed, said county would be entitled to place its prisoners in the county jail of Lafayette County under Sec. 8545, R.S. Mo. 1929, which is as follows:

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

As to the expenses of commitment, you are referred to Sec. 8551, R.S. Mo. 1929, which is as follows:

"In all cases where a person is committed from another county for a criminal offense under this article, such county, or the prisoner, or the state, shall pay the expenses, in the same manner as if the commitment had been in the county where the offense was committed; and in civil suits, the plaintiff, or defendant, or the prisoner shall pay the expenses, in the same manner as if the imprisonment had taken place in the county where the suit commenced."

Under this section your county is liable for the board and keep of the prisoners, if the prisoner is insolvent, or in the event the crime is a felony punishable solely by a sentence in the penitentiary, then the state would be liable for the costs instead of the county, granting, of course, that the prisoner is insolvent.

It is the duty of the county court to allow the sheriff not to exceed 75¢ per day. Sec. 11794, R.S. Mo. 1929 provides as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

It is the duty of the county court to fix the allowance. Section 11795, R.S. Mo. 1929 provides:

"It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

In the decision in the case of Mead v. Jasper County, 322 Mo., l.c. 1196-7, it is made the duty of the county court to make the order, but the time of making same is not mandatory as stated in the statute in the month of November, but may be made subsequently. The Court said:

"As stated above, the right and duty of fixing the sheriff's compensation for boarding prisoners has been by these statutes lodged in the county court, and appropriately so. The prices of provisions fluctuate and they may change materially from year to year. The sheriff's allowance for boarding prisoners is therefore required by statute to be fixed yearly and for periods of one year only. The county court has charge of the business and financial affairs of the county generally and the members of that body are familiar, or can readily familiarize themselves with local prices and conditions. The taxpayers, as well as the sheriff, are entitled to the benefit of the county court's judgment and official action in the matter. The duty imposed by the

statute concerns the public interest. It should be performed at the time designated in the statute, as should all duties imposed on officials, for the prompt and orderly administration of affairs. But for one reason or another it will sometimes happen that official duties are not performed in the precise manner, or within the precise time, prescribed by the law imposing them. The legislature must have understood that such failure might occur sometimes in the performance of the duty enjoined by the statute in question. Affirmative language only is used in the statutes, imposing the duty but making no provision for doing the thing required to be done in any other manner or by any other person or body in case the court could not act within the exact time designated. There is no language used in the statute that in terms limits the power or jurisdiction of the county court to the precise time therein specified. Taking into consideration the language and the purpose of the statute, the nature of the duty imposed, and the functions and duties of county courts in the management of the business and finances of the county, it seems to us clear that the county court's jurisdiction to make an order such as the one in question is not conditioned upon its being exercised within the precise time named in the statute and was not lost by the few days' delay shown in this case.

"If, after the time designated by statute and before the actual making of the order, rights had in some way become fixed which would be disturbed by enforcement of the order, we might have a different question with which to deal. But such question is not here. There is no showing that the sheriff was, or could have been, prejudiced because of the order not being made until January 5, 1924, instead of, for instance, on December 31, 1923, when he admits it could have been lawfully made. He knew that the last previous order, that on December 1, 1922, was for one year only and that by its terms, as well as by the law, it expired December 31, 1923. He knew that up to December 31, 1923, no order was yet made for 1924, though he testified that he expected one to be made. He could not then reasonably have contracted obligations for 1924, relying on an order of court or upon the few days' delay in the making of the order shown and he does not claim that he did so."



### CONCLUSION

As to whether or not your county, or the state, would pay 55¢ or 75¢ in the event of an acquittal or the insolvency of the defendant, we are guided in our opinion by that portion of your letter which states that under special agreement your county pays to the City of Marshall 75¢ per day for prisoners confined in the city jail, and 58¢ per day for the board of county prisoners confined in the Lafayette County Jail. Since your county court has made that agreement, it becomes a contract which your county must abide by, and we are therefore of the opinion that the amounts paid to the City of Marshall and to the County of Lafayette are the actual costs in a criminal case and the County of Saline or the state would be compelled to pay them.

By Sec. 11794, supra, the maximum amount is 75¢ per day and as the costs are less than 75¢ per day, they are legal. When it is determined which is liable for such costs, it will be necessary to pay the sum of 75¢ per day for the time the prisoner is confined at Marshall and 58¢ per day for the time the prisoner is confined in the Lafayette County Jail.

### II.

The cost of transporting prisoners from Saline County to Lafayette County after preliminary hearing and commitment should be taxed as a part of the regular costs in each case and should only be paid by Saline County when under the statutes Saline County is deemed liable for the costs.

Section 8551 quoted supra, as applying to your first question, is also applicable and answers your second inquiry. We construe said section to mean and include that when a prisoner is committed to the jail of another county for any cause, the costs of transporting said prisoner and the costs of the prosecution should be paid by the county in which the crime was committed, if the county is liable, or by the state if under the statutes the state is liable for costs, and this to include the extra or additional costs occasioned by reason of the prisoner being transported to and from preliminary hearing and trial. This appears to be the law as applied to costs in changes of venue and we think the situation is the same.

The decision in the case of Ransom v. Gentry County, 48 Mo. 341, while not bearing directly on the question, has the same principle involved. We are herewith quoting a portion of this decision:

"It is not disputed that, for the taxable costs, the State and not the county is liable; but the county was held liable for those items because there was no jail where the cause was tried, and it became necessary

for the sheriff to guard the prisoner. It was the duty of the sheriff where the prisoner was confined to produce him before the Circuit Court of the county appointed for his trial. (Gen. Stat. 1865, ch. 223, Wagn. Stat. 787). And when so produced and delivered to the sheriff of such county, what is to be done with him? The sheriff must take charge of him; and if there is no jail, or if the jail be insufficient, the prisoner must be guarded, under the provisions of Section 19 of the chapter last referred to.

The statute makes no provision for taxing in the bill of costs the expenses of thus guarding the prisoner; hence the State cannot be required to pay them. But their payment is expressly charged upon the county by section 20 (Wagn. Stat. 787), which reads as follows: 'The expenses of said guard to be audited and paid as other county expenses.'

From this decision we can infer that all costs relating to transportation of prisoners when there is a statute covering the situation are to be considered legitimate costs. Likewise, the very early case of *County of Perry v. John Logan*, 4 Mo. 434, 1.c. 436, wherein the Court said:

\*\*\*\*\*The fact then that the prisoner belonged to another county, is sufficient to discharge the county of Perry. The court in their answer, cite and rely on the 16th section of the revised code of 1825, respecting jails and jailors, p. 415, which says that in all cases where a person is committed from another county, for a criminal offence under this act, such county, or the prisoner or the State shall pay the expenses in the same manner as if the commitment had been in the county where the offence was committed; and in civil suits, the plaintiff or defendant shall pay the costs, etc. It is not disputed that the commitment was under this act: It would be in our opinion, exceedingly unjust, to fix the costs of the guard on the county of Perry. Whether the State or some other county may be liable for these costs, it is not necessary to consider; as to who is liable, the law appears to be clear enough. \*\*\*\*\*

May 8, 1934.

CONCLUSION

By statute it is mandatory on counties to build jails and provide for the safe-keeping of prisoners. However, the Legislature has evidently anticipated that counties are sometimes compelled to build new jails or that situations arise wherein counties cannot care for their own prisoners, and hence have provided that they can be placed in adjoining counties. By reason of such statutes and Saline County having complied with the same, we are of the opinion that the costs of transporting prisoners to and from preliminary hearings, trials, etc., constitute legitimate costs which in the case of a misdemeanor are to be paid by the county and in case of a felony by the state, or by the prisoner in both instances unless he be insolvent.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

C. F. FEES - Of collector and county clerk under Sec. 9945 and 9969.  
COLLECTORS - COUNTY CLERKS.

October 9, 1934.  
1222

Honorable S. H. Randolph  
Collector of Revenue  
Carter County  
Van Buren, Missouri



Dear Sir:

We have your request for an opinion, which  
is as follows:

"I would like as soon as possible  
to have an opinion on the following:-  
Sec. 9945, where the Collector, for  
bringing up the delinquent list and  
making the back tax book, is allowed  
ten cents per tract and the county  
clerk five cents per tract. From  
what source are they paid? Does the  
county court draw warrant for same  
or who pays this fee?

"Under Sec. 9969, "To the Collector  
for recording the list of delinquent  
land and lots to be taxed as costs."  
Does this mean the list published  
for sale at regular tax sale date  
the first Monday of November?"

For convenience, we will sub-divide this  
opinion as follows:

#2 - Honorable S. H. Randolph

1. Fees due under Section 9945, Laws 1933, p. 426, to Collector and County Clerk.
2. Fees due under Section 9969, Laws 1933, p. 429, to Collector for recording list of delinquent land.

I.

FEES DUE UNDER SECTION 9945, LAWS  
1933, PAGE 426, TO COLLECTOR AND COUNTY  
CLERK:

We have heretofore written an opinion under date of June 28, 1934 addressed to the county clerk at Princeton, Missouri, which in substance holds that the fees provided for in Section 9945, Laws 1933, p. 426 are not chargeable to the delinquent taxpayer. Upon a reconsideration of the entire matter, it may be that the opinion was incorrect. However, it may be that this opinion, as if and when the matter reaches the court for determination, will not be followed. The 1933 tax laws take on the aspects of a Chinese puzzle. It may be that the inconsistencies of these new tax laws will ultimately destroy the life of the law itself, leaving the particular sections now under consideration "mere sound and fury, signifying nothing".

We reiterate, as in our opinion under date of June 28, 1934, that the general rule is that laws imposing taxes are strictly construed against the taxing power and in favor of the person sought to be taxed, so that unless there is express statutory authority for so doing, costs and fees cannot be collected from the taxpayer.

We call your attention to that part of Section 9945, Laws 1933, p. 427, which is as follows:

#3 - Honorable S. H. Randolph

" \* \* all taxes hereafter becoming delinquent shall bear interest until paid as provided by section 9952, and shall also be subject to the same fees, commissions and charges as in this chapter provided for taxes now delinquent, \* \* "

The above statute relates to the fees of the collector for making and recording the delinquent land list and the fees due the county clerk for comparing and authenticating such record of the delinquent land list.

Section 9948, R. S. Mo. 1929, still in force and effect in this state, provides that in the back tax book there shall be recorded therein,

" \* \* the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax at the time of making said back tax book, together with the clerk's fees then due), in appropriate columns arranged therefor, \* \* "

It would appear that it was the original intention of the lawmakers to require delinquent taxpayers to meet the additional costs incurred by such delinquency. Section 9950, Laws 1933, p. 427, providing when and how delinquent taxes may be compromised, provides that such compromise may only be made when the delinquent land is not worth the amount of taxes, interests and costs due thereon, as charged in said "back tax books", or recorded list of delinquent land and lots in the collector's office.



#4 - Honorable S. H. Randolph

From this section it would appear that it was the intention of the lawmakers that the delinquent taxpayers should assume the burden of such costs.

If the fees provided for in Section 9945 for the collector and the county clerk are paid from the county treasury, then such payment would transfer these extra costs incurred by delinquent taxpayers to the shoulders of the taxpayers who pay their taxes on time. We do not believe such was the intention of the Legislature. In this matter we have constantly kept before us a statement of the St. Louis Court of Appeals (1931), in *State v. Schwartzmann Service, Inc.* 40 S. W. (2d) 479, l.c. 480:

"It is a cardinal rule, universally accepted, that, in the exposition of a statute, the intention of the law-maker will prevail over the literal sense of the terms; its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from its context; from the occasion and the necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion. The object of all rational interpretation is to reach the true intent and meaning of the law-making authority, as expressed in the language it has employed to convey the thought. All other rules are subordinate to that great one. The chief canon of construction is that which requires us to find the legislative intent and purpose. The intent and spirit of the legislative act should be made to speak, if such can be done without doing violence to express language."

The above sections quoted in this opinion are a part of Chapter 59, Article 9, specifically dealing with delinquent and back taxes. It will be noted that the language previously quoted herein from Section 9945 of the 1933 Laws refers to charges, as in this chapter provided for taxes now delinquent. Article 9 is the only portion of the entire chapter on taxation that refers to delinquent taxes. An examination of Article 9, covering the subject of delinquent taxes, will reveal that all charges necessarily incurred because of the delinquency of such taxes, whenever specific provision for same is made, are chargeable against the delinquent taxpayer.

We believe that the above statutes are sufficient to tax the fees involved in this opinion against the delinquent taxpayer and not against the county. To tax such costs against the county without specific provision therefor, would be to pay the collector and clerk compensation out of the county treasury, for which there is no specific statutory authority. In Missouri, it must be remembered that a public officer is presumed to render his services gratuitously, unless some specific statutory authorization is found providing for the payment of such services. *King v. Riverland Levy District*, 279 S. W. 195, 1.c. 196 (1926). We find no statutory authority requiring the fees in question to be paid by the county.

It may be urged that since the statute allows fees to the collector and clerk, such is sufficient within itself to make the county liable therefor. It appears that specific statutory authority imposing upon the county the duty to pay such compensation is necessary. The following general rule, taken from 11 C. J. p. 878, Section 50 will suffice:

" \* \* as a general rule the public is liable for the compensation of a clerk of court only where there

#6 - Honorable S. H. Randolph

is specific authority to the officer to make a charge for the service rendered, and a positive statutory provision making the public liable therefor. \* \* "

It may be urged that since Section 9969, R. S. Mo. 1929 contains the provision,

"Provided, that in no case shall the state, county or city be liable for any such costs, nor shall the county court or state auditor allow any claim for any costs incurred by the provisions of this article."

it was the intention of the Legislature in 1933, by the repeal of Section 9969 and the omission of the above quoted portion from the new statute enacted in lieu thereof, to make the county liable for such costs. However, in view of the well established rule of law in this state, exemplified by the King v. Riverland Levy District case, that portion of the 1929 statute was unnecessary, and its omission from the new section 9969, Laws 1933, p. 429, does not in the least alter the general rule in this state, - that compensation to public officers is allowed only by statutory authority.

It is the opinion of this office that the ten cents fee due the collector for making and recording the delinquent land list, and the five cents fee due the county clerk for comparing and authenticating such record of the delinquent land list, are to be classified under the heading of "charges", as contained in the same statute, and are to be added to the taxes and collected from the delinquent taxpayer and not from the county.

## II.

FEES DUE UNDER SECTION 9969, LAWS 1933,

PAGE 429, TO COLLECTOR FOR RECORDING LIST OF DELINQUENT  
LAND.

#7 - Honorable S. H. Randolph

Under this heading, we are called upon to construe Section 9969, Laws 1933, p. 429, relating to the fees of collector, which in part is as follows:

" \* \* To the county collector, for recording the list of delinquent land and lots, twenty-five cents per tract, to be taxed as cost and collected from the party redeeming such tract."

Under Section 9952, Laws 1933, p. 430, the words "back tax book" now means the record of the list of delinquent lands and lots in a collector's office, and the "record" of the delinquent land list by the collector, and the certification thereon by the county clerk is construed as the making of the back tax book. It therefore appears that from the delinquent land list, the collector shall "record" the same in his office in a separate book or volume for that purpose, and for such service he shall receive the fee provided for in the above statute, namely, twenty-five cents per tract.

It will be noted that the twenty-five cent fee is "per tract", to be taxed as costs and collected from the party redeeming "such tract". After the tract is once placed in this book or "record", it would appear that for the addition of subsequent years of delinquent taxes against this same tract of land, the collector would receive ten cents per tract, as provided in Section 9945 for each subsequent annual entry of delinquent taxes, and that the one recording of this tract of land and the annual entry thereon of delinquent current taxes by the collector would constitute the permanent record from which lands would be sold under Section 9952b, Laws 1933, p. 430, which is as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some news-

#8 - Honorable S. H. Randolph

paper of general circulation and published in the county, \* And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, \* \* "

It is, therefore, the opinion of this office that the fees provided for under the above portion of Section 9969, "for recording the list of delinquent land and lots" refers to the permanent record that is to be kept by the collector of all lands and lots upon which taxes are delinquent. The fee provided therein is for the making of that record; the fee does not apply to the copy of that record that is made by the collector for publication in the newspaper, under Section 9952b, Laws 1933, p. 430.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

PER:FE

**NEPOTISM:**

Persons related as first cousins or more closely come within the fourth degree; second cousins do not come within the prohibition of the Constitution.

B-16

November 10, 1934.



Mr. Owen C. Rawlings,  
Prosecuting Attorney,  
Marshall, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"A question has arisen in my county which may call for an application of the anti-nepotism provision of our constitution. Your office can assist me by advising me as to just what degree of relationship exists between first cousins, also second cousins, or is each of these within the prohibited degree of relationship?"

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employee of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

Under the foregoing constitutional provision the prohibitive relationship is that of fourth degree or closer. In 13 C. J. 511, the methods of computing the degrees of consanguinity are as follows:

"One by the canon law, which has been adopted into the common law of descents in England and the other by the civil



law which is followed both there and here in determining who is entitled as next of kin to administer personality of decedent. The computation by the canon law is as follows: 'We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related. By the civil law, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person, reckoning a degree for each person, both ascending and descending.'

We do not find that the courts of this State have laid down any rule as to how the relationship under Section 13 of Article XIV is to be computed. In other states where anti-nepotism provisions are in force the courts have generally applied the civil rule. We believe that the courts of this State, when the matter is presented for consideration, will adopt the civil rule in computing the degree of relationship under Section 13 of Article XIV.

By applying the above rule this Department has repeatedly held that persons who are related as first cousins or more closely come within the fourth degree. Persons who are related as second cousins or less closely do not come within the prohibition of the Constitution. Persons related by marriage, of course, are related by affinity and the same rule applies in computing the relationship.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

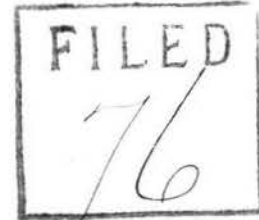
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ROY McKITTRICK,  
Attorney General.

FWH:S

PROSECUTING ATTORNEY: Salary fixed by Sec. 11314 R.S. Mo. 1929  
and fees allowed for convictions in felony  
cases must be turned over to county treasurer.

1-22  
January 19, 1934.



Honorable E.L. Redman,  
Prosecuting Attorney,  
Gentry County,  
Albany, Missouri.

Dear Sir:

This department acknowledges receipt of your letter  
relative to the fees of your predecessor as Prosecuting Attorney  
of Gentry County. Your letter is as follows:

"I would be glad to have an opinion from  
your office concerning what should be done  
with prosecuting attorney's fees for con-  
victions of felonies in cases where the  
defendant is insolvent and unable to pay  
and is sentenced to the penitentiary, and  
the costs are adjudged against the state,  
and the state pays to the prosecuting attor-  
ney the fee provided for conviction in  
felony cases.

My predecessor, Mr. E.C. Lockwood, had a  
few felony cases with convictions where the  
costs were certified to the state and the  
costs including the prosecuting attorney's  
fee are now in the county treasurer's office.  
If this fee is the individual and personal fee  
of the prosecuting attorney, of course, he  
wants it, and that is the question he is rais-  
ing now with me. In counties such as Gentry  
County, if that fund does belong to the pros-  
ecuting attorney, of course, it will be of  
benefit to me, and I am willing to turn them  
over to him providing they belong to him  
and I wouldn't have to re-account for them.

Enclosed you will find the statement of this  
question and the brief of Mr. Lockwood, which  
he made and presented to me. I forward this  
for your use if it may be of any convenience  
to you and your office."

## I.

Prosecuting Attorney's Salary fixed by Sec. 11314, R.S.  
Mo. 1929; not allowed fees for convictions in felony cases.

Prior to 1913 the Prosecuting Attorney was paid a salary and was also allowed to retain certain fees. After 1913 the office was placed on a salary basis and continued so until 1919, when Section 11314, R.S. Mo. 1929 was enacted, under which section your predecessor drew his salary. We quote the pertinent part of said section:

"On and after the first day of January, 1921, the prosecuting attorney shall receive for his services per annum, to be paid out of the county treasury in all counties having a population of less than ten thousand inhabitants, the sum of one thousand dollars (\$1,000.00); in all counties having a population of ten thousand and less than fifteen thousand inhabitants, the sum of eleven hundred dollars (\$1,100.00); \*\*\*\*\*"

The Legislature did not repeal or materially change any of the sections dealing with the fees of prosecuting attorneys; however, under Section 11315, R.S. Mo. 1929, which is as follows:

"It shall be the duty of the prosecuting attorney to charge upon behalf of the county every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the clerk of the county court, and shall at the end of every quarter make out an itemized and accurate list of all fees in his office which have been collected by him, and one of all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the county court, stating that he has been unable, after the exercise of diligence, to collect the part unpaid--said report to be verified by affidavit--and it shall be the duty of the county court to cause the fees unpaid to be collected by law, and to cause the same when collected to be turned over to the county treasury,"

the Prosecuting Attorney is compelled to dispose of the fees as directed, and is not permitted to retain the same.

Your predecessor refers to the fact that in counties of a certain population the Prosecuting Attorney's salary is fixed "in lieu of all fees". Section 11314 does not use the phrase "in lieu of all fees" and he therefore concludes that in the absence of such

phrase he should be entitled to the fees mentioned in Section 11783, R.S. Mo. 1929 for convictions obtained in felony cases. We are unable to agree with your predecessor in this respect.

We shall now deal with the phrase "shall receive for his services per annum". As stated before, it was evidently the intention of the Legislature to place the Prosecuting Attorney entirely on a salary basis and compel him to account for all fees received during each month and pay same over to the County Treasurer, retaining none for himself. Referring to the phrase "for his services", we cite you to a case very much in point - Supervisors v. Jones, 119 N.Y., l.c. 343, wherein the Court said:

"The chief ground of his contention is that the act of June, 1881, does not in express terms forbid the receipt of fees by the county treasurer or repeal by implication the laws under which before 1877, the county treasurers were entitled to receive them. But I think that is a very narrow interpretation and more nice than wise. If the statute of June, 1881, stood alone it would, by the force of its own terms, substitute an annual salary for fees. When it declares that the county treasurer shall receive, 'as compensation for his services', an annual salary, it very plainly implies that such salary is to be his sole and only reward. 'For his services' means for all his services, for the entire and complete performance of his official duties, and a specific compensation awarded for those services implies the full and entire compensation to which he is entitled. But this natural interpretation of the language becomes conclusive when the statute is read in connection with the legislation on the same subject. The Act of 1877 defined the phrase 'as compensation for his services' so fully and explicitly as to leave no possible room for doubt. The later legislation on the same subject repeats the phrase, which must retain the meaning attached and not bear a new and different one. The inference from the statutes read together, and in the light of the evil they were intended to remedy, becomes irresistible."

#### CONCLUSION

Conceding the fact that the procedure may be somewhat clumsy and inconsistent as to the collection of fees by the Prosecuting

January 19, 1934.

Attorney relating to persons convicted of felonies and the manner in which they are to be turned over to the Treasurer, the approving of fee bills by the Prosecuting Attorney and the payment of criminal costs by the Auditor, yet, in the light of the above quoted sections, it is the opinion of this department that the salary of your predecessor was fixed by Sec. 11314, supra, at a definite amount, and he cannot retain the fees in question, but must turn them over to the County Treasurer, as provided by Section 11315, supra. He is therefore not entitled to the fees as now claimed by him.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

DRAINAGE DISTRICTS: TAXATION: CONSTITUTION:

Lands purchased by a drainage district at a tax sale or redeemed from taxes, are not exempt from the payment of general taxes under Section 6, Article X of the Constitution of Missouri.

10-2 October 1, 1934

*This op in wrong See 111 SW 2d 151*

Honorable A. Ives Reid  
Treasurer and Ex-officio Collector  
Harrisonville  
Missouri



Dear Sir:

This Department acknowledges receipt of your letter dated September 12, 1934, as follows:

"We have some land in our County which is in the Drainage District, that the Drainage Board has taken title to or is in suit to collect Drainage Tax.

The Attorney and Sec'y of the Drainage Dist. claim this property is not subject to tax sale.

Will you please give me your opinion relative to this matter."

1.

By the provisions of Section 10766 Revised Statutes Missouri 1929, authority is given the Board of Supervisors of a drainage district, organized in circuit court in this state, to purchase lands at sales of lands in the district for drainage taxes and to redeem lands sold for general taxes when the district is not made a party to a suit wherein a sale is had for general taxes. The section of the statutes referred to, in part, is as follows:



"To protect said lien of said drainage taxes upon the lands and other property against which said taxes shall be levied, in any case where delinquent lands are offered for sale for such delinquent taxes, and the amount of the tax due, together with interest, cost, and penalties is not bid for the same, the board of supervisors shall have authority to bid or cause to be bid, not to exceed the whole amount due thereon, as aforesaid, in the name of the drainage district, and in case such bid is the highest bid, the sheriff shall sell and convey such lands to such drainage district, and such lands shall thereupon become the property of the drainage district, and may be held, disposed of, and conveyed by the board of supervisors at such price and on such terms, as in the discretion of the board of supervisors may be to the best interest of the district."

And further,

"The board of supervisors shall also have authority to protect the lien of the drainage district for drainage taxes by paying the general, state, county, school and road taxes, and in case the lien of the state for such general, state, county, school and road taxes is foreclosed, and the land, or other property, sold for such general taxes, and the said drainage district is not made a party to the proceedings foreclosing the said lien for such general taxes, the said board of supervisors shall be authorized at any time within one year after said sale to redeem such lands, by paying not to exceed the whole amount of such taxes, together with penalties and costs accrued thereon."

As to what funds may be used for making such purchases or redemptions is not directly disclosed.

Section 10752 Revised Statutes Missouri 1929, authorizes the board of supervisors of any drainage district, organized under the provisions of Article I of Chapter 64, to levy a uniform tax of not more than fifty cents per acre upon each acre of land in the district, to be used for the purpose of paying expenses incurred or to be incurred in organizing said district, making surveys and to pay other expenses necessary to be incurred before the board shall be empowered to pay the total costs of works and improvements in the district.

Section 10759 Revised Statutes Missouri 1929, authorizes the board of supervisors of drainage districts organized in circuit court to levy a tax on the lands, railroad and other property in a drainage district at such sums as may be found necessary by the board of supervisors to pay the costs of the completion of the proposed works and improvements, and in carrying out the objects of the district plus ten per cent of said total amount for emergencies, the tax to be spread over each tract of land or other property in the district in proportion to the benefits assessed.

Section 10788 authorizes the board of supervisors of such drainage districts to issue bonds in an amount not to exceed ninety per cent of the total amount of the taxes levied, and payable out of the money derived from the aforesaid taxes. A sufficient amount of such drainage tax when collected shall be preserved in a separate fund for the payment of the principal of and interest on such bonds, and for no other purpose. It being provided in the latter section that:

"The funds derived from the sale of said bonds or any of them shall be used for the purpose of paying the cost of the drainage works and improvements and such costs, expenses, fees and salaries as may be authorized by law and used for no other purpose."

2.

A solution of your question, of course, depends on

a proper construction of Section 6 of Article X of the Constitution of the State of Missouri, which section reads:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 10743 Revised Statutes 1929, as amended by Laws 1933, page 217, provides that drainage districts may be formed

"\* \* \* for the purpose of having such lands and other property reclaimed and protected from the effects of water, for sanitary or agricultural purposes, or when the same may be conducive to public health, convenience or welfare, or of public utility or benefit, by drainage or otherwise,\* \* \*"

The latter section refers to the organization of drainage districts by circuit courts. Substantially the same language is used in Section 10902 Revised Statutes 1929 in reference to the organization of levee districts.

By virtue of the provisions of Article II, Chapter 64, Revised Statutes 1929, county courts may organize, incorporate and establish drainage districts.

"When the same is necessary to drain or protect any land or other property."

It has been held in this state that drainage districts are municipal corporations within the meaning of the constitutional provision above set out. Such cases will be referred to later. Perhaps as clear a definition as has been stated by the Supreme Court of this State as to the character and functions of a drainage district, is to be found in an opinion by Graves, J., in State ex rel. Hausgen v. Allen 298 Mo. 448, 458, where it was said:

"The functions exercised by drainage districts being purely governmental in character, the question is whether or not they are liable for negligence of their agents in the prosecution of the reclamation plan, where damages are sought by one whose lands are within the district. These districts have no private or proprietary functions to perform, and in this their powers are not as broad as cities, towns and villages. Their functions are governmental and public. The very foundation stone of their structure is public necessity, or public convenience, or public welfare. (Sec. 4378, R. S. 1919)."

We may have a better view if we distinguish clearly between proprietary rights and governmental functions. Defining governmental functions or purposes, in the City of Fort Worth v. Higgins 5 S. W. (2d) 761, 763, the Court of Appeals of Texas said:

"It will be observed, to be governmental the purposes of the act must be 'essentially public, purposes pertaining to the administration of general laws made to enforce the general policy of the state'; while the powers which are classed as proprietary are such as are 'not of this character, voluntarily assumed, powers intended for the private advantage and benefit of the locality and its inhabitants.'"

Making the distinction between the two terms and speaking of the management of its parks by a city, in State ex rel. Welsh v. Darling 88 A. L. R. 218, 227, it is said, speaking of such control,

"No revenue is received therefrom. In the management and control of its parks, municipalities, under the rule prevailing in this state, act in a purely governmental capacity."

And further,

"A different rule prevails in many jurisdictions, at least where the municipalities operate their parks and other similar property for revenue, and therefore in a proprietary capacity."

The Supreme Court of this State, en banc, in Auslander v. City of St. Louis 56 S. W. (2d) 778, 780, discussing the functions of a city in reference to its liability for tort, said:

"Municipal corporations are considered in two aspects. One where their functions relate to the corporate interests only, and the other where they discharge certain governmental functions. The authority for the latter is characterized as 'quasi delegated sovereignty for the preservation of the public peace and safety and the prevention of crime.' In performing the duties relating solely to its corporate character, the city is liable for injuries caused by negligence of its agents; in performing duties relative to the latter or governmental character for the public good, it is not liable."

And further, on the same page:

"\* \* \* It is generally held that the exercise of the police powers by municipal corporations is a governmental function,



acting in their governmental capacity.  
\* \* \* The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public."

The purchase of lands by a drainage district at a tax sale could have no relation to drainage, public health or welfare, and therefore no relation to the governmental functions of the district, except insofar as it incidentally might provide means of payment of works and improvements in the district. We know as a matter of common knowledge that bonds are commonly issued upon the organization of all drainage districts in this state, and the same sold for the purpose of paying for the improvements constructed in the district by reason of its organization, so that ordinarily funds would be on hand with which to pay for the carrying out of the plan for reclamation. In the last analysis the only purpose in purchasing the lands in the district at a sale to pay its taxes would be for the use and benefit of the holders of the bonds, or perhaps other landowners in the district who had not paid out the amount of their assessed benefits by way of taxes. Hence, we think that when a drainage district acquires land at a sale for the payment of its taxes, the district is acting in a proprietary capacity rather than in the exercise of governmental functions, and according to the decisions hereinafter referred to it is only property used in the exercise of its governmental functions that is exempt from taxation under the constitutional provision above set out.

In the case of *State ex rel. Caldwell v. Little River Drainage District* 291 Mo. 72, the court had under consideration a suit wherein it was the purpose to enforce the collection of state and county taxes attempted to be assessed and levied on office furniture, books, engineering instruments and office equipment, owned and used by the drainage district exclusively in carrying on and conducting its work as a drainage district. The court at page 77 of the opinion stated:

"The only question presented for determination here is whether such property is exempt from taxation under Section 6 of Article X of the Constitution and its correlated statute Section 11335, Revised Statutes 1909."



Disposing of the case at page 81 of the opinion the court said:

"Our conclusion is that the defendant is a municipal corporation within the meaning of that term as used in the provision of the Constitution dealing with tax-exemption, and that its property, used exclusively in the discharge of its prescribed governmental function, is exempt from taxation."

State ex rel. Kinder v. Little River Drainage District 291 Mo. 267, involved an attempt to collect taxes levied against the right-of-ways and holding basins of the defendant drainage district. Again, Section 6 of Article X of the Constitution was necessarily involved. The point was made that the property sought to be taxed was not all used for public purposes and that at least a part of it was subject to taxation. The court at page 281 of the opinion said:

"If the containing basin were necessary to store the surplus water in flood time, then the district was obliged to acquire such land as would be overflowed by such surplus water."

The evidence shows the land described in the petition, except that used in the right-of-way, was acquired for that purpose; strictly the purpose for which the district was formed - to protect the district from the effects of water, and the health, welfare and prosperity of a large community - depended upon the proper maintenance of the facilities thus provided for taking care of the water. It is in evidence that all this land included in the petition was subject to overflow. If at times some of the land included in the west basin was not overflowed and could be cultivated that would not affect the propriety of acquiring it to prevent embarrassment by

its belonging to other persons. It would be the duty of the district to husband its resources in that way and obtain any revenue it could by the use of such land, and such use would not subject the land to taxation."

Neither of the above opinions make reference to the other, one being decided in Division Number One, the other in Division Number Two. It is clear that in both cases the court was careful to confine what it said to property used exclusively in the discharge of governmental functions; doubtless having in mind that some such a situation as is now presented might arise in the future.

Commenting on previous decisions of the Supreme Court of this State in defining drainage districts as municipal corporations, in *State ex rel. Hausgen v. Allen*, supra, page 458, it is said:

"It is true that in the other cases there are statements likening drainage districts to, or calling them, municipal corporations. The questions pressed in those cases did not call for a close comparison of strict municipal corporations with drainage districts. But be that as it may, these later cases of *Caldwell* and *Kinder* were the ones controlling upon the Court of Appeals, because the latest expressions of this court, and from both divisions thereof. To the cases last mentioned may be added *In re Birmingham Drainage District*, 274 Mo. 1. c. 151 et seq."

In *Wilson v. Drainage And Levee District* 237 Mo. 39, the court was considering the question of whether or not a drainage district was a political subdivision of the State, so that an appeal by it would lie to the Supreme Court of this State. On that point at page 48 of the opinion the court said:

"We are of the opinion that the words, 'other political subdivisions of the State,' as used in section 12, article 6, following as they do, the word 'county,' mean such political subdivisions as may be created having powers similar to those of a county, and do not refer to townships, school districts, levee districts, drainage districts, and such like minor political subdivisions of the State. We are thereof of the opinion that the defendant is not a political subdivision of the State in a jurisdictional sense and within the meaning of section 12, article 6 of the Constitution."

The opinion last quoted from does not serve any particular purpose so far as the question at hand is concerned, except that it does recognize a distinction between a county as a political municipality and a drainage district as such.

The only purpose in a drainage district buying land within its boundaries and taking title thereto or redeeming same from a sale for general taxes, would be that the cost of the organization and the cost of carrying out the plan of reclamation might be paid, or that such land might thereafter be sold and the proceeds thereof applied as a payment on the bonded indebtedness of the district. If the costs of carrying out the plan for reclamation or the bond issue was paid by other means, then, unless used for maintenance purposes such land would be sold and the proceeds thereof divided ratably between the land-owners in the district so that, at least to a degree, the district would hold such purchased land in trust for the creditors of or land-owners in the district. On this point we call attention to the case of *St. Louis v. Wenker* 145 Mo. 230, which case involved an attempt to assess property held by the city as trustee under the will of Bryan Mullanphy. It was contended that the property so held was exempt from taxation under the constitutional

provision above quoted. The court at page 238 of the opinion said:

"We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted, is that of which such county or city is the beneficial owner, which is held by it 'for its own use' and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation."

As to funds unexpended by a drainage district upon the completion of the improvements under its plan for reclamation, in 19 C. J. 761, it is stated:

"Unexpended funds of a drainage district are trust funds and, in the absence of some statutory provision therefor, equity has jurisdiction to distribute them among the landowners of the district, but the landowners are not entitled to the return of such funds if there is a future use for them. Where a portion of the benefits found to have resulted from the construction of a ditch was never assessed or called for, the amount so uncollected cannot be collected and applied to new work."

We can well conceive a situation, if the lands so purchased by drainage districts are exempt from general taxes, where a drainage district would acquire a large

October 1, 1934

acreage of land, land values soar in price so that the bonded indebtedness of the district might be discharged and large tracts of valuable lands be held by the district to be sold and the proceeds thereof distributed to the landowners in the district, while such lands during the time they were held by the district were free from assessment for general taxes and while counties suffered on account of lack of revenue and perhaps schools caused to be closed for the same reason. We do not believe that the opportunity for such a situation arising was intended to be provided by the framers of the Constitution.

#### CONCLUSION

Because of the importance of the question involved, we have re-examined the law thereon and have reached the conclusion that the opinion of this department dated December 29, 1933 was wrong.

We are of the opinion that lands purchased by a drainage district at a tax sale or lands redeemed on a sale for general taxes by a district, are not exempt from taxation under the provisions of Section 6 of Article X of the Constitution of the State of Missouri.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General.

APPROVED;

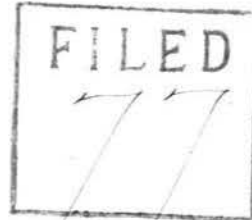
ROY EGGITTRICK  
Attorney General.

GL:LC

SCHOOLS: Transportation Fund received from State should be placed in Incidental Fund.

Warrants in payment of transportation should be issued and paid from the Incidental Fund;

2-24  
February 21, 1934.



Hon. Homer Rinehart,  
Prosecuting Attorney,  
West Plains, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of some time ago regarding a controversy which has arisen in your county as to the proper distribution of school funds received from the State. Your letter in full reads as follow:

"In this county there are several individuals and school boards in controversy over the proper disbursement of school funds received by the state.

The statutes provide for the creation of three funds, namely: Building Fund, Teachers Fund and Incidental Fund, but the Consolidated districts received from the state different funds marked Transportation, Tuition, Teachers and Text Books.

Section 14 of the Session Acts of 1931, page 343, provides: 'In no case shall more than 25% of the minimum guarantee on account of teaching units be used for incidental purposes.' Under these facts we would very much appreciate a letter from you fully explaining where these funds, as received from the state should go.

Should the fund marked Transportation received from the State go into the Incidental Fund, or should there be a separate fund created by the districts as Transportation Fund?

On what fund should the warrants issued for Transportation be drawn?

Has a school the right to use not to exceed twenty-five per cent of the funds received from the State for incidental purposes?

A letter from your office in this regard answering these questions will cause a great number of individuals and school districts in this county to avoid long and expensive law



## I.

THE TRANSPORTATION FUND RECEIVED FROM  
THE STATE BY SCHOOL BOARDS SHOULD BE  
PLACED IN THE INCIDENTAL FUND.

Section 9312, R.S. Mo. 1929 provides the classification of the various funds received by the treasurer, the pertinent part of which is as follows:

"The treasurer shall open an account for each fund specified in this section, and all moneys received from the state, county and township funds, and all moneys derived from the taxation for teachers' wages, and all tuition fees, shall be placed to the credit of the 'teachers fund'; the money derived from taxation for incidental expenses shall be credited to the 'incidental fund'; all money derived from taxation for building purposes, from the sale of school site, schoolhouse or school furniture, from insurance, from sale of bonds, from sinking fund and interest, shall be placed to the credit of the 'building fund'; and all moneys not herein specified that now belong to any school district, or that may hereafter be received by such school district, shall be placed to the credit of the 'teachers' fund'; of such school district. No treasurer shall honor any warrant unless it be in the proper form and upon the appropriate fund; and each and every warrant shall be paid from its appropriate fund, and no partial payment shall be made upon any school warrant, nor shall any interest be paid upon any such warrant.  
\*\*\*\*\*

Section 9196 provides in part as follows:

\*\*\*\*\*And when ratified by a two-thirds vote of the qualified voters of such district, voting at a special election such arrangements may be made final and the board shall be authorized to make such arrangements from year to year thereafter without calling a special election to ratify such arrangements until petitioned by ten qualified voters requesting that a special election be held therefor. And the board shall be authorized to issue warrants upon the teachers fund for the payment of tuition and upon the incidental fund for the payment of the cost of transporting pupils; provided, that at such special

election the proposition of the payment of tuition and the proposition of the payment of transportation shall be voted upon separately. \*\*\*\*\*

Section 9197, R.S. Mo. 1929, omitting parts not pertinent to the question under discussion, is as follows:

"The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

In view of the above sections, we are of the opinion that the funds marked "Transportation" should be placed to the credit of the Incidental Fund and no separate fund should be created by the district.

## II.

### WARRANTS IN PAYMENT OF TRANSPORTATION SHOULD BE ISSUED AND PAID FROM THE INCIDENTAL FUND.

Sec. 16, Laws of Missouri 1933, page 393 deals with the question of tuition and transportation, and having held above that transportation money should be placed in the Incidental Fund, we likewise hold that the warrants issued for transportation should be drawn on the Incidental Fund.

## III.

### FUNDS RECEIVED FROM THE STATE CANNOT BE USED FOR INCIDENTAL PURPOSES

We have heretofore, to-wit, October 31, 1933, rendered an opinion to the Honorable Edward Cusick, Prosecuting Attorney, Waynesville, Missouri, wherein it was held that no part of the funds

Hon. Homer Rinehart

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Feb. 21, 1934.

received from the State could be used for incidental purposes. We are attaching hereto a copy of this opinion and respectfully submit same in answer to the last question of your inquiry.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH

ESCHEAT - Construction of the Statutes (R. S. Mo. 1929, Sec. 625) relating to proceedings on behalf of the state for escheated lands:

August 3, 1934.



Mr. Leslie D. Rice,  
Prosecuting Attorney,  
Newton County,  
Neosho, Missouri.

Dear Sir:

Request for an opinion has been received from you under date of July 13th, 1934, such request being in the following terms:

"There is an estate in the Probate Court of Newton County in which the final settlement has just been made, and the real estate will undoubtedly escheat to the state, as there have been no heirs found or will be found.

"I would like your construction of Section 625 R. S. Missouri 1929. There are several pieces of real estate here in Neosho belonging to the deceased, on which there are city and county taxes, as well as paving taxes, and if the state is going to have to wait five years from the date of the death of the deceased before we can proceed to sell the real estate, the other liens may come in ahead.

"I was wondering what construction, if any, had been put on this section by your department. Please advise me, and oblige."

R. S. Mo. 1929, Section 625 provides as follows:

"When the prosecuting attorney shall be informed, or have reason to believe, that any real estate within his county has escheated to the state, and such estate shall not have been sold according to law, within five years after the death of the person last seized, for the payment of the debts of the deceased, he shall file an information in behalf of the state in the circuit court of the county in which such estate is situate, setting forth a description of the estate, the name of the person last lawfully seized, the names of the tenants and persons claiming same, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated and alleging that, by reason thereof, the state of Missouri hath right to such estate."

Mr. Leslie D. Rice

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August 3, 1934.

This statute and the subsequent sections of chapter 3 deal with the procedure by which the state secures land subject to escheat. As we understand your letter, the question about which you are most concerned is when you can bring proceedings under the statutes to secure land for the state, and especially if it is necessary to wait five years.

I.

TITLE TO ESCHEATED LAND VESTS IMMEDIATELY IN STATE

R. S. Mo. 1929, Section 620 provides that one situation giving rise to an escheat is "If any person die intestate, seized of any real or personal property, leaving no heirs or representatives capable of inheriting the same", and this is the type of escheat about which you have inquired.

When the person who formerly held this land died, assuming there to be no heirs, there could not be a period in which the title was in no one. The title could not pass to the executor or administrator under the facts presented by you, because an executor or administrator has no right to the real estate of his decedent unless it is necessary to pay debts or unless the court has ordered him to take control of it. Thus in the case of *McQuitty vs. Wilhite*, 218 Mo. 586, 117 S. W. 730, (1909) the Court said:

"Administrators, the personal representatives of the deceased, have no interest in the lands. They take no title to the lands. Under an order of the probate court, Revised Statutes 1899, section 130, they can under certain conditions rent the lands, and by section 131, Revised Statutes 1899, by order of court repairs to fences and buildings may be made by the ordinary administrator. By Section 145, Revised Statutes 1899, such administrator may on order of the probate court sell lands to pay debts. These sections cover all the rights an administrator has in the real estate, and none of them rise to the dignity of title in real estate. They are all mere rights contingent upon the order of the probate court." (218 Mo. 591) See also *Chambers vs. Wright*, 40 Mo. 482 (1867)

Since the decedent has lost the capacity to hold the land by his death and since his personal representative has no title to or control

August 3, 1934.

over it, and there being by hypothesis no heirs, the title to the land must instantly at the death of the decedent vest in the state without the necessity of any act being done so to vest it, because the theory of land tenure avows no gap of seisin as was pointed out by the court in *Farrar vs. Dean*, 24 Mo. 16 (1856), where the court said in holding that land held by an alien passed instantly on his death to the state by way of escheat:

"At his death, he being a foreigner, his lot would instantly and of necessity, (as the freehold can not be kept in abeyance,) without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent. (2 Kent's Com. 54) Chancellor Kent says: 'Though an alien may purchase land, or take it by devise, yet he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the state, upon an inquest of office found; and if he does, before any such proceeding be had, we have seen that the inheritance can not descend, but escheats of course.' (2 Kent's Com. 61)."

This conclusion is borne out by the language of R. S. Mo. 1929, Sec. 625 above quoted, (which, incidentally, was enacted in 1825 and is found in the revised statutes of 1825 at page 356), in authorizing the proceedings under such statute when land "has escheated", thus showing that the legislators contemplated that the land would already have escheated and title vested in the state when the proceedings under Section 625 and the following statutes were instituted.

## II.

### NECESSITY OF PROCEEDINGS TO TAKE CHARGE OF ESCHATED LAND.

At common law where a person seized of real estate died without leaving any heirs the right of the state to such did not depend upon any action or proceedings to secure control thereof, but was automatic. The rule is stated in *Werner, American Law of Administration*, 3rd Ed. Sec. 132, at page 461 as follows:

"whenever the owner dies intestate; without leaving any inheritable blood, or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the State by operation of law. No inquest of office is requisite in such cases."



Mr. Leslie D. Rice

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\*4 Kent, \*424; Farrar v. Dean, 24 Mo. 16; People v. Conklin, 2 Hill ( N. Y.), 67, 74; Pom. Mun. L. 567.

However, the Missouri Statutes have altered the common law rule and the proceeding and judgment under such statutes is necessary for the state to secure full rights over the property, the title to which escheated upon the death of the person last seized.

### III.

#### TIME WHEN PROCEEDINGS ON BEHALF OF STATE MAY BE INSTITUTED.

As has been demonstrated above, the title to land held by one dying without heirs vests in the state at the instant of his death, and the only interest which his personal representatives might assert would be to use such land or the proceeds thereof in the payment of the debts of the decedent.

The decedent about whose lands you have inquired, we assume left no debts or left sufficient personal property to pay such debts and in any event we assume that since the final settlement has been made the time for exhibiting such debts under R. S. Mo. 1929, Sec. 183, has elapsed. This would remove from consideration the necessity of construing that part of Section 625 which provides "and such estate shall not have been sold according to law within five years after the death of the person last seized, for the payment of the debts of the deceased," because this provision could not be operative in a case where there was no further possibility of the sale of this realty for debts. The meaning of such provision is not free from doubt, but we shall reserve a ruling on it until such time as a case is presented in which such ruling is necessary.

### IV.

#### STATUS OF TAX LIENS AGAINST REAL ESTATE.

A. When it was stated above that there were no personal debts

Mr. Leslie D. Rice

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August 3, 1934.

for which this real estate might be sold we were not unmindful of the taxes and tax bills against this property to which your letter refers. However, such tax obligations were no personal obligations of the deceased but were only rights against the land itself.

State ex rel Hayes vs. Snyder, 139 Mo. 549, 41 S. W. 216 (1897); State ex rel Beckwith vs. Finn, 100 Mo. 429, 13 S.W. 712; O'Day vs. McDaniel, 181 Mo. 529, 80 S. W. 895 (1904); Neenan vs. City of St. Louis 126 Mo. 89 (1894); Stewart et al vs. Allison, 150 Mo. 343, 51 S. W. 712 (1899).

B. R. S. Mo. 1929, Sec. 182 - III. contains the following proviso:

"Provided, that no executor or administrator shall pay any taxes on the real estate of the deceased that are not a charge against the same at the death of the deceased, except where he is in possession of the realty under an order of the court."

By inference it would seem that if there were sufficient personal property in the estate after the payment of all debts provable against the estate, the administrator or executor could pay taxes which were a charge on the real estate at the time of the death of the deceased. As to taxes not a charge on the real estate at the time of the death of the decedent, it would seem that such taxes could not be properly assessed, for the liability of the property itself to taxation would cease upon the death of the decedent, because at that time the title vested in the state and the constitution of Missouri, Article X, Section 6 provides that:

"the property, real and personal, of the State, \* \* \* shall be exempt from taxation."

Consequently the only taxes which could be a charge on this land and to which a sale would be subject would be taxes which were a charge at the time of the death of the decedent.

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CONCLUSION.

In conclusion, it is our opinion that where a person dies seized of land in this state and leaving no heirs that title to such lands vests in the state instantly on the death of the decedent and that proceedings under R. S. Mo. 1929, Section 625, on behalf of the state to take charge of such land can be instituted immediately upon the establishment of the fact that there are no debts to which such land would be subject or that the time for exhibiting proof of such debts has elapsed, and it is our further opinion that the only taxes to which such land would be subject would be taxes which were a charge against such land at the time of the death of the decedent.

Yours very truly,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

APPROVED:

ATTORNEY GENERAL

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OFFICERS:-Under Section 4 of Article XIV of the Constitution of Missouri, a person cannot hold office under the United States and under the State of Missouri, and the acceptance of an office under the United States would vacate the office of Probate Judge.

September 13, 1934.



Mr. Nat B. Rieger,  
Prosecuting Attorney,  
Kirksville, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would appreciate an official opinion of your office as to whether or not a person holding the office of Judge of the Probate Court in Missouri is privileged to and can legally be appointed Conciliation Commissioner, under and as provided in the new amendment to the Federal Bankruptcy Act. As I understand it, a Conciliation Commissioner is to be appointed in each county to, in a measure, represent a bankrupt's estate and the bankrupt's creditors and is to receive a fee for his services.

"The question is, is this such a dual holding of offices as might vacate his office as Probate Judge."

Section 4 of Article XIV of the Constitution of Missouri provides as follows:

"No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

It is obvious from what is stated in your letter that the person appointed Conciliation Commissioner under the Federal Bankruptcy Act is holding an office of the United States. He receives fees for his services, which makes it an office for profit. By accepting that appointment of Conciliation Commissioner the person, therefore, becomes an office-holder for profit under the United States. The general rule is that where a person holding a public office accepts another public office the acceptance of the second office will be treated as an automatic resignation of the first. The rule is laid down in State ex rel. vs. Bus, 135 Mo. 325, 330 where it is said:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first."

"Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case, the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal; it is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied."

In view of the foregoing constitutional provision and the above case, we are of the opinion that if a Probate Judge is appointed Conciliation Commissioner under the Bankruptcy Act he is holding an office for profit under the United States; that by the acceptance of the second office he automatically resigns from the first. Such being true, the acceptance of the appointment of Conciliation Commissioner would vacate his office as Probate Judge.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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(Acting)  
Attorney General.

FWH:MS.

LIQUOR CONTROL ACT: Answering six questions relating to various  
phases of the Act.

March 26, 1934.



Hon. James S. Rooney,  
Prosecuting Attorney,  
Clay County,  
Liberty, Missouri.

Dear Sir:

This department is in receipt of your letter of February 15, 1934 requesting an opinion as to the following state of facts:

"I would be pleased to have an expression of your opinion on the following questions concerning the Liquor Control Act:

1. Does the last sentence in Section Nine apply to malt liquors? Some of our restaurants here claim that they would have considerable trouble in obtaining help over 21 years of age if this is applied to malt liquor.
2. May one who sells liquor by the drink also sell intoxicating liquor in the original package?
3. Does a dealer who only sells malt liquor up to 5% have to have goods, wares, and merchandise in his place of business to the amount of \$1500.00?
4. Under Section 22 would an ordinance of a city of the Third class be legal which provided that only drug stores could sell in the original package?
5. Under Section Nine would an ordinance be legal changing the state law beginning with line five of said section to read 'intoxicating liquor shall not be given, sold, or otherwise supplied to any person under the age of 21 years; excepting upon the written instruction and direction of a physician?



6. Under Section 27 would an ordinance of a city of the Third class be legal when changed beginning with the middle of line 8 to read, 'or who has been convicted, within one year prior to making application for a license, of a violation of the provisions of any law applicable to the manufacture, or sale of intoxicating liquor, or who employs or has employed, in his business as such dealer, any person whose license has been revoked or who has been convicted of violating the provisions of any such law within one year next before the filing of such application?'"

I.

Section 9 of the Liquor Control Act of the State of Missouri provides in part as follows:

"No person under the age of twenty-one years shall sell or assist in the sale or dispensing of intoxicating liquor."

Section 17 of the Liquor Control Act provides:

"The term 'intoxicating liquor' as used in this act, shall mean and include alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of three and two-tenths (3.2) per cent of alcohol by weight."

In view of this definition of "intoxicating liquor", it is the opinion of this department that Section 9 applies to malt liquors having an alcoholic content not in excess of 5% by weight.

II.

Under the Liquor Control Act of Missouri, intoxicating liquor other than malt liquor having an alcoholic content not in excess of 5% by weight may not be sold by the drink for consumption except in cities having a population of 20,000 or more or in cities where an election has been held to determine whether or not intoxicating liquor may be sold by the drink. However, in cities where it is permitted to sell intoxicating liquor by the drink for consumption it is permissible for the same licensee to sell intoxicating liquor in the original package.

Section 22 of said Act provides as follows:

"For every license issued for the sale of all kinds of intoxicating liquor, as herein defined, at retail by the drink for consumption on the premises, the licensee shall pay to the Supervisor of Liquor Control the sum of three hundred dollars (\$300.00) per year, which shall include the sale of intoxicating liquor in the original package."

Outside the limits of these cities it is, of course, impossible to sell intoxicating liquor other than malt liquor by the drink; however, it is also impossible for a licensee authorized to sell intoxicating liquor in the original package to obtain a license to sell malt liquor having an alcoholic content not in excess of 5% by weight. Sec. 22 of the Liquor Control Act provides in part as follows:

"Provided, that a licensee authorized to sell malt liquor, at retail by the drink for consumption on the premises where sold, shall not be permitted to obtain a license for the sale of intoxicating liquors, other than malt liquor, in the original package, except in cities where the sale of all intoxicating liquors by the drink at retail for consumption on the premises where sold, is permitted by law."

### III.

The condition provided for in Sec. 22 of the Act with reference to the \$1500 stock of goods is applicable only to dealers selling intoxicating liquor in the original package. Sec. 22 of the Act provides as follows:

"Provided, however, that no license shall be issued for the sale of intoxicating liquor in the original package, not to be consumed upon the premises where sold, except to a person engaged in, and to be used in connection with the operation of one or more of the following businesses: A drug store, a cigar and tobacco store, a grocery store, a general merchandise store, a confectionery and/or delicatessen store, nor to any such person who does not have and keep in his store a stock of goods having a value according to invoices of at least fifteen

hundred (\$1500.00) dollars, exclusive of fixtures and intoxicating liquors."

There is no such condition attached to the sale of malt liquor, and it is the opinion of this department that it is not necessary to have a stock of goods of \$1500 in order to sell malt liquor having an alcoholic content not in excess of 5% by the drink at retail for consumption on the premises where sold.

#### IV.

Sec. 22 of the Liquor Control Act provides that malt liquor may be sold in the original package in connection with the operation of one or more of the following businesses: drug store, cigar and tobacco store, a grocery store, a general merchandise store, a confectionery and/or delicatessen store. An ordinance providing that only drug stores could sell intoxicating liquor in the original package would be inconsistent with the provisions of this Act and would be beyond the authority granted to municipalities by Sec. 25 of the Act and would, in the opinion of this department, be invalid.

#### V.

Sec. 9 of the Liquor Control Act provides that intoxicating liquor shall not be given, sold, or otherwise supplied to any person under the age of 21 years, "but this shall not apply to the supplying of intoxicating liquor to a person under said age for medicinal purposes only, or by the parent or guardian of such person or to the administering of said intoxicating liquor to said person by a physician". An ordinance providing that "intoxicating liquor shall not be given, sold or otherwise supplied to any person under the age of 21 years, except upon the written instruction and direction of a physician" would, in our opinion, limit the exceptions provided in Sec. 9 of the Act, for the reason that Sec. 9 not only provides that intoxicating liquor may be administered to a minor, by a physician, but also gives this right to the parent or guardian or for medicinal purposes only. An ordinance limiting the exceptions to the "written instruction and direction of a physician" would, in the opinion of this department, be invalid, as being inconsistent with the provisions of the Liquor Control Act of Missouri.

#### VI.

Sec. 25 of the Liquor Control Act provides that cities may charge for licenses, fixing the amount to be charged and providing for the collection thereof, and make and enforce ordinances for the regulation and control of the sale of all intoxicating liquor within their limits.

March 26, 1934.

Sec. 27 of the Act sets out the qualifications for licensees, one of the qualifications being "And no person shall be granted a license or permit hereunder, whose license as such dealer has been revoked, or who has been convicted, since the ratification of the Twenty-first Amendment to the Constitution of the United States, of a violation of the provisions of any law applicable to the manufacture or sale of intoxicating liquor, or who employs or has employed in his business as such dealer, any person whose license has been revoked or who has been convicted of violating the provisions of any such law since the date aforesaid."

An ordinance that would attempt to limit the right to a license by imposing a condition other than found in Sec. 27 would, in the opinion of this department, be inconsistent with the provisions of the Liquor Control Act of the State of Missouri, and invalid. It is clear that if the words "or who has been convicted within one year prior to making application for a license", as used in the proposed ordinance, be substituted for the words "who has been convicted since the ratification of the Twenty-first Amendment to the Constitution of the United States", as found in the Liquor Control Act of Missouri, the ordinance would be a limitation upon the rights granted under the Liquor Control Act of Missouri and would, therefore, be invalid.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

2711  
I: RELATING TO QUALIFICATION OF A CANDIDATE FOR OFFICE  
WHO FAILED TO COMPLY WITH CORRUPT PRACTICE ACT.

II: RELATING TO AUTHORITY OF DRUGGIST TO SELL INTOXICATING  
LIQUOR ON PRESCRIPTION ON SUNDAY OR ELECTION DAY UNDER  
INTOXICATING LIQUOR ACT.

5-10  
May 3rd, 1934

Hon. James S. Rooney  
Prosecuting Attorney  
Clay County  
Liberty, Missouri



Dear Sir:

We acknowledge receipt of your letter of date  
April 14th, 1934 in which your inquire and state as  
follows:

"I would like to have an expression of  
your opinion on the following questions:

1. Twelve years ago a citizen here was  
a candidate for a county office. He was  
defeated at that time and did not file  
any statement of his expenses in the  
campaign. He wishes now to file again  
for the same office.

Would the fact that he failed to file  
his statement of expense twelve years ago  
disqualify him if he were elected now?

2. A druggist here has a license to sell  
intoxicating liquor in the original pack-  
age. He also sells straight alcohol marked  
"For non-beverage purposes."

Is it lawful for him to sell this alcohol  
on Sunday or election days?

Thanking you in advance for your opinion  
in the matter, I am."

I.

Failure to comply with section 10482 R.S. 1929  
is strictly penal in its nature, and nothing  
should be included in it which is not clearly  
described in its very words.

Section 10483 R. S. 1929, relating to the Corrupt  
Practice Act provides as follows:



Hon. James S. Rooney

May 3rd, 1934

"FAILURE TO COMPLY WITH PRECEDING SECTION-  
PENALTY.- Any person failing to comply with the provisions of section 10482 of this article shall be liable to a fine not exceeding one thousand dollars, to be recovered in an action brought in the name of the state by the attorney-general, or by the prosecuting attorney of the county of the candidate's residence, the amount of said fine to be fixed within the above limit by the jury, and to be paid into the school fund of said county."

From the foregoing provision of the statute, it appears that failure to comply with said statute is strictly penal in its nature, and no penalty not clearly described in it should be included. Nothing is said in said statute regarding disqualifying one as a candidate who previously had failed to comply with same, when he or she was a candidate in a previous election.

It will be remembered also that one elected to office does not derive title to his office, if elected, by virtue of a certificate of election, but from his election.

In State Ex Inf. Hawkins v. Hodges, 8 S.W. (2d) 1. c. 883-4, Judge Atwood in ruling the case said in part as follows:

"Our attention is directed only to that part of section 5031, R.S. 1919, which provides that, within 30 days after election, such statement shall be filed with the officer empowered by law to issue the certificate of election and a duplicate with the recorder of deeds; to section 5032, which provides for the assessment of a fine in event of failure so to do; and to section 5033, which provides that no person shall enter upon the duties of any elective office until he shall have filed such statement and duplicate. It must be noted that none of these provisions state that such person shall forfeit title to his office by reason of failure to comply with this statute. This provision is a part of what is generally known as the Corrupt Practice Act. It is strictly penal in its nature, and should be strictly construed. Nothing should be regarded as included in it which is not clearly described in its very words. Even if we regard that portion



May 3rd, 1934

of the statute which provides that no officer authorized by law to issue certificate of election shall issue the same until such statement shall have been so made, verified, and filed, to which relater has not directed our attention, we must remember that this is a proceeding to try title to an office, and respondent derives title to his office by his election and not by his certificate of election."

Also in State Ex Inf Crow vs. Bland, 144 Mo. l. c. 555, Judge Marshall in ruling the case said in part as follows:

"This act is penal in its every nature and fibre. It provides for punishment as for felonies and as for misdemeanors, and also for forfeiture of office even after the incumbent has received a majority of the votes cast at the election and been inducted into office. The act should therefore be strictly construed, and nothing should be regarded as included in it which is not clearly and intelligently described in its very words."

From the above statute and opinions of our Supreme Court, it appears that one who fails to comply with said statute at the most would be guilty of a misdemeanor and subject to a fine not to exceed the sum of One Thousand Dollars, and nothing more.

We therefore hold that one who was a candidate in an election previously held, who failed to comply with said statute would not on that account be disqualified as a candidate in another election.

## II.

A druggist may sell intoxicating liquor to a person (at any time) on prescription from a regularly licensed physician.

Section 4 Laws (Extra Session) 1933, page 79, reads as follows:

"~~DRUGGISTS~~ MAY SELL AND PHYSICIANS PRESCRIBE LIQUOR.--Any druggist may have in his possession intoxicating liquor purchased by him from a licensed vendor under a license pursuant to this act, or intoxicating liquor lawfully acquired at the place of acquisition

Hon. James S. Rooney

May 3rd, 1934

and legally transported into this state, and lawfully inspected, gauged and labeled as provided for in this act; such intoxicating liquor to be used in connection with the business of a druggist, in compounding medicines or as a solvent or preservative. Provided, that nothing in this act shall prevent a regularly licensed druggist, after he procures a license therefor in compliance with this act, from selling intoxicating liquor in the original packages, but not to be drunk or the packages opened on the premises where sold, and, provided further, that nothing in this act shall be construed as limiting the right of a physician to prescribe intoxicating liquor in accordance with his professional judgment for any patient at any time, or prevent a druggist from selling intoxicating liquor to a person on prescription from a regularly licensed physician as above provided."

Also section 15 Laws 1933 Extra Session, page

83, reads as follows:

"WHEN LIQUOR MAY BE SOLD.- No person having a license under the provisions of this act shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity on the first day of the week, commonly called Sunday, or upon the day of any general or primary election in this state, or upon any county, city, town or municipal election day."

It will be observed that the restrictions contained in the foregoing law relate to a person licensed under the provisions of the Intoxicating Liquor Act, and not as a druggist who sells upon prescription issued by a regular licensed physician, in case of the latter the law presumes the intoxicating liquor so sold is for medicinal purposes, and not as a beverage.

We therefore hold that a sale of intoxicating liquor by a druggist, to a person on a prescription from a regular licensed physician on either Sunday or Election

Hon. James S. Rooney

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day would not be a violation of the Intoxicating Liquor Act.

Respectfully submitted,

W. W. Barnes

ASSISTANT ATTORNEY-GENERAL

APPROVED:

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ATTORNEY GENERAL

DELINQUENT TAXES:

Publication must be in one newspaper  
of general circulation.

September 27, 1934



Honorable James S. Rooney  
Prosecuting Attorney Clay County  
Liberty, Missouri

Dear Sir:

This Department is in receipt of your request for  
an opinion as to the following state of facts:

"Clay County consists of three distinct communities; one of them in Excelsior Springs and vicinity, one of them in North Kansas City and vicinity, and the other in Liberty and vicinity. There is no newspaper in the county of general circulation over the entire county. Each of these three communities has its own newspaper.

Section 9952b appearing at page 430 of the laws of Missouri for 1933 provides for the publication by the county collector of the delinquent tax list. The county collector of this county proposes to publish in an Excelsior Springs paper that part of the list including the lands of the Township in which Excelsior Springs is located; to publish in a North Kansas City paper that part of the list including the lands in the townships in which North Kansas City is located; and the remainder of the list in a newspaper in Liberty. He proposes to state in the notice in each paper that it is only a part of the complete list, stating what part, and that the remainder of the list is being published in other named newspapers.

He has asked me if such publication is a valid, legal publication under the Statute. I have told him that, in my opinion, such publication would give notice to the public better than if the entire list is published in one newspaper, but that I was not sure of the legality of such publication."

Section 9952b Laws Missouri 1933, page 430, provides in part as follows:

"The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. \* \* \* \*

It is contended that there is no newspaper in Clay County of 'general circulation' and it is proposed to publish the list of delinquent lands and lots in three different newspapers, representing three different localities in Clay County.

This proposed publication is not contemplated by the statute nor can the statute be broadened sufficiently to permit any such publication, for it will be noticed that the statute requires the list to be printed in some newspaper, and further provides that the county collector shall, before the day of sale, certify on his record the name of the newspaper of the county in which such notice was printed and published, and the dates of the insertion of such notice in such newspaper. Throughout the statutes the intention of the Legislature is clearly discerned that this notice is to be published in one newspaper only.

The question of what constitutes a newspaper of 'general circulation' has never been specifically passed upon by the courts of Missouri. However, the courts of other states have passed on the question, and it may be said generally that a newspaper is one of 'general circulation'

even though it is devoted to the interests of a particular class of persons and specializes on news and intelligence primarily of interest to that class, if in addition to such special news it also publishes news of a general character and of a general interest and to some extent circulates among the general public. 68 A. L. R. 542.

In the case of *Lynn v. Allen* 145 Ind. 584, 44 N.E. 646, the court, in passing upon this question, said:

" 'By a "newspaper of general circulation" the legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is, in a greater or less degree, devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party, and especially devoted to the interests of such party, it would not, therefore, be a newspaper of general circulation. Yet such a newspaper is, to a large extent, read only by the members of the political party whose doctrines are advocated and expounded in its columns.' "

The case of *Ruth v. Ruth* 39 Ind. App. 290, 79 N.E. 523, in holding a certain newspaper to be a paper of 'general circulation,' as required by the statute, said:

"No fixed number of subscribers is required to constitute general circulation. A newspaper's circulation does not necessarily mean that it is read by all the people of the county or the township."

In the case of *In re: Mt. Penn. Fire Co.* 14 Pa. Dist. R. 873, the court said:

"The addition of the words 'of general circulation' . . . distinctly excludes publications whose usual contents do not deal with matters with which the public at large is concerned, but only



with such as are of moment to a limited portion thereof, as, e. g., the legal profession. . . . It is, of course, not decisive that the publication specially appeals to, or serves the particular interest of, any part of the general public short of the whole, if its contents cover the broader field above indicated. Neither is it to be laid down that it must furnish or discuss the news of the whole world or nation or state. If it deals with the news and current events, generally, of the county in which it is published and concerning the whole people thereof, it may be regarded as adapted to the general reader, as intended for general circulation, not only within the county, but beyond it; in short, as a newspaper of general circulation. The size of its subscription list, however, is not controlling one way or the other."

#### CONCLUSION.

In view of the foregoing it is the opinion of this Department that the notice required by Section 9952b Laws of Missouri 1933, page 430, must be published in only one newspaper. The newspaper chosen must by reason of the statute, be a newspaper of 'general circulation,' but whether or not a newspaper is one of 'general circulation' is a matter of substance and not of size and it would seem by reason of the above cases that if a newspaper contains news of general character and interest to the community although the news may be limited in amount, it

Honorable James S. Rooney

-5-

September 27, 1934

would qualify as a newspaper of 'general circulation'.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General.

JWH:LC

TAXATION: City tax fourth class city inferior to State and County Taxes.

11-9  
October 31, 1934.



Hon. O. L. Robuck  
City Collector  
LaPlata, Missouri

Dear Mr. Robuck:

Acknowledgment is made of your letter of October 20, 1934, requesting an opinion of this office on the following matter:

"\* \* \* Can a Collector of a City of the Fourth class, conduct the sale of property for back taxes?

Or should he file the back tax list with the County Collector where the property is to be sold for taxes.

The County Collector of Macon County is selling some property in LaPlata for back taxes and I did not file the City back taxes with him. Will the City loose the taxes or will the city taxes hold on the property and be sold for city taxes if they are not paid.

The property in question in LaPlata, the County had the years of 1929-30-31-32 and 33, while the City of LaPlata has only 1931-32 and 33.

I.

CITY COLLECTOR OF CITIES OF  
THE FOURTH CLASS TO COLLECT  
CITY BACK TAXES.

It has heretofore been the opinion of this office that by virtue of the provisions of Article VIII, Chapter 38 R. S. Mo. 1929, the City Collector of cities of the fourth class should proceed with the collection of delinquent city taxes in the same manner and at the same time that the County Collector proceeds with

the collection of delinquent state and county taxes. This was the holding in the opinion of October 8, 1933, to the State Tax Commission of this State. Therefore, you are the party to conduct the sale rather than the county collector.

## II.

### LIEN OF STATE AND COUNTY TAXES SUPERIOR TO THAT FOR CITY TAXES.

The tax lien of city taxes in cities of the fourth class is established by Section 6994 R. S. Mo. 1929. A portion of this Section reads as follows:

"\* \* \* A lien is hereby created in favor of such city against the same, which said lien shall be superior to all other liens or encumbrances except the lien of the state for state, county or school taxes.

By the foregoing provision, the superior character of the State, county and school taxes is recognized, and the lien of taxes of your city is determined to be junior to that for state, county and school taxes. However, the mere sale of the property this November for state and county taxes will not entirely eliminate your lien for city taxes, as the taxpayer cannot defeat the city's lien by permitting the land to be sold on the 5th of November and then a few days later redeeming the property from such sale. In such a case the party redeeming would be in the same condition so far as your city taxes are concerned as if the sale for state and county taxes had never taken place.

## III.

### SALE WITHIN FIVE YEARS OF DELINQUENCY IS COMPLIANCE WITH LAW.

The 57th General Assembly in Extra Session, passed Senate Bill 54, found at page 154, Laws of Missouri Extra Session, 1933-34, which section provides in part as follows:

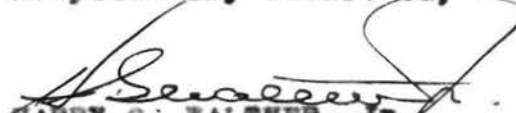
October 31, 1934.

"Sec. 9961. Limitation of actions--No proceeding for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein." . . . . .

In an opinion of this office dated September 4, 1934, to Charles M. Hay, City Counselor of the City of St. Louis, this office construed the foregoing Section as intending to vest discretion in the Collector in the advertising and sale of certificates on delinquent lands and lots, provided that he must bring such proceeding within five years of the date of delinquency. Therefore, you would not be required to bring this action for the collection of your 1931 City taxes until 1936, as a proceeding started then would be within the five years required. I assume your 1931 city taxes were not delinquent until January 1, 1932.

It is therefore the opinion of this office that you would not be required under the law to hold a sale for delinquent city taxes for the years 1931, 1932 and 1933 this November.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General

APPROVED:

ROY McKITTRICK,  
Attorney General

HGW:MM

**TAXATION:**

Lands purchased by William Jewell College at foreclosure, for payment of endowment funds loaned by it on the lands as security, are exempt from taxation.

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11-20  
November 10, 1934

Honorable James S. Rooney  
Prosecuting Attorney  
Liberty  
Missouri



Dear Mr. Rooney:

Receipt of your letter dated October 11, 1934 is acknowledged. Your letter follows:

"The Trustees of William Jewell College, being the name of the corporation owning and operating William Jewell College at Liberty, Missouri, has for several years loaned a part of its endowment fund on real estate security and during the last four or five years has acquired by foreclosure a considerable amount of farm land in this as well as other counties in Missouri.

The Assessor and Collector of Revenue of this County takes the position that the College is liable for State and County taxes on its farm land owned and acquired as above stated. The land involved is, of course, not used directly in connection with the College, but it does constitute a part of the endowment fund of the College.

The question of the right to tax college property was before the Supreme Court and was considered in an opinion appearing at 224 Mo. 299.



That case specifically involved only personal property, but it would appear that the reasoning in the case would settle the above question adversely to the contention of the Assessor and Collector.

Will you please give us your opinion on the matter? "

In a consideration of the important problem presented by your inquiry, we are impressed with the statement made by Chief Justice of the United States Marshall, in the opinion in the case of the Trustees of Dartmouth College v. Woodward 4 Wheat. (U. S.) 519, 4 L. ed. 629, wherein at page 625 of the opinion, L. ed. 656, it was said:

"This court can be insensible neither to the magnitude nor delicacy of this question\* \* \* \* \* And, however irksome the task may be, this is a duty from which we dare not shrink. "

In reaching a conclusion on this matter we set out what we consider applicable portions of the Session Acts of Missouri, sections of the statute, sections of the constitution of the United States and of the State of Missouri.

1.

Certain persons as Trustees of William Jewell College were declared to be a body politic and corporate with perpetual succession, by an act of the Legislature of the State of Missouri found in the session acts of 1849 at pages 232, 233 and 234. Section 3 of the act provides:

"After the college shall have been located and named as provided in the second section, the persons named in the first section and their successors in office shall be known and styled by the name of the Trustees of the College thus named, and

shall have full power in their corporate capacity, to hold by gift, grant, demise, devise, or otherwise any lands tenements hereditaments, monies, rents, goods, or chattels of what kind soever the same may be, which is or may hereafter be given, granted, devised demised to or purchased by them for and to the use of the aforesaid college, and may sell and dispose of the same or any part thereof or lease, rent, or improve in such manner as they shall think most conducive to the interest and prosperity of said college."

Section 6 provides in part as follows:

"The treasurer shall take charge of the funds of the college which may be placed in his hands by order of the board, and shall pay out the same only upon orders of the board and shall perform such other services as may be prescribed by the board."

Section 13 of the act reads:

"That the property real and personal authorized to be held by said corporation by virtue of this act, shall be held and applied in good faith to the purposes of education according to the provisions of this act and for no other or different purpose. This act to be in force from its passage."

There is nothing in the foregoing act in reference to the exemption of any of the property that was owned or might be owned by the corporation, from taxation.

An act of the Legislature of the State of Missouri approved February 22, 1851, Laws of Missouri 1851, pages 64 and 65, exempting the then owned lands of the William Jewell

College, or lands that might thereafter be granted or devised to it, from taxation, was passed. The act in full is as follows:

"Sec.1. That all the land and improvements thereon now owned by the 'William Jewell College' in the counties of Clay, of Grundy, Mercer and Sullivan, and all the lands that may hereafter be granted or devised to said college, (or any other institution of learning in this state), for the benefit of education, be, and the same are hereby exempted from all taxes and assessments so long as said lands may be owned by said college.

Sec.2. That the lands belonging to said college in the counties of Mercer and Sullivan which have been returned delinquent for non payment of taxes, are hereby released from the same; and the Register of Lands is hereby authorized to grant an acquittance of the same to said college on payment of the office fees.

Sec.3. That any person or persons, who shall wilfully cut, injure, destroy or remove any timber or other materials, from, or on, any of the lands belonging to said college without the consent of the Board of Directors thereof, shall be guilty of a misdemeanor, and subject to be indicted and punished as in cases now provided for by law.

Sec.4. This act is hereby declared a public act, and shall be given in charge to the grand juries of the counties of Clay, Grundy, Mercer and Sullivan, at each term of the circuit court.

This act to take effect and be in force from and after its passage.

Approved February 22, 1851."

At this point we direct attention to the wording of the act, in that only lands thereafter granted or devised to the college were exempted from taxation.

At the time of the passage of each of the foregoing acts of the Legislature the constitution of 1820 was in force and effect in Missouri.

Section 16 of Article XI of the Constitution of Missouri adopted in 1865 read as follows:

"No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state."

The Constitution of Missouri adopted in 1875 became operative on November 30, of the last named year. Section 1 of the schedule of that constitution reads as follows:

"The provisions of all laws which are inconsistent with this Constitution, shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in force until the first day of July, one thousand eight hundred and seventy seven, unless sooner amended or repealed by the General Assembly.

Section 3 of article 10, of above Constitution provides that:

Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

Section 4 of article 10, supra, provides that:

All property subject to taxation shall be taxed in proportion to its value.

Sections six and seven of said article, are as follows:

Sec.6. The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; Provided, That such exemptions shall be only by general law.

Sec.7. All laws exempting property from taxation, other than the property above enumerated, shall be void. "

Conforming to Section 6 of Article X of the Constitution, the Legislature of Missouri enacted a law in reference to exemptions of property from taxation. The same being now found in Section 9743 Revised Statutes Missouri 1929, and reads as follows:

" The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

The first paragraph of Section 10 of Article I of the Constitution of the United States reads as follows:

"No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything



but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

2.

The act of the Legislature, Laws 1849, page 232, constituted a grant of a charter by the State of Missouri to certain persons named in the act and to their successors, and prior to the Constitution of 1865 and under the Constitution of 1820, the Legislature of this state had authority to make such grant. In State ex rel. v. Trustees of William Jewell College 234 Mo. 299, 314, it is said:

"Prior to the Constitution of 1865 there was no restriction on the legislative power in the matter of granting exemptions from taxation."

A charter is defined in Bouvier's Law Dictionary, Volume 1, Third Revision, page 469, as:

"A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1. Story, Const. Sec. 161; 1 Bla. Com. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land."

And further,

"The charter of a corporation consists of its articles of incorporation taken in connection with the

law under which it was organized;  
Chicago Open Board of Trade v.  
Bldg. Co. 136 Ill. App. 606.

The name is ordinarily applied to government grants of powers or privileges of a permanent or continuous nature, such as incorporation, territorial dominion or jurisdiction. Between private persons it is also loosely applied to deeds and instruments under seal for the conveyance of lands. Cent. Dict."

The rule of construction to be applied in this case is declared in State ex rel. Waller v. Trustees of William Jewell College 234 Mo. 299, 308, to be as follows:

"It is urged that exemption statutes are to be strictly construed. Generally speaking, such is the rule. But we take it from the cases that there has been a well recognized exception to the rule. Perhaps a better wording would be to say that the courts have never been over anxious to apply the rule so as to impose burdens upon religious, scientific, literary and educational institutions. Strict construction has largely been applied to corporations organized for profit and gain, not to corporations performing a public service. As tending to show the drift of the courts, some of the cases may not be amiss."

The rule just stated is in conflict with the rule of construction laid down by the Supreme Court of the United States in the Home of the Friendless v. Rouse 8 Wall. (U. S. ) 430, 19 L. ed. 495.

Northwestern University v. The people 99 U.S. 309, 25 L. ed. 387.  
Jefferson Branch Bank of the State of Ohio v. Skelley 66 U. S. 436, 17 L. ed. 173.

By section 3, Laws 1849, page 232, the corporate body there created is given full power to hold by gift, grant, demise, devise or otherwise, lands, monies, rents, goods or chattels of what kind soever the same may be, which may have been or may thereafter have been given, granted, devised, demised to or purchased by the corporate body, to the use of the college. There is no tax exemption in the grant of charter powers to the corporation but the tax exemption right is to be found in the Act of 1851, at page 64, wherein it was enacted that all the lands and improvements thereon now owned by the 'William Jewell College' in certain counties and all the lands that may hereafter be granted or devised to said college be, and the same are exempted from all taxes and assessments so long as said land may be owned by said college.

The word 'grant' is defined in Coates and Hopkins Realty Company v. Terminal Ry. Co., 328 Mo. 1118, 1132, in the following language:

" 'Grant' means give, bestow or confer, to transfer property by an instrument in writing."

In view of the fact that it was held in State ex rel. v. Trustees of William Jewell College, supra, that the word 'lands' as used in the Act of 1851 included personal property belonging to the college, and therefore exempt from taxation, and in view of the further fact that the exempt personal property of the corporation was loaned and land taken as security therefor and thereafter purchased by the corporation and title taken thereto as in satisfaction, in part at least, of the debt, and in view of the broad power given the corporation by the laws of 1849, at page 232 in reference to holding lands, we are of the opinion that lands purchased by the corporation under such circumstances, would be lands granted to it within the meaning of the tax exemption act of 1851.

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(a) The real problem presented by your question is whether or not the Act of 1851 was such a grant as constituted a contract between the corporation and the State of Missouri, and further, whether or not

such act was thereafter repealed by the adoption of the constitutions of 1865 or 1875, or either of them, or the passage of statutory enactments, and whether or not if constitutional provisions and statutory enactments were sufficient for that purpose if the same would violate section 10, of article I of the Constitution of the United States as being an impairment of the obligation of a contract.

(b) Perhaps the first historical discussion of whether or not a grant of power by the sovereign to the corporation constituted a contract between the sovereign and the corporation, was in relation to the French East India Company in 1789. While the matter did not reach the stage of litigation, it seemed to be conceded by the Bar of France that such was the result of a charter grant by the sovereign to a corporation. A discussion of the subject may be found in "Tracts on French East India Company, Paris 1788."

The pioneer and leading case in this country, of course, is the Trustees of Dartmouth College v. Woodward, supra. In that case a charter was granted the plaintiffs on the 13th day of December, 1869, incorporating twelve persons therein named, under the name of "The Trustees of Dartmouth College," granting to them, and their successors, the usual corporate privileges and powers in relation to establishing and governing a college in the State of New Hampshire. The charter was granted to the Trustees by the British Crown. The State of New Hampshire thereafter passed certain legislation changing the management and set-up of the corporation as outlined in its charter. The question in the case was as to the validity of the acts of the legislature of the State of New Hampshire, it being claimed that the legislation violated the federal constitution prohibiting the passage of a law by a state impairing the obligation of a contract. Referring to the charter, at page 643 of the opinion, L. ed. 661, the court said:

"This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It

is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution."

And further, on page 650, L. ed. 662:

"The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court."

In the case of *The Home of the Friendless v. Rouse 8 Wall. (U. S.) 430, 19 L. ed. 495*, a companion case to that of *the Washington University v. Rouse 8 Wall. (U.S.) 439, 19 L. ed. 498*, the Supreme Court of the United States had under consideration and for construction, a charter granted by the Legislature of the State of Missouri to the Home of the Friendless, as well as to Washington University. In that case the tax exemption was contained within the charter grant and not as in the case of *William Jewell College* by a separate and later enactment. The court at page 437 of the opinion, L. ed. 497, said:

"It is true that legislative contracts are to be construed most favorable to the State if on a fair consideration to be given the charter, any reasonable doubts arise as to their proper

interpretation; but, as every contract is to be construed to accomplish the intention of the parties to it, if there is no ambiguity about it, and this intention clearly appears on reading the instrument, it is as much the duty of the court to uphold and sustain it, as if it were a contract between private persons. Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation,' are the words used in the Act of Incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was, undoubtedly, the purpose of the Legislature to grant to the Corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the Legislature, without taking direct action on the subject, could, at its will, resume the power of taxation. This view is fortified by the provisions of the general law of the State regarding corporations, in force at the time this charter was granted, and which the Legislature declared should not apply to this Corporation. The 7th section of the Act concerning corporations, approved March 19, 1845, provided that 'The charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature.' As the charter in controversy was granted in 1853, it would have been subject to this general law if the Legislature had not, in express terms, withdrawn from it this discretionary authority. Why the necessity of



doing this if the exemption from taxation was only understood to continue at the pleasure of the Legislature?"

Note particularly the underscored portion of the foregoing opinion in part set out, being an enactment of the State Legislature of Missouri in the year 1845, and carried into the 1855 revision and found there as section 7 chapter 34, page 371, and which statutory provision was the law of this state at the time of the enactment by the Legislature in 1851 in reference to William Jewell College. It will be noted also that in the Act of 1851 this general law was not withdrawn from operation in the tax exemption privilege granted William Jewell College.

The act of March 19, 1845 will be noted later.

The rule has been declared in Missouri over and over that a charter grant by the state legislature creating a corporation for educational purposes, constitutes a contract between the state and the corporation which could not thereafter be violated. See Sloan v. R. R. Co. 61 Mo. 30. Scotland County v. Ry. Co. 65 Mo. 123, 134. State ex rel. v. Greer 78 Mo. 188, 190. It will be observed that in each of the above cases the tax exemption was included as part of the charter grant of corporate rights.

The Supreme Court of this state in State ex rel. v. St. Joseph's Convent of Mercy, 116 Mo. 575, had under construction a charter granted to the defendant incorporating it in February 1857, the charter grant containing a tax exemption clause. It was sought to tax the property of the corporation. It is stated in the opinion that the charter was granted subject to the laws in force in 1855, referring to the act of March 19, 1845. The court at page 580 of the opinion further said:

"We are unable to see why the constitution of 1875 should receive, as to these sections, a different construction from that of 1865. As to prospective legislation, they are both clear and specific, but in neither do we discover any intention that they should act retrospectively.

The rule has often been announced in this state that a general affirmative statute does not repeal a prior special statute, unless negative words are used or the two acts are irreconcilable. *Manker v. Faulhaber*, 94 Mo. 430, and cases cited; *Sedgwick on Construction of Statutory and Constitutional Law* (2 Ed.), 98. And, applying this rule, it has been held in other states and in England that a law imposing a general tax on all lands in the state does not repeal a prior special law exempting the property of special corporation from taxation. *State v. Minton*, 23 N. J. L. 529; *Williams v. Pritchard*, 4 Term. Rep. 2; *Blain v. Bailey*, 25 Ind. 165."

We call attention to the fact that the last named opinion was written in Division Number 2 and concurred in by Burgess, J., only, Sherwood, J., not sitting.

In *State ex rel. Morris v. Board of Trustees of Westminster College* 175 Mo. 52, the court had for consideration the right to recover taxes from the trustees. The defendant claimed its charter existence and powers under four separate acts of the general assembly of Missouri incorporating it as an educational institution. The grant of date February 25, 1857, contained the tax exemption provision. All of the enactments seemed to have been considered as making up the charter of the defendant. On the question of whether or not the act granting tax exemption to defendant had been repealed the court at page 60 of the opinion said:

"At the date of this charter, the General Assembly had authority to exempt the property from taxation, there being no restriction on the power of the General Assembly in that respect under the Constitution of 1820.

The Constitution of 1865 and that of 1875 put limitations on the power of the General Assembly in the matter of exempting property from taxation, but those provisions were intended to be prospective only in their operations; they were not intended to impair the obligation of a contract into which the State had previously entered. (St. Vincent College v. Schaefer, 104 Mo. 261; State ex rel. v. St. Joseph Convent, 116 Mo. 575.) We hold that the property of this corporation held by it for its corporate purposes is exempt from taxation."

In the case of State ex rel. Waller, Collector, v. Trustees of William Jewell College 234 Mo. 299, the Act of 1851 (Laws 1851, p. 64), was also, as stated, under consideration, on the question of whether or not the use of the word 'lands' in the act also included personal property. In that case the Act of 1851 was assailed as a tax exemption privilege and it was urged that the act had been repealed by subsequent constitutional and statutory provisions. At page 319 of the opinion, Graves, J., said:

"It is next urged that this statute has been repealed by subsequent constitutional and statutory provisions. The claim is made that there is a direct repeal of the law or an attempted direct repeal of the law. The question, however, has been fully settled by the adjudications of this court upon similar statutes, and we shall not re-open nor re-argue it. (St. Vincent's College v. Schaefer, 104 Mo. 261; State ex rel. v. Westminster College, 175 Mo. 52)."

It must be said of the last named case that from the concurring and dissenting opinions filed there was not a majority concurrence in the above quotation.

However, the dissenting opinion concurred in by three judges went off on the proposition that the word 'lands' did not include personal property.

The case of State ex rel. Morgan v. Hemingway 272 Mo. 187, was a suit to collect certain taxes from the defendant, a private individual. A special act of the Legislature made the lands of the defendant part of the City of Glasgow, Missouri, the act providing that the mayor and councilmen should not have the power to levy and collect taxes on such real estate, unless the same was laid off into lots. It was not laid off into lots. The City of Glasgow was incorporated by a special charter of the Legislature. Thereafter the City of Glasgow incorporated as a city of the fourth class under the general laws of the state. The plaintiff claimed that the act exempting defendant's lands from taxation had been repealed by constitutions adopted and statutory enactments thereafter passed. The defendant claimed such constitutional provisions and legislative acts were prospective in character and did not operate as a repeal of the tax exemption act as applied to the defendant's land. The court held that the constitutions subsequently adopted and statutory enactments subsequently passed were not prospective as to the act exempting defendant's land from taxation. However, there was no consideration for the passage of the act exempting defendant's lands, and that case does not present the same question as is presented here where a tax exemption has been granted to an educational institution. The opinion in the latter case does not refer to any of the Missouri cases herein mentioned, nor are any of them undertaken to be expressly overruled.

All of the foregoing Missouri cases, except the latter one, construed charter grants where the tax exemption was contained within the grant itself. The case of the President, etc., of St. Vincent's College v. Schaefer 104 Mo. 261, is substantially the same in facts as is the present case. There the legislature, by act of February 9, 1853, exempted property of the plaintiff from taxation and on February 27, 1853, by act of the legislature certain persons were created a body corporate with the name of the plaintiff. It was insisted that the constitution of 1875 and Section 6659 of the Revised Statutes of 1879 repealed the tax exemption act. The court at page 267 of the opinion said:

"Acts like the one in question, exempting corporations from taxation, constitute contracts, and the state has no power to impair the obligations of such contracts, unless that right is reserved. The right of the legislature, unrestrained by constitutional prohibitions, to grant irrevocable exemptions from taxation is no longer an open question. *Mechanics' Bank v. City of Kansas*, 73 Mo. 555, and cases cited; *Cooley on Const. Lim.* (5 Ed.) 340; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Washington University v. Rouse*, 8 Wall. 439."

It is to be noted that the act of March 19, 1845, section 7, chapter 34, Revised Statutes Missouri 1855, is not mentioned in the latter opinion, and naturally under the holding of the court it would not be because if the constitution of 1865 and 1875 and the pertinent statutory provisions, which may be claimed repeal the act of 1851, are prospective in their operation and effect then the act of March 19, 1845, as well as the observations of the Supreme Court of the United States in the *Home of the Friendless v. Rouse*, supra, are inapplicable. Also any question of a violation of the obligation of a contract drops out.

On the general right of the legislature to grant statutory tax exemptions see the

*Northwestern University v. The people* 99 U. S. 309, 25 L. ed. 387, 61 C. J. 382, 384, 408.

Under the decisions of the courts in this state as they now stand, we are of the opinion that none of the provisions of the constitution of 1865 or of 1875 nor any statutory enactments have served to repeal the act found in *Laws of Missouri 1851*, page 64.

#### CONCLUSION.

We are of the opinion that the property purchased by the trustees of William Jewell College at fore-

Honorable James S. Rooney

-19-

November 10, 1934

closure sale, where the endowment funds of the college had been loaned on the security of such lands for repayment, is exempt from taxation by virtue of the provisions of the act of the legislature of Missouri found in Laws of Missouri 1851, at page 64, so long as said money has been loaned in the exercise of the proper functions of William Jewell College as a college.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC



ROAD DISTRICTS:-Whether bond of district is barred by Statute of Limitations depends upon whether or not person holding bond is under disability, as provided in Section 868, R. S. Mo. 1929.

1-22  
January 17, 1934.



Hon. James H. Russell, Senator,  
17th Senatorial District,  
Jefferson City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I respectfully request an opinion from your office on 'Grand River Township Compromise Interest Bond No. 80 of Cass County, Missouri,' as shown by facts set out in a letter, which you will find attached, from Frank H. Davidson, County Clerk of Cass County.

Does the Statute of Limitations hold against the payment of this bond?

Is there a legal way for this money to be released as suggested by the letter attached from Mr. Davidson?"

Attached to your letter is a statement from Mr. Frank H. Davidson of Harrisonville, Missouri to the effect that in 1887 the Grand River Township in Cass County, Missouri issued some 20/30 years 5% bonds. It appears that the bonds were called for payment on February 10, 1913, and payment of interest was ceased March 16, 1912. There is outstanding Bond No. 80 in the amount of \$1500.00 and there is in the treasury to the credit of the fund for the payment of this bond the sum of \$1500.00. You desire an opinion as to whether this bond has been barred by the Statute of Limitations, and if not, what disposition should be made of the \$1500.00 held to take up the bond.

Section 861, R. S. Mo. 1929, provides as follows:

"Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title

of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for."

Under the foregoing section, an action upon any writing, whether sealed or unsealed, shall be brought within ten years. We do not have a copy of this issue of bonds but the bond is a 20/30 year bond, which we interpret to mean is callable within 20 years and due in 30 years. Being due in 30 years from date of issue, it would be due 30 years from 1887, or in 1917. There being no interest payments since that time so as to toll the Statute of Limitations, the Statute of Limitations would run, providing the bond is not in the hands of a person suffering a disability. Section 868, R. S. Mo., 1929, defining persons under disability, provides as follows:

"If any person entitled to bring an action in this article specified, at the time the cause of action accrued be either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under a sentence of a criminal court for a less term than his natural life, or a married woman, such persons shall be at liberty to bring such actions within the respective times in this article limited after such disability is removed."

Under Section 868, if the cause of action accrued while the holder was under twenty-one years of age, insane, imprisoned on a criminal charge, or under sentence for a less term than his natural life, or a married woman, such persons shall have ten years after such disability has been removed in order to bring a suit upon the bond. Since it is possible that the bond is in the hands of some person suffering a disability, as provided in Section 868, we are of the opinion that the Road District would have no right to transfer the \$1500.00 from the bond fund to the general fund of the District.

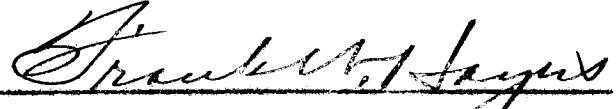
Apparently it is unknown who owns Bond No. 80. If it can be developed that the present holder of the bond is not in one of the classes of persons as mentioned in Section 868, then we believe that the bond is barred by the Statute of Limitations, and that the \$1500.00 fund might be transferred to the general fund of the District. On the contrary, if the holder of the bond should turn out to be one of the class of persons mentioned in Section 868, then the Statute of Limitations might not have run as yet and may not run for several years, and in such an event the District would have no right to transfer the \$1500.00 from the bond fund to the general fund of the District.

It is therefore the opinion of this Department that

January 17, 1934.

whether or not the bond in question is barred by the Statute of Limitations depends on whether or not it is held by the classes of persons as set out in Section 868. If not so held, the bond, in our opinion, is barred. If so held, it may or may not be barred, depending upon the facts, but in the absence of an affirmative showing that the bond is held by a person other than those mentioned in Section 868, we cannot rule that said bond is barred by the Statute of Limitations. Unless the bond is barred by the Statute of Limitations according to the facts as they exist, then the District would have no right to transfer the \$1500.00 in question.

Very truly yours,



Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

**COMMISSION FOR THE BLIND.**

1. Members of Commission for the Blind must file Federal Income Tax returns for private incomes.

2/9  
February 7th  
1934.



Mrs. Mary E. Ryder,  
Missouri Commission for Blind,  
3858 Westminster Place,  
St. Louis, Missouri.

Dear Mrs. Ryder:-

We have your letter of January 29, 1934, in which information was requested as follows:

"Will you please tell me if the members of the staff of the Missouri Commission for the Blind are exempt from Federal income tax returns because they are employees of the State of Missouri?"

Laws of 1933, page 190, repealing and reenacting Sections 8888 and 8892 Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 8892. Compensation of members.--The officers and members of the Commission hereby created shall receive no salary or other compensation for their services as officers or members of the Commission for the Blind, but their traveling expenses and other necessary expense in the performance of their duties as officers and members of the Commission for the Blind may be allowed and paid them out of any funds that may be appropriated by the State for the use of said Commission."

The United States Internal Revenue Laws provide that the compensation received by state and municipal officers and employees shall not be in any way subject to the Federal Income Tax. See U.S.C.A. Title 26, Section 954(b)(7), and note 46 thereunder; also Title 26, Section 1065(b) and Article 643 of Regulations 77, promulgated under Section 116 of the Revenue Act of 1932 as amended. This exemption does not, however, apply to the person but merely to the compensation. In other words, a state employee would be taxed on any income he had outside his state remuneration, and would be required to file a return as to such income.

Mrs. Mary E. Ryder

-2-

February 7th, 1934.

Since under Section 8892 above quoted it is provided that the members of the Commission shall receive no compensation for their services except expenses, the question of taxation on that source does not arise. As to such income as the members may have from sources not connected with the state, Federal Income Tax returns must be filed.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General.

Approved:

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Attorney General.

NEPOTISM: Sec. 13, Art. XIV, Mo. Constitution does not apply to appointment of one's self;

Employment of one's self by school director to transport own children to school does not forfeit office and money received therefor is not embezzlement under provisions of Sec. 4091 R.S. 1929; prosecution under Sec. 4090, R.S. 1929.

March 1, 1934.

35

Hon. James H. Russell, Jr.,  
Chilhowee, Missouri.



Dear Senator:

This department acknowledges receipt of your letter of some time ago, relative to a school problem in Chilhowee, which reads as follows:

"1. Earl B. Coe is now and has been for a number of years a member of the Board of Education of C.D. #2, Chilhowee, Mo.

The Board of Education during this time has employed Mr. Coe to transport his own children from his home to school, paying him from school funds by warrant, several hundred dollars for this service.

Question No. 1. Just what degree of relationship does Mr. Coe bear to himself so far as section 13, article 14 of the Constitution applies to the case? In other words, could Mr. Coe vote to employ himself to render service to the district and not forfeit his office by so doing, but should he vote to employ his fourth cousin he would forfeit his office?

Question No. 2. Is such employment as noted above a violation of section 9360, R.S. Mo. 1929? If so, does such violation carry with it forfeiture of office?

Question No. 3. If such employment was a violation of the law, was the expenditure of the school to pay for such hire a misuse and a diversion of school funds? I refer you in particular to Sections 4090 and 4091, R.S. Mo. 1929."



March 1, 1934.

Question No. 1. Section 13 of Article XIV, being what is commonly termed the "nepotism section", provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

As stated to you verbally, school directors are public officers; the nepotism section therefore applies to school boards. As to the relationship Mr. Coe bears to himself so far as the nepotism section is concerned, we are of the opinion that this section deals solely with the question of a person having the appointive power appointing another person related to him within the fourth degree, and has no application to the appointment of the person himself. It is therefore, the opinion of this department that said section does not apply in the instant case.

If Mr. Coe employs himself, he would be violating Section 9360, R.S. Mo. 1929, the pertinent part of which is as follows:

"No member of any public school board of any city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services: Provided, the compensation of the secretary shall not exceed one hundred and fifty dollars, and that of the treasurer shall not exceed fifty dollars for any one year; \*\*\*\*\*"

The contract of his employment would be void and an action to recover the money so paid him would lie. As to whether or not he would forfeit his office in the event he voted to employ his fourth cousin, this department has held in a recent opinion (copy of which is enclosed herewith) that fourth cousins are not within the degree prohibited by the nepotism section of the Constitution of Missouri.

Question No. 2. The section referred to in your second question, i.e., Sec. 9360, the pertinent part of which is quoted

you in Question No. 1, does not state that the member of the board, if he violate the provisions of said section, is subject to ouster. We therefore conclude that it does not carry a forfeiture of the office. The result of such a violation will be taken up in our discussion of Question No. 3 hereof.

Question No. 3. Section 4090, R.S. Mo. 1929 provides as follows:

"Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school district, or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which he is a member--such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

Under this section you will note that if any officer of the school district willfully or corruptly votes for, assents to, or reports in favor of, or allows or certifies for allowance any claim or demand against the district of which he is a member of the board, he is subject to prosecution.

We are of the opinion that Section 4091, R.S. Mo. 1929 is not applicable to the case under discussion, as it could not be considered that Mr. Coe, in receiving the money from the board of which he is a member, has embezzled the same.

The Supreme Court of Missouri in the case of State v. Douglass, 239 Mo. 674, makes the following pertinent comment (l.c. 680-681):

March 1, 1934.

"There are a great many felonies which may be committed by public officers besides bribery and embezzlement, to-wit, receiving benefits from the deposit of public funds, Secs. 4558 and 4559, R.S. 1909; corruptly allowing and auditing claims, Sec. 4560, R.S. 1909; unlawful disbursement of public moneys, Sec. 4561, R.S. 1909; failing to pay over excess fees collected, Sec. 4563, R.S. 1909. It would therefore have been well nigh impossible for the General Assembly to have recited all these crimes in the Statute of Limitations, and in using the broad words 'corruption in office', they found a comprehensive phrase intended to cover every class of crimes which amounts to a felony when intentionally committed by a ministerial or judicial officer."

It is therefore, the opinion of this department that if Mr. Coe has willfully or corruptly voted for his own employment and for the compensation incident thereto, he would be subject to prosecution under Section 4090 R.S. Mo. 1929.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

Collector's Bond - Township Board may properly accept new bond under Extra Session Laws 1933-1934, p. 167, where old bond does not cover full term as required by law.

7-31

July 21, 1934.



Hon. Dewey A. Routh,  
Prosecuting Attorney of Vernon County,  
Nevada, Missouri.

Dear Sir:

Answering your letter of July 5, 1934, which is as follows:

"The Township Collector of Center Township of Vernon County, Missouri, one Mrs. Carr, gave an enormously large bond a year ago in order to qualify for office. A great deal of trouble was experienced in obtaining this bond and the bonding company only gave it upon one year. The time has now arrived when she must renew her bond and she is again going to experience a great deal of trouble in getting the bonding company to bond her.

"Under the new law passed by the Extra Session in 1933, Section 12279, the bonds are considerably cut down. Of course, it is my understanding that when a person has made a bond, it cannot be cut down during their term of office. However, in the case cited, the bond was only made for a year and will have to be remade for the simple reason that the bonding company would not make it for any longer time.

"I would like to have your opinion as to whether or not the Township Collector could come under the new law and could get a bond in accordance with the new law. Such a bond could be easily obtained."

First, it is apparent that the bond given in the first instance was not in full compliance with the law, Sec. 12279, R. S. 1929, as it ran for only one year, whereas the statute requires the bond to be effective "during the period for which such collector shall be elected or appointed." However, such a bond having been given and accepted, there certainly would exist a common law liability on such a bond for a breach, if any, of its terms.

Also a mere failure of an officer to file his bond within the time prescribed by law does not ipso facto vacate his office. State ex rel Blankenship v. Texas County, 44 Mo. 230; State v. Churchill, 41 Mo. 41.

In 46 C. J. 962, Sec. 94, it is said:

"The legislature has power to change the law with regard to official bonds and to exact a new and additional bonds variant in condition, penalty, obligation and surety, from those executed under the existing law under which the officer was inducted into and held office."

Hon. Dewey A. Routh--#2--

July 21, 1934.

The new statute of 1934 also reads at the end:

"Provided, the county court or township board shall annually examine the collectors or trustees bond as to form and sufficiency of surety and in case of doubt shall require additional security."

It is therefore, in our opinion, eminently proper for the township board in this instance to require a new bond in accordance with the present statute, which obviously was passed by the legislature to relieve officers from the hardship of the excessive requirements of the old law.

Respectfully yours,

WILLIAM ORR SAWYERS  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General



X  
GARNISHMENT - Liability of Missouri Commission for the Blind to.

8.30  
August 27, 1934.

Mrs. Mary E. Ryder,  
Executive Director,  
Missouri Commission for the Blind,  
3858 Westminister Place,  
St. Louis, Missouri.



My dear Mrs. Ryder:

A request for an opinion has been received from you dated August 22, 1934, such request being in the following terms:

"Please give me your opinion as to whether or not the wages of blind men, with families of minors, can be attached.

The men in question receive \$11.50 per week as wages in our broom shop, and in addition are the recipients of the blind pension of \$25.00 per month.

This matter is referred to in the attached copy of letter to Mr. C. A. Ryan, attorney at law, 2521 Howard Street, for Louise Preise, 1506 Elliott Street.

We have had several recent attempts to attach the wages of our broom shop employees and will be glad to have your advice on this subject."

Revised Statutes Missouri 1929 Section 1398 provides in part as follows:

"No sheriff, constable or other officer charged with the collection of money shall, prior to the return day of an execution or other process upon which the same may be made, be liable to be summoned as garnishee; nor shall any county collector, county treasurer or municipal corporation, or any officer thereof \* \* \* be liable to be summoned as garnishee;"

It will be observed that this statute defines certain persons and corporations as exempt from garnishment and that although some public officers and entities are specifically mentioned, the Missouri Commission for the Blind is not among them, and the question is whether or not the Missouri Commission for the Blind is exempt from garnishment even although it is not specifically exempted by this statute.

At common law a municipal corporation is exempt from garnishment on grounds of public policy, *Hawthorn v. City of St. Louis*, 11 Mo. 60 (1847), *Fortune v. City of St. Louis*, 23 Mo. 239 (1856). In the former case, the court in explaining the reasons of public policy on which it was basing its



August 27, 1934.

decision said at page 61:

"But the city of St. Louis is a public municipal corporation, created for the public benefit, and not subject to the same rules governing private corporations, such as banks, insurance companies, and other similar corporations. It should not, therefore, be compelled to stand at the bar of all the courts in the State and participate in the judicial controversies carried on between debtors and creditors. Whilst these contests would be going on, the public interest would suffer, by abstracting from their corporate duties the time and attention of the officers, and occupying them in contests about which the corporation had no interest. And however desirable it may be to creditors to enforce against the officers of the corporation their just demands, by the means resorted to in this case, yet we think that public policy forbids the imposition of such a liability upon the corporation." (11 Mo. 61)

See also *Fendleton v. Perkins*, 49 Mo. 565 (1872).

The case of *Hawthorn v. City of St. Louis*, supra, was decided before the statute exempting municipal corporations from garnishment had been enacted and it might be argued that now that there is in existence a statute naming certain persons and entities as exempt from garnishment, that such statute by implication declares that persons and entities not named therein as exempt must be regarded as subject to garnishment. However, since the enactment of this statute the case of *Kein v. School District*, 42 Mo. App. 460 (1890) has been decided in which it was held that a school district was not subject to garnishment on grounds of public policy, and the court declared that it was not placing this exemption on the ground that a school district was a municipal corporation and as such expressly exempt by the statute, the court taking the position that even although school districts were not expressly exempted by the statute, nevertheless on grounds of public policy a school district should be exempt from garnishment. The court said:

"The government of the school districts is vested in a board of directors. Their powers and duties are prescribed by statute. For the performance of these duties they receive no salary or compensation. It is a trust reposed in them--the execution of which is oftentimes attended with much difficulty and embarrassment; and to allow them to be subject to garnishment for any debt that may be supposed to be due by them to any attachment defendant, it seems to us would contravene the policy of the school law. It doubtless would greatly frustrate these humble, but necessary, officers in their laudable endeavors to carry on the free public schools, if the funds which came into their hands for that purpose are to be condemned and taken from them by the courts of law, by the process of garnishment. We think the public policy of the state forbids this." (42 Mo. App. 463).

3. Mrs. Mary E. Ryder

August 27, 1934.

In the case of *State ex rel and to use of Leach v. American Surety Co.*, 210 Mo. App. 203, 242 S. W. 983 (1922) it was held that the United States Railroad Administration was not subject to garnishment, the court in holding such entity exempt saying :

"And it is well settled that such governmental agency, being a part of the sovereign power, was not subject to garnishment if such had been attempted in the present case." (210 Mo. App. 210).

This latter case may not be strong authority on the point under consideration because, although the court did not indicate its reasons for the exemption, such reasons might well have been and probably were the fact that the United States Railroad Administration is an instrumentality of the government of the United States.

We consider that the case of *Hawthorn v. City of St. Louis*, supra, establishes the principle in this state that public policy exempts strictly governmental bodies exercising governmental functions from a subjection to the confusion and distraction of garnishments against them in which they necessarily have no interest, and that the case of *Kein v. School District*, supra, defines the law of this state to be that R. S. 1923 Section 1398 does not impliedly prevent an exemption from garnishment to a public governmental agency not expressly exempted therein, and in regard the Missouri Commission for the Blind as a governmental agency to which the arguments quoted above from these two cases would apply.

In conclusion, it is our opinion that the Missouri Commission for the Blind is not subject to garnishment.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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Attorney General.

NOTARY PUBLIC: Notary Public commissioned in the State of Missouri not permitted under the law to attest his own signature.

1B-24

November 21, 1934



Honorable Harry P. Rosecan  
Prosecuting Attorney City of St. Louis  
Municipal Courts Building  
St. Louis, Missouri

Dear Sir:

Your letter requesting an opinion is as follows:

"Will you please advise at your earliest convenience as to whether or not a notary public commissioned in the State of Missouri is permitted under law to attest his own signature?"

Thanking you, I am."

Section 11739 R. S. Mo. 1929, provides the powers and duties of a notary public in Missouri and provides:

"They may administer oaths and affirmations in all matters incident or belonging to the exercise of their notarial offices. They may receive the proof or acknowledgment of all instruments of writing relating to commerce and navigation, take and certify relinquishments of dower and conveyances of real estate of married woman; the proof or acknowledgment of deeds, conveyances, powers of attorney and other instruments of writing, in like cases and in the same manner and with like effect as clerks of courts of record are authorized by law; take and

certify depositions and affidavits and administer oaths and affirmations, and take and perpetuate the testimony of witnesses, in like cases and in like manner as justices of the peace are authorized by law; make declarations and protests, and certify the truth thereof under their official seal, concerning all matters by them done by virtue of their offices, and shall have all the power and perform all the duties of register of boatmen."

The general question presented by your inquiry has never been exactly decided by the Missouri Courts, but we do find that where one is named as a party to a deed he cannot take and certify the acknowledgment of said deed. In the case of Dail v. Moore (1873) 51 Mo. 589, the court said, when reviewing assignments of errors in the trial court, at l. c. 591:

"The court correctly decided that the acknowledgment of the deed of trust to Stephens, having been taken by himself, was void. This point was expressly held in Stevens v. Hampton, 46 Mo. 404."

Again in German American Bank v. Garondelet Real Est. Co. 150 Mo. 570, l. c. 576, 51 S. W. 691, the court said:

"The notary before whom the deed was acknowledged was Charles F. Vogel, and when the deed was presented for record, he appeared therein as the grantee, and it was so recorded. The wording of such a deed was improper, and the record thereof does not impart constructive notice to subsequent purchasers, under Section 2419, R. S. Mo. 1889."

46 Corpus Juris 518, Section 30, announces the following doctrine:

"The general rule is that a notary cannot certify to an act in a matter in which he has a personal interest, although the contrary doctrine has been announced. The nature of an interest which will disable him to act cannot be stated in any general rule, but must be determined in each case from the peculiar facts and circumstances of that case."

The Missouri cases cited above, it is to be noted, deal only with acknowledgment to deeds and do not deal with attestations generally. The right of a notary to attest under the statutes of Missouri, is not limited to deeds. Your query is not limited to acknowledgments to deeds. On the other hand, the rule in Missouri voiding an acknowledgment to a deed, where the notary swears himself, follows the common law rule laid down generally as to "attestation." The common law is thus stated in Seal v. Claridge 7 QB 516, (quoting from Donivan v. St. Anthony 8 N. D. 585, l.c. 589, 80 N. W. 772, 73 Am. L. R. 779, 46 L. R. A. 721:)

"Lord Selbourne, in answer to an inquiry as to the meaning of the word 'attestation,' said: 'The word implies the presence of some person who stands by, but is not a party to the transaction,' and elsewhere in the same case used this language: 'I was at first surprised that no authority could be found directly in point, but no doubt, the common sense of mankind has always rejected the notion that a party to a deed could also attest it.' "

#### CONCLUSION.

It is the opinion of this office that the common

November 21, 1934

law rule prevails in Missouri as to a notary attesting his own signature, and that not only in the taking of acknowledgements to deeds but also in any other attestation by a notary, allowed by statute, it is not legally allowable for a notary to represent himself and attest to his own signature. The notary's statutory right to attest is a right to represent a client other than himself, and when he pretends to substitute himself for a client the attestation resulting therefrom is void and of no legal consequence.

Respectfully submitted,

Wm. ORR SAWYERS  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

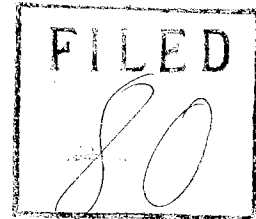
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CRIMES AND PUNISHMENTS:—Under Section 7782, para. a, to tamper with an automobile is a crime, and according to Webster, to tamper means to alter or change without right. Since our Courts have not interpreted the word we cannot definitely say whether a person who removes a part and carries it away should be prosecuted under said Section, instead of under the Larceny section.

2-24  
February 21, 1934.

Mr. Henry C. Salveter,  
Prosecuting Attorney,  
Sedalia, Missouri.



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I am writing to your department for an interpretation of the word 'tamper,' as used in paragraph 'a' of Sec. 7782, 1929, which section reads as follows: 'No person shall drive, operate, use or tamper with a motor vehicle or trailer without the permission of the owner thereof.

To make the point clear we have for some time in our court filed informations under this paragraph of the statute, charging defendants with tampering with automobiles. Most crimes under this section are committed by young men, and many of them have had no prior convictions.

In the case I have in mind a young man stole two truck tires which were over a greater value than \$30.00. In the interest of permitting the jury to give the young man a jail sentence if they saw fit, rather than charging out and out grand larceny, I have put two counts in the information, one on grand larceny and one on tampering, and then in cases where they are young men of previous good character I have elected to go to the jury on the charge of tampering with an automobile under the above section.

A short time ago an attorney in our court raised the point that if a defendant does nothing more than go to the owner's truck and remove tires and carry them away, that he cannot then be found guilty of tampering. It has always been my belief that the word 'tamper' means just what Webster defines it to mean,

that is changing or altering a thing.

I have been unable after diligent search to find any court definitions square out on this point. I have found a citation which refers to an opinion of the attorney general dated April 24, 1931. I do not know what the facts were or the question raised in the opinion above cited.

If I am correct in my opinion that the word 'tamper' was intended by the Legislature in its procedure sense, that is altering or changing a thing without permission, then, of course, my fellow attorney's opinion is incorrect. If I have a mistaken interpretation, then, of course, I shall not in the future act upon my former opinion in the matter, and will let a case involving the facts as above stated stand or fall entirely upon the proposition of larceny.

I will sincerely appreciate the opinion of your department, and also any information you can give me with reference to the former opinion of the Attorney General under date of April 24, 1931."

Paragraph (a) of Section 7782, R. S. Mo. 1929, provides as follows:

"No person shall drive, operate, use or tamper with a motor vehicle or trailer without the permission of the owner thereof."

Paragraph (c) of Section 7786, R. S. Mo. 1929, provides as follows:

"Any person who violates paragraph (a) of section 7781, paragraph (a) of section 7782 or paragraph (f) or (g) of section 7783 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

While our courts have upheld prosecutions under

paragraph (a) of Section 7782 for driving, operating, using or tampering with automobiles where the person has attempted to drive the car or use it in some manner, we have not been able to find any decision where the court has construed the word "tamper" to include the removing of parts or equipment from an automobile. Webster defines the word tamper to mean, "To meddle so as to alter a thing, especially to make changes without right." While we find no judicial construction of the word "tamper", under the foregoing definition by Webster it would seem that if a person removed a part or a piece of equipment from an automobile he would be "tampering" with said automobile, under the terms of the statute. If such is true, the crime would be committed regardless of whether the accused person stole the article removed or not.

Paragraph (a) of Section 7786 provides that the stealing of any part of equipment of a motor vehicle of the value of more than \$30.00 shall be a felony and punished by imprisonment in the penitentiary for a term not exceeding five years, or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment. Both are made felonies, although the punishment for tampering is not as severe as the punishment for stealing. In view of the fact that there is no decision of this State, or any other State which we can find, dealing with the construction of the word "tampering," as applied to your inquiry, we cannot say whether or not a conviction would be upheld. In view of the definition of the word as given by Webster, it would appear that one is guilty of "tampering" when he removes a part or piece of equipment on an automobile. Yet, it is barely possible that the courts might hold that the word "tamper" is synonymous with the words "drive, operate, or use."

You inquire as to the opinion issued by a former Attorney General under date of April 24, 1931. This opinion, written by Mr. Carl J. Otto, then Assistant Attorney General, is as follows:

"The word 'tamper' according to Webster means, 'To meddle so as to alter a thing; especially to make changes without right.' If, under the facts you give, a crime was committed of 'tampering' with a motor vehicle, said crime was completed immediately upon removing the engine head, and it was not necessary that the same be stolen or taken away in order to complete the crime. We are inclined to believe that prosecution might possibly be brought under the felony charge of tampering.

However, as a practical matter and in order to minimize the danger of an acquittal, we seriously doubt the advisability of prosecuting under the felony section. In the first place, there has been no Supreme Court interpretation of this law, and the penalty inflicted is rather severe, thereby increasing the possibility of acquittal. On the whole, we believe the best practical advice is to prosecute him under subsection (b) of Section 28, p. 105, Laws 1921, First Extra Session."

The opinion which we give now is not in conflict with the above opinion given by a former Attorney General. We, of course, cannot with certainty, in view of a lack of decisions by our courts, determine what construction will be placed upon this Section. If the courts should follow the literal definition of the word, then a person who removes a part or piece of equipment from an automobile would be "tampering" with the automobile. However, as a matter of safety, it might be advisable to indict such individual either for stealing or attempting to steal such part or equipment.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:MS

ROAD DISTRICTS;--Commissioners of road district would be personally liable for paying out money of district upon contract entered into in violation of Section 13 of Article XIV of the Constitution of Missouri.

6/5

May 26, 1934.



Mr. Henry C. Salveter,  
Prosecuting Attorney,  
Sedalia, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I would much appreciate an interpretation from your office with reference to the following question:

Can the road commissioners of a special road district, organized under Article 9, Chapter 42, of the Revised Statutes of Missouri for 1929, appoint and hire a son of one of the commissioners to perform services on the roads of the district?

If such employment is in violation of Section 13 of Article 14 of the Constitution of Missouri, would the commissioners, or any of them, be personally liable to reimburse money thus paid out to the road district, assuming that the relative employed did perform bonified services during the course of his employment?

This question has frequently been called to my attention by road commissioners, as well as citizens of the County. It is my personal opinion that such employment is in violation of Section 13, Article 14 of the Constitution of Missouri. However, if the relative employed renders bonified services and assuming that the pay is fair and reasonable for the services performed, I am anxious to know whether or not any members of the road district would nevertheless be responsible to reimburse the district."

Section 13 of Article XIV of the Constitution of Missouri provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The Supreme Court in the case of State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, held that a school director who votes to employ a relative related within the prohibited degree subjects himself to forfeiture of office, the Court saying at page 101:

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. In this case it is admitted that respondent had such power at the time of the selection, and that he exercised it by naming and appointing his first cousin to the position of teacher of the school in said district."

The road district is a political subdivision of the State so as to come within the limits of the above section of the Constitution. It is said in State ex rel. v. Thompson, 285 S. W. 57, 61:

"The district when organized is a municipal corporation, not in the limited sense applied to certain cities, but in the general sense in that it exercised governmental functions. It is a political subdivision of the State. State ex rel. Kinder v. Little River Drainage District, 236 S. W. 848."

It will be seen from the foregoing, therefore, that a road commissioner who votes to appoint or hire his



son to perform services for the district has violated the above constitutional provision, and has made himself liable to have his office forfeited.

You next inquire whether the commissioners would make themselves personally liable if they paid the son for the services performed. We believe that the contract entered into where the commissioner appoints his son is an illegal contract. The intention in the adoption of Section 13 of Article XIV is evident in every word. The ouster of the director is the correction of only one-half of the evil. To permit the related employe to retain the benefits of the vicious contract would be to defeat the purposes of the amendment. The appointed person, in our opinion, would not be able to enforce the illegal contract against the district. Since the contract is illegal, as being made in direct conflict with the provisions of the Constitution, the commissioners would have no legal right to pay out the funds of the district upon the illegal contract. If they do pay out money illegally they make themselves personally liable. In the case of Knox County v. Hunolt, 110 Mo. 67, it was held that the Judges of the County Court were liable to the county for the diversion of the county school fund for other than county school purposes, even though the diversion was by mistake and the county received the benefit of the money misapplied. the Court said at page 75:

"The use of the fund for the payment of ordinary county debts was an act in direct violation of the Constitution and laws creating that fund, and was, therefore, nothing short of malfeasance. That the judges would be liable in a private suit to persons especially injured for such a violation of law is clear, and we can see no reason why they are not liable to the county."

Applying the rule announced in the above case to your inquiry it must logically follow that if the county court would be personally liable for a diversion of funds where it was done by mistake, certainly they would be personally liable for money paid out upon a contract which was executed in direct violation of the State Constitution.

It is therefore the opinion of this Department that if a road commissioner votes to elect or appoint his son to render service to the district, the contract entered into between the district and the son is illegal and unenforcible, and if the district pays, out of the district treasury, funds upon the illegal contract, the road commis-

Mr. Henry C. Salveter,

-4-

May 26, 1934.

sioners would be personally liable to refund that money into the treasury, regardless of whether the services were performed or the amount paid was reasonable.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

FWH:S

ELECTIONS: ) Last day for candidates to file for August Primary  
PRIMARY: ( Election, 1934.

6-5.  
June 1, 1934.



Hon. Paul H. Sanderson  
County Clerk  
Pike County  
Bowling Green, Missouri

Dear Mr. Sanderson:

We acknowledge receipt of your letter of May 29th, 1934, in which you request an opinion as to the last day in which candidates may file for office in the forthcoming primary election. Your letter is as follows:

"There seems to be some misunderstanding as to the last day in which candidates may file for office in the forthcoming primary.

"Will you please advise me by return mail the last day a candidate can file?"

Section 10254, R. S. Mo. 1929, provides as follows:

"The primary shall be held at the regular polling places in each precinct on the first Tuesday of August, 1910 and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

And, Section 10257, R. S. Mo. 1929, provides that,

"The name of no candidate shall be printed upon any official ballot at any primary

June 1, 1934.

election, unless at least sixty days  
prior to such primary a written dec-  
laration shall have been filed by the  
candidate, \* \* \* \* \*

The general rule is, that where a statute requires that an act be performed a fixed number of days previous to a specified day, the last day should be excluded and the first day included in making the computation. The primary election will be held on Tuesday, August 7th, 1934. It will, therefore, be necessary for all candidates to have their declarations filed with the proper officials on or before midnight, June 8th, 1934.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

CRH:EG

DEPARTMENT OF PENAL INSTITUTIONS: Inmates of Intermediate Reformatory should be held in that institution until ordered transferred by the Commissioners of Penal Institutions with the consent of the Governor.

8-17  
August 16, 1934

Honorable J. M. Sanders  
Warden  
Jefferson City  
Missouri



Dear Mr. Sanders:

Receipt of your letter dated July 31, 1934  
is acknowledged.

Your letter is as follows:

"The statutes provide that if a person be convicted for the first time of a felony, he being between the ages of seventeen and twenty-five and he not be guilty of treason or murder in the 1st or 2nd degree, or any other offense in which capital punishment is provided, may be sentenced to the Intermediate Reformatory at Alcoa, Missouri; however, in many cases the Courts not knowing of the prisoner having a former record, have sentenced them to the Reformatory at Alcoa.

It has been the practice, when it was discovered, that they had a former record, to hold the inmate in our receiving cell at the prison pending the transfer to the prison proper.

It also has been the practice, in cases of escapes from Alcoa, to be brought to the prison until the transfer to the prison is made.

I contend in all cases, both second offenders and escapes, should be held at Alcoa where they have been sentenced by the Court, until the final order of the Governor is made transferring them to the penitentiary.

August 16, 1934

I do not think that I have any legal right to hold any Alcoa prisoner pending the decision of the Board, and should not be held responsible for same, as Alcoa and the Penitentiary are two separate institutions.

Would you please render an opinion in this matter."

Section 8466 Revised Statutes 1929 provides:

"An intermediate reformatory for young men, who for the first time have been convicted of a felony as hereinafter designated, is hereby established."

With reference to the management and control of the intermediate reformatory Section 8470 provides:

"The commissioners of the department of penal institutions shall have control of the institution, determine the policy of the same and make necessary rules not inconsistent with the law, for the discipline, instruction, and employment, and release or transfer, of the inmates; cause to be kept proper records including those of the inmates; and audit the accounts of the superintendent monthly."

Section 8474 reads:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials, in charge of said



reformatory to receive all such convicted persons."

Subdivision b. of Section 8475, authorizing the transfer of inmates from the intermediate reformatory to the penitentiary, in part reads as follows:

"The department of penal institutions shall have the power, with the consent of the governor, to transfer to the penitentiary any prisoner who subsequent to his committal to the intermediate reformatory, shall be shown to their satisfaction to have been, at the time of his conviction, twenty-five years of age or over, or to have been previously convicted of a felony; and may also transfer any apparently incorrigible prisoner, whose presence in the reformatory appears to be seriously detrimental to the well-being of the inmates of the institution.  
\* \* \* \*"

The above quoted portion of Section 8475 gives to the Commissioners of Penal Institutions, with the consent of the Governor, authority to transfer to the penitentiary any inmate of the intermediate reformatory when it is shown that such inmate does not come within the provisions of Section 8474 above set out. The power and authority is clear and absolute notwithstanding the judgment and sentence of the court.

The judgment and sentence of the court is presumptively correct as to age and first conviction, until a different finding is made by the commissioners of penal institutions.

Until such showing is made to the commissioners of penal institutions and until the consent of the governor to a transfer to the penitentiary has been procured, the inmate should be kept and remain in the intermediate reformatory and not in the state penitentiary. He should only be transferred to the state penitentiary from the intermediate reformatory when the commissioners of penal institutions have made an order therefor, with the consent of the governor.

The above statement would apply to any inmate sentenced to the intermediate reformatory who might be subject

Honorable J. M. Sanders

-4-

August 16, 1934

to be transferred to the state penitentiary by order of the commissioners, with the consent of the governor.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

MEMBERS OF THE STATE HIGHWAY PATROL are not entitled to receive rewards for the apprehension of escaped convicts from the Missouri State Penitentiary.

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9-12  
September 7, 1934.

Honorable J. M. Sanders, Warden  
Missouri State Penitentiary  
Jefferson City, Missouri



Dear Sir:

This Department is in receipt of your letter of August 14th, wherein you state as follows:

"Will you please advise as to whether or not State Highway Patrolman are entitled to receive a reward for the apprehension of an escaped convict of the Missouri State Penitentiary,"

Laws of Missouri 1931, Section 13, page 234, declares that members of the Missouri State Highway Patrol are officers of the State of Missouri and reads as follows:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator

or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

Under the above rules and regulations of the State Highway Patrol the members of the patrol are declared officers of the State and are vested by law with powers possessed by peace officers, except service of civil process. The members of the State Patrol are further given the authority to arrest any person detected by them in the violation of any law of this State.

In the case of *Kick v. Merry*, 23 Mo. 72, 1. c. 76; 66 Am. Dec. 658, our court in holding that an officer may not receive a reward for services required of him as part of his official duties, said:

"The case falls within the mischief of the rule of the common law which prohibits an officer from taking a reward as an inducement to do his duty. He received a stated salary for his services. The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. Under such circumstances, to permit an officer to stipulate for extra compensation for services to which the public was entitled, would lead to great corruption and oppression in office. It would follow that whenever a crime was committed, instead of speedy efforts for the arrest of the offender, there would be a holding back, in the hope that there would be a reward given for his apprehension. If once a habit of taking a reward is introduced, nothing will be done unless the service is previously purchased by extra pay."

Again in the case of *Cornwell v. St. Louis Transit Company*, 73 S. W. 305; 100 Mo. App. 258, 1. c. 262, our court

in holding that a member of a posse who at the time he made the arrest was a peace officer, and, therefore, not entitled to a reward, stated:

"Plaintiff, as a member of the posse, at the time he made the arrest, was a conservator of the peace (R. S. 1899, sec. 6219) and therein was merely discharging his duty as such deputy and temporary officer and would have been debarred from recovering any reward for the performance of such official obligation, for a public officer is not allowed to receive, for performing an official duty, any other compensation than that provided by law. Public policy forbids an officer from claiming a reward for performance of any act which is by law made part of his duty, \* \* \* \* \*

Wood on Master and Servant (2 Ed.), sec. 170; Gregg v. Pierce, 53 Barb. 387; Reif v. Page, 55 Wis. 496; Morris v. Kassling, 11 L. R. A. 399; Brounberg v. Coburn, 110 Ind. 174; Thornton v. Railroad, 42 Mo. 58; Hogan v. Stophlet, 179 Ill. 150; Smith v. Gentry, 42 L. R. A. 302; Lees v. Colgan, 40 L. R. A. 355; St. Louis etc., Ry. Co. v. Grafton, 51 Ark. 504."

As previously stated, members of the State Highway Patrol are public officers of this State. They have the authority to arrest any person, detected by them, in the violation of any law of this State, and it is therefore clearly a part of their official duty to apprehend any escaped convict. The courts in this country are practically unanimous in declaring, and it has been the principle at common law, that a public officer, working for a fixed compensation, or whose fees are prescribed by law, cannot demand or contract for a reward for services rendered in the line or scope of his official duty.

A State Highway Patrolman receives a stated salary for his services, and as said by our courts "to stipulate for extra compensation for services to which the public was entitled,

Honorable J. M. Sanders

-4-

September 7, 1934

would lead to great corruption and oppression in office. It would follow that whenever a crime was committed, instead of speedy efforts for the arrest of the offender, there would be a holding back, in the hope that there would be a reward given for his apprehension."

In view of the foregoing we are of the opinion that since members of the State Highway Patrol are public officers, and since it is part of their official duty to apprehend any escaped convict from the Missouri State Penitentiary, in so doing they are not entitled to extra compensation or reward for such services.

Respectfully submitted,

Wm. ORR SAWYERS  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General.

MW-WOS:H



COUNTY COURT: SALARIES: LIMITATIONS: HIGHWAYS: Suit by ex-office holder governed by five year statute of limitations.

Ex-office holders are not estopped to claim back salary.

Rock public roads include gravel roads.

Section 11808 Revised Statutes Missouri 1929 to be used in estimating population until effective date of Laws 1933, page 369.

September 20, 1934



Honorable Henry C. Salveter  
Prosecuting Attorney  
Sedalia  
Missouri

Dear Mr. Salveter:

This Department acknowledges receipt of your letter dated September 14, 1934 as follows:

"Two suits against the County of Pettis have recently been filed on behalf of two Ex-County Judges, who were members of our County Court from January 1, 1929, to January 1, 1931. Since January 1, 1931, Judges of the County Court in Pettis County have drawn a salary of \$2500 per year under Section 2092 R. S. Mo. 1929. The claims on behalf of these ex-judges are for \$1200 a year, as road overseers for the years 1929 and 1930, under Section 7892 R. S. Mo. 1929. This same Section had been the law for several years prior to 1929. Section 7892 aforesaid, interpreted with Section 11808 R. S. Mo. 1929, gave Pettis County a population of between seventy and eighty thousand, during the years in question. In these years the County also had more than two hundred miles of paved, macadamized and graveled public roads. Pettis County also had a total taxable wealth of over \$25,000,000 and did not contain a city of the first class. The above named suits were filed in our Circuit Court the latter part of June, 1934.

In preparing the defense of these cases on behalf of the County, and considering whether a settlement should be made of the claims, I respectfully petition your

September 20, 1934

department for an opinion with reference to the following questions, concerning said cases.

(1) Does an ex-office holder, of a county, have the benefit of a five year period within which to file his claim against the county for back salary?

Section 862 R. S. Mo. 1929 allows a five year period within which to sue, in cases of, 'an action upon a liability created by a statute other than a penalty or a forfeiture.' I am unable to find any other statute which limits claims against a county for a less period. Section 11416 R. S. Mo. 1929 limits claims against the State to a period of two years, but in my opinion this does not apply to claims against a county. You will observe from the above statement of facts that the suit was filed four and half years after December, 1929. Counsel for claimants agree that the salary for the first six months of the year 1929 is barred under the five year statute. Hence, whether or not claimants could recover for the first six months of the year 1929 is not an issue in this inquiry.

(2) The second question is: Are claimants now estopped to assert their claim for back salary? Claimants, as judges of the County Court and as members of the board of road overseers, were the officers who wrote their own pay checks. They had absolute opportunity to pay themselves what was due them under the law. The fact that they did not take their money at the time it was due is entirely their own fault. As a moral proposition, it seems unjust that they should now be permitted, after these long years, to come in and ask for their pay. However, as a legal proposition, which of course governs, it appears

to me that the following cases lay down the rule that if the law gives a county officer a salary, that he is entitled to collect the full salary, and even though he accepts a smaller sum than the law allows, that he may later demand and collect the full amount to which he was originally entitled:

State ex rel. -v- Hamilton, 312 Mo. 157,  
279 S. W. 33

State ex rel. -v- Hamilton, 260 S. W. 466

State ex rel. -v- Ludder, 285 S. W. 421

State ex rel. -v- Grinstead, 282 S. W. 715.

State ex rel. -v- Fisher, 282 S. W. 724

State ex rel. -v- Bockleman, 240 S. W. 209

State ex rel. -v- Bailey, 272 S. W. 921

State ex rel. -v- McCurdy, 282 S. W. 722

(3) The third issue is whether or not a public graveled road, and being an all weather road at all seasons of the year, comes within the qualifications prescribed in Section 7892, aforesaid. Said Section provides, 'and which now have or may hereafter have more than two hundred miles of macadamized or rock public roads.' The phrase 'rock public roads' would, in the opinion of this office, mean and refer to a road which had sufficient hard surface, to be available and open to public traffic at any and all seasons of the year, under all weather conditions. In my opinion a gravel road which was an all weather road for all seasons comes within the meaning, 'rock public roads.' However, I will appreciate your interpretation as to that question.

(4) The fourth question is whether or not Pettis County during the years in question had a population of more than 50,000. The actual or census population of Pettis County during the years concerned was less than 50,000. However, Section 11808 R. S. Mo. 1929 expressly provided that the population of all counties for the purposes of determining the fees or salary due an officer, should

be determined and ascertained by multiplying the highest number of votes cast at the last previous general election by five. It is the opinion of this office that the population of Pettis County for the purpose of determining the salary of the board of road overseers during the years in question is determined by the multiplication method and is not to be determined by the actual census. As above stated Pettis County had a population, under the terms of Section 11808, of over 50,000. It is the opinion of this office that the right of the claimants to prevail is determined upon the provisions of the law as it was written and existed during the years in question. The fact that Section 11808 R. S. 1929 was repealed and a new section re-enacted bearing the same number in the laws of 1933, page 369, whereby the population of a county is determined solely by the last decennial census of the United States, cannot have a retroactive force and effect against the claimants in the opinion of this office.

While this office, and the great majority of the county tax payers would be personally gratified to be in a position to defeat the above claimants, yet it appears that the law and the facts are in favor of the claimants. Since the claims involve a matter of public importance to the tax payers of the county, I desire to know the opinion of your department and to learn whether or not it concurs with my own, before advising the present Judges of our County Court with reference to a disposition of the claims."

We address ourselves to your inquiries in the order in which you number them.

1.

Section 862 Revised Statutes Missouri 1929 provides:

September 20, 1934

"What within five years. Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 861, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract, and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

There is not any special statute of limitations in the State of Missouri applying to actions brought by an ex-office holder of a county against such county. We do not find that the question of whether or not Section 862, above set out, applies to actions brought by an ex-office holder of the county against such county to have been ruled in this State. But in a number of such suits the fact that such section would apply to such action does not seem to have been questioned; for instance, in the case of State ex rel. Sperry v. Beatty 282 S.W. 725, the action was one to recover unpaid salaries for the years 1921, 1922, 1923 and 1924, and there was no contention that Section 862 did not apply.

We are of the opinion that in an action brought against a county, by an ex-county office holder, for unpaid salary that so far as the question of limitation is concerned Section 862 Revised Statutes Missouri 1929 controls.

2.

By Section 7892 Revised Statutes Missouri 1929, in counties where certain precedent conditions of fact exist, members of the county court are entitled to,



"\* \* \* \* receive a salary of \$1200 per annum to be paid, by the county, monthly, in equal monthly installments out of a fund mentioned in said subdivision (2) of Section 9874."

The legal obligation of a proper county to pay the members of the county court is thus and thereby fixed. The question of whether or not by accepting a portion of what the law provided the members of a county court were entitled works an estoppel against such members thereafter claiming the proper amount due them under the law, was discussed in principle in *State ex rel Summers v. Hamilton* 312 Mo. 157, being an action by a clerk of the circuit court to compel issuance to him of warrants for a certain portion of his salary theretofore uncollected by him. It was contended that, having theretofore accepted a portion of the salary due him, the circuit clerk was estopped to thereafter make claim for the unpaid portion of the salary. The Supreme Court of Missouri, at page 172 of the opinion said:

"Having reached the conclusion that relator was entitled under our Constitution and Statutes to \$1950 per annum as his salary, what has transpired to cut off his right to recover the difference between the above amount and the salary of \$1600 paid by respondents?

The County Court of Crawford County was not vested by law with the power to compromise relator's rights and compel him to accept as his salary less than the law allowed him. The county court was simply required, in the performance of a purely ministerial act, to issue warrants to relator for his monthly salary, based on the population of said county, as determined under the foregoing law. In so doing, it was not acting judicially. (*Marion County v. Phillips*, 45 Mo. 75; *State to use Carroll Co. v. Roberts*, 60 Mo. 402, 62 Mo. 388; *Cole County v. Dallmeyer*, 101 Mo. 57; *Spars v. Stone County*, 105 Mo. 236; *State ex rel. Christian County v. Gideon*, 158 Mo. 1. c. 338; *State ex rel. v. Diemer*,



255 Mo. 336; State ex rel. Moss v. Hamilton, 260 S. W. 466.)

We are of the opinion that, on the undisputed facts, the doctrine of estoppel has no place in the case. the conclusion reached by Court in Banc, speaking through Graves, J., in State ex rel. Moss v. Hamilton, 303 Mo. 302, 260 S. W. 1. c. 471, is applicable to the facts in this case, and we hereby adopt the same, as follows:

'If there was the legal obligation upon Crawford County to pay relator at the rate of \$1950 per year, as we have ruled, then there is nothing in the conduct and acts of relator which occasioned said county through respondents to act to their detriment, or to change its position to its detriment. At most the county only partially discharged a legal obligation. The partial payment of a legal obligation is not payment in full, and does not discharge the debt. (Zinke v. Maccabees, 275 Mo. 1. c. 666, 205 S. W. 1.)

Upon the facts no act of relator caused Crawford County, or respondents, its agents, to do anything to the detriment of the county or to themselves, as its agents. There was simply a part payment of a debt which the county owed under the law.' "

A debt is not paid until it is paid in full, compromised or settled. From your letter I take it there is no question of compromise or settlement involved in your controversy. The members of the county court simply failed to collect what the county owed them under the law, and in that situation we are of the opinion that estoppel does not lie against such members of a county court to collect the unpaid portions of their salaries, unless some portion of same may be barred by the statute of limitations.

3.

In *Fellows v. Dorsey* 171 Mo. App. 289, the Kansas City Court of Appeals defined "gravel" as,

"Small stones, or fragments of stone, very small pebbles, often intermixed

with particles of sand."

We know, of course, that the words 'stones' and 'rocks' are often used interchangeably.

The statutes of the State of Indiana authorized the building by a railroad of a branch line extending to lands containing building stone. In the case of Cottrell, et al. v. Railway Co. 138 N. E. 504, a railroad company in the State of Indiana undertook to extend its lines, under the statute above referred to, to gravel beds. Its right to do so was upheld by the court. The court at page 505 of the opinion said:

"Gravel consists of stone, more or less broken up and disintegrated, and is used extensively for building purposes. Building a branch line extending to mineral lands containing gravel, less than 50 miles from the main line of the railroad, is therefore authorized by the statute. Burns' 1914, Sec. 5425; Acts 1889, c. 63, p. 100."

In the case of Dione v. West Paris Building Association 126 Me. 454, the court had under consideration the construction of a building contract. Referring to the meaning of the word 'stone' the court said that,

"The word 'stone' as ordinarily used refers to small pieces or moderately sized pieces of rock."

It is our opinion that the term 'rock public roads' as used in Section 7892 Revised Statutes Missouri 1929, was and is sufficient to cover and include what is known as graveled roads.

4.

It is too elementary for discussion that a law has no efficacy before its effective date, so that the amendment to Section 11808 Revised Statutes Missouri 1929, by laws Missouri

Honorable Henry C. Salveter -9- September 20, 1934

1933, at page 369, did not affect in any way the provisions of the above section prior to the effective date of the 1933 law.

On the facts submitted by you the population of Pettis County, so far as your question is concerned, should be ascertained under and by virtue of the provisions of Section 11808 Revised Statutes Missouri 1929.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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(Acting)  
Attorney General.

GL:LC

SCHOOLS: Right of children of transients to attend free public schools in Missouri.

10-22  
October 12, 1934.



Honorable Henry C. Salveter  
Prosecuting Attorney  
Pettis County  
Sedalia, Missouri

Dear Sir:

Your letter of September 11, 1934, requesting an opinion from this office is as follows:

"I desire your opinion relative to the following propositions:

"Several months ago the Federal Government established a Transient Bureau at Sedalia, Missouri. At this time there are approximately twelve young men whom the officials of the Transient Bureau desire to have admitted to the Sedalia High School, without the payment of tuition. The Government, through the Transient Bureau, also have approximately eight families for whom it has rented houses here in Sedalia. According to the records of the Transient Bureau, all these families have what is termed their legal or permanent residence, and Sedalia listed as their temporary residence. Some four or five of these families have their legal or permanent residence listed as being in other States. The Government, according to my information, pays the rent for these families and is also providing food for them. Each of these families has children who at this time are attending the grade schools.

"The school board has refused to admit the young men from the Transient Bureau. None of them has Sedalia as a permanent residence, but are merely what may be termed 'floaters', going from one part of country to another, and as we use t

the expression, 'living wherever their hat is.' The school board objects to the young men from the Transient Camp desiring to attend High School, for the reason that they fear they will have a demoralizing influence and may bring diseases into the school. The board further objects because it is low on funds, and this additional number adds just that much increased cost. With reference to the children from the homes, above named, attending the grade schools, the board has no objection on a moral ground, but does not like this additional burden on teachers and cost without having tuition.

"Does the board have the right to refuse to admit the young men from the transient bureau unless tuition is paid?

"Would the board also have the right to refuse them admittance on the theory that they were undesirable persons to have associated with boys and girls in the High School?

"Does the board have the right to refuse children from transient families who are living in Government rented houses at Sedalia, and are now attending the grade schools, until tuition is paid, or in other words, can the board charge tuition for the children attending grade schools?

"The school board is greatly concerned concerning the above matter, as well as the officials of the Transient Bureau, and, therefore, this office would appreciate the earliest consideration which your department can give to the opinion."

October 12, 1934.

Missouri Constitution, Article XI, Section 1, provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

Residence for purpose of claiming right to attend public schools is determined by the intention of the guardian of said child or children who are under the surveillance of the transient bureau at Sedalia. The records of the Transient Bureau are but mere evidences of residence and at best only speak the intention of the transient at the time that said transient made the record for the Bureau. Such record should not be taken as conclusive evidence of non-residence, at all events disbaring the children of transients the right to attend free public schools in this State. As a matter of criminal law, it is compulsory for children of school age to attend school in this state and the law compelling attendance does not exempt them for non-residence.

Section 9433, R. S. Mo. 1929, provides:

"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and fourteen years shall cause such child to attend regularly some day school, public, private, parochial or parish, not less than the entire time the school which said child attends is in session, or shall provide such child at home with such regular daily instruction during the usual hours as shall, in the judgment of a court of competent jurisdiction, be substantially equivalent at least to the instruction given the



children of like age at said day school in the locality in which said child resides; and every parent or person in this state having charge, control or custody of a child between the ages of fourteen and sixteen years, who is not actually and regularly and lawfully engaged for at least six hours each day in some useful employment or service, shall cause said child to attend regularly some day school as aforesaid: Provided, that a child between the ages aforesaid may be excused temporarily from complying with the provisions of this section, in whole or in part, if it be shown to the satisfaction of the attendance officer, or if he declines to excuse, to the satisfaction of a court of competent jurisdiction, that said child is mentally or physically incapacitated to attend school for the whole period required, or any part thereof, or that said child has completed the common school course as prescribed by constituted authority, or its equivalent, and has received a certificate of graduation therefrom".

Section 9207, R. S. Mo. 1929, provides how non-resident pupils are admitted.

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district-- said rules to take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules

may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any <sup>city</sup> district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided further, that any person paying a school tax in any district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

It is to be noted that the right of attendance is not at all events dependent on residence but a temporary home is all that the law requires under the different provisos above set out.

School laws in Missouri have always been construed liberally by our courts so that the advantages of securing an education will be as free as possible. In the case of State ex rel. 164 Mo. App. 671, 1. c. 678; 147 S. W. 1119, the appellate court held that a child, residing with its grandfather under an agreement with the child's father, not made solely for the purpose of sending the child to school, is entitled to attend school where his grandfather resides without paying tuition and at 1. c. 1120, the court said:

"The statute is not ambiguous, and plainly provides that children who

are unable to pay tuition, and whose parents are not contributing to their support, shall have the privilege of attending school in any district in which they may have a permanent or temporary home. It will be noticed that the privilege is granted, regardless of the residence or domicile of the parent."

Later at l. c. 1121, the court said:

"We have not overlooked the point forcibly made in appellants' brief that the Steelville district is largely maintained by tuition fees received from non-resident pupils, but we do not believe that the effect of this decision will be to deprive the school of such fees."

Now, considering the right of the school board of Sedalia to make reasonable rules whereby pupils are suspended and expelled for conduct demoralizing to the school, we have already seen that Section 9207 provides for such rules.

Then tho, children may be required to submit to examination by a physician where there is danger of them carrying contagious or infectious diseases into this school.

Section 9208, R.S. Mo. 1929, provides:

"It shall be unlawful for any child to attend any of the public schools of this state while afflicted with any contagious or infectious disease, or while liable to transmit such disease after having been exposed to the same. For the purpose of determining the diseased condition, or the liability of transmitting such disease, the teacher or board of directors shall have power to require any child to be examined by a physician or physicians, and to exclude such child from school so long as there is any liability of such

Honorable Henry C. Salveter    -7-    October 12, 1934.

disease being transmitted by the same. A refusal on the part of the parent or guardian to have an examination made by a physician or physicians, at the request of the teacher or board of directors, will authorize the teacher or board of directors to exclude such child from school; and any parent or guardian who shall persist in sending a child to school, after having been examined as provided by this section, and found to be afflicted with any contagious or infectious disease, or liable to transmit the same, or after having refused to have such child examined as herein provided, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than five nor more than one hundred dollars.

CONCLUSION.

It is the opinion of this office that children of school age of transients, temporarily located in the Sedalia school district should be admitted to the public schools of that district without paying tuition, where it be shown that they are unable to pay tuition, and their parents do not contribute to their support but are supported by charity. These facts are admitted in your request. Fears of demoralizing conduct is no ground for a child's exclusion. Proof of immoral conduct after notice and a hearing upon charges preferred is sufficient grounds for suspension or expulsion under the statutes. These unfortunate children have a constitutional right to an education in Missouri, and their attendance in school is compulsory under our statutes. The fact that they add to the cost of running the school without paying tuition does not alter the law in such cases, nor does the effect of this opinion deny the school board fees that they could ever hope to collect.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK

12-12  
December 4, 1934.



Honorable J. M. Sanders, Warden  
Missouri State Penitentiary  
Jefferson City, Missouri

Dear Sir:

Your letter of October 25, 1934, requesting an  
opinion is as follows:

"On January 23, 1934, J. E. Jones,  
our 44206, was tried and convicted  
of Larceny by the Circuit Court of  
Maries County, Mo., and was sentenced  
to '2 years in the penitentiary from  
January 23, 1934.'

"Later he was taken out on a writ  
of habeas corpus to Gasconade  
County, Mo., and was tried and con-  
victed in the Circuit Court of that  
County of Burglary and Larceny and  
was sentenced to '3 years in the  
penitentiary from September 11, 1934,'  
being returned to prison. Proceed-  
ings were had at different times and,  
of course, under different juris-  
dictions. No reference is made in  
either commitment to the proceedings  
or sentence in the other.

"There appearing to be a difference  
of opinion among interested attorneys,  
this office would like to know how  
much time Jones is required to do."

Section 648 R. S. Mo. 1929, provides the limita-  
tion in Missouri upon imprisonment of any person:

"No person's body shall be imprisoned  
or restrained unless by authority of  
law."

In *Meininger v. Breuer*, 304 Mo. 381, at 389 the Court discussed concurrent and cumulative sentences, and, although the facts of said case are not identical with the facts in the case presented, the propositions of law therein stated are applicable in all cases where a problem of cumulative or concurrent sentences is presented. The Court said at l. c. 391:

"The law then, as now, was settled beyond dispute, that in the absence of a statute to the contrary, sentences were not cumulative, even where they might be made so unless the sentencing court expressly made them so by directing that the subsequent one should commence at a future time determined or determinable with certainty. In the Meyers sentences no sort of effort was made by the trial court to render the sentences cumulative."

There are statutes in Missouri which direct the trial court to render cumulative sentences under certain circumstances, as for instance Section 4456 R. S. Mo. 1929, which reads as follows:

"When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction."

Providing for cumulative punishment, there is also Section 12969, R. S. Mo. 1929, which provides:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and



sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

Since the facts presented in your query are not applicable under the above sections (Section 4456 or Section 12969), and since we have been unable to find any other legislative act in Missouri directing cumulative sentences or punishment in Missouri, it remains for us to decide what sanction you are to place on the judgments and sentences of two different courts in two different circuits relating to two different crimes, when by the terms of said judgments and sentences, the same prisoner is committed to do time certain, but said time certain under the two commitments overlaps and is cumulative to the extent of said overlapping of specified time.

Let us look to the Constitution Statutes and see the jurisdiction of a circuit court and criminal courts to render judgment and pass sentence on one convicted of a felony, in felonies where cumulative sentence is not expressly provided for by Statute, that is, in felonies where the judgment and sentence of the court is not controlled by Sections 4456 and 12969, supra.

Article VI, Section 22 of the Missouri Constitution provided in part:

have

"The circuit court shall/jurisdiction over all criminal cases not otherwise provided for by law;\*\*\*."

Under the Missouri Constitution, above set out, we see that both the circuit courts of Maries County and of Gasconade County were given Constitutional jurisdiction over the two felony cases to which you refer.

Section 3715 R. S. Mo. 1929, provides the essentials of a formal judgment upon a conviction for a felony and is as follows:

"Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such judgment fully on the minutes stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

Both judgments rendered, although coming from different Circuit Courts at different times, are in substantial conformity to the statutory requirements.

Section 3717 provides for making a certified copy of any judgment and sentence to the penitentiary, as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Section 8413 R. S. Mo. 1929 provides:

"Whenever any convict shall be delivered to said board, the officer having such convict in charge shall

deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Here we have a person duly sentenced, delivered and now committed under two judgments against him. On one he is committed for "2 years in the penitentiary from January 23, 1934, and on another is committed for "3 years in the penitentiary from September 11, 1934." There exists two judgments outstanding against this prisoner which remains to be satisfied, and it is the Warden's duty to satisfy them. The prisoner must comply with the conditions of both judgments, and the Warden must take said judgments as he finds them, and restrain the prisoner only "by authority of law".

It cannot be said that the judgment of either Circuit Court is rendered beyond the jurisdiction of either court, nor is either sentence uncertain as to time or place of punishment, and as said before, both meet with statutory requirements as to form and style. Nor can it be said that the punishment in either instance does not conform to the statutory punishment provided for said felonies.

16 Corpus Juris, page 1372, Section 3238 states the law thus, although no Missouri cases are used as authority:

"The time imprisonment is to commence ordinarily is no part of the sentence; and where the judgment fixes the date that imprisonment shall begin, it should be construed to mean that the period of imprisonment shall begin from the date named unless the execution of the sentence is stayed for the time being in some of the ways provided by law, in which event it ought to be computed from the time the prisoner is actually incarcerated."

Although some states by legislative act have so provided, we have no statute in Missouri expressly providing in criminal cases that the judgment and sentence

December 4, 1934.

of the court shall set out specifically the date from which imprisonment shall be computed. In Missouri a judgment and sentence of a court of competent jurisdiction is legal when it is in good form and conforms to the statutory punishment, which was done by both Circuit Courts in the problem presented.

CONCLUSION.

It is the opinion of this office that the trial court's power in both Maries and Gasconade counties was limited, upon a conviction of the accused, to the imposition of a sentence authorized to be imposed. It is our opinion that it was within the discretion of the second trial court of Gasconade County to sentence this defendant, his term to start at the day of the sentence, and that such a sentence is no abuse of discretion on the part of the court. It follows as the opinion of this office that the Warden is to impose imprisonment as per the time shown in each of the judgments and sentences and that in so far as such two judgments overlap, they are to run concurrently with each other. Such a confinement is by "authority of law", allowable in such cases.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.

WOS:H

PENITENTIARY--CONVICTS--WARDENS: Right of Warden to issue certificate of delivery to officers delivering persons to penitentiary.

12-10  
December 7, 1934.



Honorable J. M. Sanders, Warden  
Missouri State Penitentiary  
Jefferson City, Missouri

Dear Sir:

Your letter of October 30th, requesting an opinion is as follows:

"It has been the custome of the Sheriffs of the various counties in the state to bring all prisoners who have been committed either to the Penitentiary or to the Intermediate Reformatory to the Penitentiary for delivery and receipt.

"The question has been raised as to whether the officials of the Penitentiary have the legal right to accept and receipt for prisoners who have been sentenced direct to the Intermediate Reformatory by the Circuit Courts, the contention being that the responsibility for wrongful imprisonment and the correctness of the commitments accompanying the prisoners should rest with the authorities of the institution to which the prisoner is committed.

"It is the opinion of this office that each institution should receive and receipt for its own inmates. It is therefore the desire of the Warden's office to know of your office what its rights and duties are. A written opinion from you at an early date will be appreciated."

In Missouri the Commissioners for the Department for Penal Institutions have the statutory power to con-

trol and manage the admission of prisoners and inmates to Penal Institutions, and this statutory power refers to all penal institutions in this State. This power, referring to admission of prisoners and inmates, is not left to the commissioners' general powers which are provided in Section 8341 R. S. Mo. 1929, and which read as follows:

"The state prison board shall at all times and under all circumstances mentioned or authorized under this article reserve the supervision of all prisoners under sentence and committed to said board."

This power, referring to admission of prisoners and inmates, is specifically provided for by the Legislature in Section 8323, R. S. Mo. 1929, which provides:

"Every power heretofore conferred by law upon the state prison board, and every duty heretofore required by law of said board, is hereby transferred to and vested in the commission of the department of penal institutions, and by said commission may be exercised and shall be performed with the same legal force and effect as the same might, or should, heretofore have been done by the prison board, it being the express purpose and intent of this law to transfer to said commission all rights, powers, privileges, duties and functions heretofore enjoyed, exercised or performed by said prison board, and in the exercise of such powers, and the performance of such duties, or any thereof, the said commissioners of the department of penal institutions shall have authority, and they are hereby authorized, to do any act of thing with reference to the control and management of the penal institutions herein referred to, including the admission of prisoners, or inmates thereto, the buying or



selling of supplies, surplus products, or raw materials, with the same legal force and effect as the same, or any thereof, might heretofore have been done by the said state prison board."

It is true that the prison commissioners can make general rules for the different penal institutions, but their right to make rules is "subject to law", and where the Legislature has acted, any rule that they make must give way to the law. Their power to make rules and employ a warden at the Penitentiary and a Superintendent at Alcoa is set out in Section 8338 R. S. Mo. 1929, which follows:

"The state prison board shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said board, and said board shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions of persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article. Said board shall employ and at all times control a warden, deputy warden, superintendent of industries, superintendents, matrons, physicians, chaplains, trade foremen, turnkeys and guards, and all other officers and employes, as the board may, under law, from time to time deem necessary and proper for the efficient administration of said board."

December 7, 1934.

Since the Commissioners can make rules, within statutory limitations, we must look to the Statutes and see if the Legislature has provided any statutory procedure governing the admission of prisoners or inmates to penal institutions relating to the formality necessary when dressing in an inmate or a convict.

Section 3717, R. S. Mo., 1929, provides for the delivery of convicted persons to the penitentiary as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Section 8413, R. S. Mo. 1929, provides for accepting and receipting for prisoners and inmates delivered, as follows:

"Whenever any convict shall be delivered to said board, the officer having such a convict in charge shall deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

Before we can construe the word "keeper" in Section 3717, supra, we must first understand the powers and duties of the warden when construed along with the other statutory powers and duties of the Commissioners. The powers and duties of the Warden are set out in Section 8396, R. S. Mo. 1929, and follow:

"The warden shall exercise a general control and supervision over the government, discipline and police regulations of the penitentiary in accordance with the orders, rules

and regulations adopted by the board for the government of said penitentiary, and shall see that all such orders, rules and regulations are duly enforced. They shall make such orders, rules and regulations for the government of subordinate officers and employes as they shall deem necessary and proper and shall see that the same are duly enforced. The same shall be in writing and shall be entered in a book to be kept by the board for that purpose; and they shall cause to be posted, printed copies of said rules, together with a fair copy of section 8442 in conspicuous places about the prison that they may be seen by the officers and prisoners."

#### CONCLUSIONS.

It is our opinion that the word "keeper" as used in Section 3717, supra, refers to the warden in the exercise of his police powers. In the light of Section 8396, supra, the warden is the keeper of the penitentiary, but he supervises prisoners under the law and under the rules and regulations adopted by the board. Since the legislature has provided that delivering of prisoners and inmates shall be made to him as "keeper" it becomes his duty to take physical custody of prisoners and inmates delivered in the receiving cell at said penitentiary and keep them subject "to the government, discipline and police regulations adopted by the board." With such a keeping he fulfills his statutory duty, and with such a keeping his authority is at an end as far as it can be exercised over prisoners or inmates.

It is our opinion that the Commissioners have no authority to pass a rule contrary to Section 8413, supra, which provides also for delivery of persons to the board of Commissioners. The physical delivery of the prisoner or inmate to the warden as "keeper" of the penitentiary is also a constructive delivery of said prisoner or inmate to the Commissioners, and when they prisoner or inmate is delivered physically to the warden for police regulations, the officer making the delivery is not finished with his mission until he delivers "to the board the certified copy of the sentence received by such office from the clerk of the court," and it is his duty to "take from the board a certificate of the delivery of such convict." The quoted portions of the statute are not subject to an interpretation that a "certificate of delivery" from

December 7, 1934.

the warden is in compliance with the Statute. The word "shall" as used in the Statute makes it the mandatory duty of the board to receipt for delivery, and the board has no authority to make a rule which will supplant the necessity of the board giving the statutory "certificate of delivery", if the officer delivering the prisoner so demands. Section 8338, supra, also speaks of prisoners being "committed to the custody of the board".

On the other hand, it is our opinion, that where the board by rule has commanded the warden or superintendent at Algoa to issue a "certificate of delivery" independent of the one provided for in the statutes, the warden or superintendent must comply with the rule, and where the person delivering the prisoner or inmate accepts the warden's or Superintendent's certificate issued under the rule as a sufficient receipt of delivery, then he is the only person who can compel the board to issue the statutory "certificate of delivery" which would be in addition to the warden's "certificate of delivery issued under the rule". He has been shorted, under the Statute, if he delivers a prisoner without receiving a certificate of delivery from the board itself.

The Surety Bonds, of the Warden or of the Superintendent at Algoa, assuring the faithful performance of their duties, would not be subject to default because either issued a "certificate of delivery" under a rule of the Commissioners. Without such a rule neither has the statutory authority to issue same, and either may make their bondsmen liable for the bad doing of that which they had no authority to do in the first place. When a "certificate of delivery" is issued by virtue of a rule, the responsibility for unlawful imprisonment is upon the Commissioners and their bondsmen.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY MCKITTRICK  
Attorney General.

WOS:H

2-2  
- ACT: Holder of Permit to sell non-intoxicating beer having alcoholic content not in excess of 3.2% by weight is prohibited from obtaining any license under Liquor Control Act.

January 31, 1934.



Dr. W.F. Schlicht,  
Niangua, Missouri.

Dear Dr. Schlicht:

This department is in receipt of your request for an opinion as to the following state of facts:

"I wish to ask you if you will please give me a ruling on the following questions in regard to retail dealers handling beer:

Is it permissible for a retailer with 3.2% license to handle 3.2 beer, and at the same time secure license for 4.5% beer, he holding both state permits, sell 3.2 and 4.5% beer at the same place of business,

or must a 3.2% holder just sell 3.2 beer and not be allowed to purchase a 4.5% license,

or 4.5% retailer purchase 4.5% license and not be permitted to purchase 3.2% license.

Any other information that you can give me in regard to the handling of beer and hard liquor, I will greatly appreciate same."

I.

A retailer possessing a license to sell 3.2% beer may not sell any intoxicating liquor having an alcoholic content in excess of 3.2 per cent by weight.

The Liquor Control Act of Missouri as passed by the 57th General Assembly of the State of Missouri in extra session has caused much confusion with reference to persons holding what are properly termed "3.2% beer permits" under the Act of the General



Assembly legalizing the sale of non-intoxicating beer. (Laws of Mo. 1933, p. 256).

In the first place, the Liquor Control Act of Missouri does not alter, suspend or repeal in any manner whatsoever any of the provisions of the "3.2% beer law" referred to above. Both laws are now in effect and both are the law of Missouri.

Section 13139h of the Non-intoxicating Beer Law (Laws of Mo. 1933, p. 259) provides in part as follows:

"Before any permit authorized by this article shall be issued and delivered to any applicant therefor, such applicant shall take and subscribe to an oath that he will not allow any intoxicating liquor of any kind or character, including beer having an alcoholic content in excess of 3.2 per cent by weight, to be kept, stored or secreted in or upon the premises described in such permit, and that such applicant will not otherwise violate any law of this state, or knowingly allow any other person to violate any law of this state while in or upon such premises."

It will thus be seen that the holder of a permit to sell 3.2 per cent beer would be prohibited from obtaining any license under the Liquor Control Act providing for the manufacture and sale of intoxicating liquor having an alcoholic content in excess of 3.2% by weight. This, not by reason of any provision of the Liquor Control Act, but by express mandate of the act relating to the manufacture and sale of non-intoxicating beer.

#### CONCLUSION

In view of the foregoing, the holder of a permit to sell non-intoxicating beer having an alcoholic content not in excess of 3.2 per cent by weight would be prohibited from obtaining any license under the Liquor Control Act of Missouri.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

JWH:AH

APPROVED:

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ROY MCKITTRICK,  
Attorney General



DRUGGISTS OR PHARMACISTS: ) After failure of two (2) years  
BOARD OF HEALTH: ) to renew druggists' or pharmacist's  
1 license, such person stands in same  
status as original applicant.

4-9  
March 27, 1934.



W. F. Schlicht, M. D.  
Niangua, Missouri

Dear Dr. Schlicht:

This is to acknowledge your letter of the 24th inst.,  
as follows:

"I wish to ask you for your opinion on  
the following question:

I have a druggist in my district who  
was a registered pharmacist. He became  
unable during a period of sickness to  
pay his annual fees to the state phar-  
macy board for twelve years. Now he  
wishes to re-instate by paying up his  
back fees for the past twelve years.  
Is it permissible for him to re-instate  
or not? As he wishes to operate a  
drug store in my territory I would like  
an opinion on this question at a very  
early date."

Chapter 94, R. S. Mo. 1929, regulates druggists and  
pharmacists. Section 13140 of said chapter provides in part  
as follows:

"It shall be unlawful for any person not  
licensed as a pharmacist within the  
meaning of this chapter to conduct or  
manage any pharmacy, drug or chemical  
store, apothecary shop or other place  
of business for the retailing, compound-  
ing or dispensing of any drugs, medicines,

chemicals or poisons, or for the compounding of physicians' prescriptions, or to keep exposed for sale, at retail, any drugs, medicines, chemicals or poisons, except as hereinafter provided, \* \* \* \* \*

And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense or sell, at retail, any drug, medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist or assistant pharmacist."

The above statute exempts legally registered practitioners of medicine or dentistry in the compounding or dispensing of their own prescriptions; also patent and proprietary medicines in localities where there is no licensed pharmacist or assistant pharmacist; and the ordinary household remedies, drugs or medicines, as may be specified by the board of pharmacy, which are usually sold by those engaged in the sale of general merchandise. This statute further provides that a corporation may own a drug or chemical store.

Section 13141 of the same chapter provides in part as follows:

"Every person now licensed or registered as a pharmacist under the laws of this state shall be entitled to continue in the practice of his profession until the thirty-first day of December, 1909, and after such date shall be entitled to renewal of his license under the provisions of this chapter upon the presentation of an application for such renewal. Etc."

Section 13142 provides the qualifications of pharmacists.

Section 13143 provides when, and under what circumstances, the board of pharmacy may refuse to grant or revoke a license and the procedure for applicant to appeal from such ruling.

Section 13145, which we believe is decisive of your inquiry, provides in part as follows:

"\* \* \* \* \* Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of this profession shall, within thirty days next preceding the expiration of his license or permit, file with the board an application for the renewal thereof, \* \* \*. If the board shall find that the applicant has been legally licensed in this state and is entitled to a renewal of license, \* \* \*, it shall issue to him a certificate attesting that fact. If any pharmacist, \* \* \* shall fail, for a period of sixty days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacists, \* \* \*, and such person, in order to again become registered as a licensed pharmacist \* \* \* shall be required to pay the same fee as in the case of original registration: Provided, that no application for the renewal of a license shall be granted after a period of two years after its expiration, and if any pharmacist \* \* \* fail within that time to make application to the board for a renewal of his license, he shall be subject to all of the provisions of this chapter regulating the issuance of licenses. Etc."

Thus, Section 13145, supra, provides that if one fails to renew his license for a period of two years after its expiration, then for him to obtain its renewal he is subject to the provisions of this chapter regulating the issuance of licenses.

Section 13142, supra, provides in part as follows:

"In order to be licensed as a pharmacist within the meaning of this chapter, an applicant shall be not less than twenty-one years of age, \* \* \* \*, and he shall present to the board satisfactory evidence that he has had four years' experience in pharmacy under the instruction of a licensed pharmacist, and shall pass a satisfactory examination by or under the direction of the board of pharmacy: Provided, that if the applicant for a license as a pharmacist be a graduate of a school or college of pharmacy, whose requirements for graduation are satisfactory to and approved by the board of pharmacy, it shall not be required that he pass any examination or that he shall have been an assistant pharmacist. Etc."

In your letter you stated that the person desiring reinstatement has not practiced pharmacy for twelve years. In other words, no renewal license has been issued to him for a period of twelve years and he wishes to reinstate by paying up back fees for the years he failed to renew. The payment of a renewal fee is incidental to the practice of pharmacy and the charge made is a fee payable to the board.

In *De Gruy v. Louisiana State Board of Pharmacy*, 141 La. (Sup. Ct.) 896, 75 So. 835, 1. c. 836, the court had this to say relative to the charge made for the renewal of license:

"And our opinion is that the plaintiff is mistaken in assuming that this charge of \$1 to be paid annually by every registered pharmacist and qualified assistant, for the renewal of his certificate, is a license tax. It is a fee charged for a service rendered in protecting, not only the public against the malpractice of pharmacy,

but the profession of the pharmacists themselves against impostors. The levying and collecting of this fee of \$1 annually from every registered pharmacist and qualified assistant is not done in the exercise of the taxing power of the state, but in the exercise of the police power. The purpose of the charge is not to derive a revenue, but to pay the expense of carrying on the police regulation provided by the statute. It is true the labor of issuing the renewal certificate is, of itself, not worth \$1, or does not cost the board \$1. But the functions of the board are something more than swapping dollars. The dollar collected annually from every registered pharmacist and qualified assistant, in consideration for the renewal of his certificate, is expended not only for maintaining the office of the board and paying for the clerical work, but also for investigating complaints against and correcting the evil practice of having nonregistered, nonqualified, and incompetent persons compounding dangerous drugs. The regulation of matters of such vital importance to the health and safety of the public as that is surely within the police power of the state. The evidence shows that the board needs, for carrying on the work for which this fee is collected annually from every registered pharmacist and qualified assistant, every dollar collected, and more."

Thus, the payment of the fee is a condition precedent to the obtaining of the license. And, if one does not file his application for renewal and pay the required fee, then after sixty days his name is erased from the register of licensed pharmacists (Section 13145); and if one does not file an application for renewal of a license within two years after its expiration, then such person would stand in the same class as

one who never held a license. In other words, the status of the person stated in your letter is the same as one who has never held a license and in order for him to practice the profession of pharmacy he would have to take the same steps as one who had never been licensed, and such is our opinion.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

cc - State Board of Health



27  
TAXATION: Relating to exemption of charitable organizations.

June 22nd, 1934

6.25  
FILED

Mr. Edward Schlichter, Secretary  
Salisbury Lodge 236, I.O.O.F.,  
Salisbury, Missouri.

Dear Sir:

This Department is in receipt of your letter of June 11th,  
requesting an opinion, wherein you stated in part as follows:

"I am writing you in regard the matter of  
taxing our lodge property here, which  
I mentioned to you some time ago. This  
is I.O.O.F. property and this property  
went tax exempt for years, and it is just  
in the last few years that we are being  
taxed. Now I want to make it clear to  
you that the rent money that we collect  
downstairs goes into the same place that  
the dues from the members goes; that is  
for the relief of the sick, to bury the  
dead and relief of the orphan children,  
and a certain part of all this money goes  
to maintain a home for the old people and  
educate the orphans which possibly would  
be a charge and have to be maintained by  
the taxpayers of the State of Missouri.  
That is why we claim we should be tax  
free as this is strictly a charitable in-  
stitution and there is no commercialism  
in anything which we do, but all the money  
we take in goes into the same treasury  
and for the same cause."

Missouri constitutional and statutory provisions exempt from  
taxation property used exclusively for charitable purposes.  
Article X, Section 6 of the Missouri Constitution exempts certain  
property from taxation and reads as follows:

"PROPERTY EXEMPT FROM TAXATION.--The property,  
real and personal, of the State, counties  
and other municipal corporations, and cemeteries

shall be exempt from taxation. Lots in incorporated cities or town, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, that such exemptions shall be only by general law."

Section 9743, Revised Statutes of Missouri, 1929 sets out the property exempt from taxation and reads in part as follows:

"\* \* \* sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

It is a cardinal principle that statutes exempting property from taxation must be strictly construed against those claiming the exemption and as stated in the case of Fitterer vs. Crawford, 157 Mo. 51, l.c. 58, wherein it was stated:

"In the construction of laws exempting property from taxation it is a cardinal principle that they must be strictly construed. As a rule all property is liable to taxation, exemption the exception, and it devolves upon the person claiming that any specific property is exempt to show it beyond a reasonable doubt."

Vol. 2, Cooley on Taxation, (4 Ed.) pp. 1403-1408, states the rule on strict construction as it relates to exemption from taxation, in part as follows:

"An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant."

In the case of *Odd Fellows vs. Redus*, 78 Miss. l.c. 355; 29 So. 163, the Odd Fellow's Lodge erected a two story building, used a part thereof for its lodge room and rented a part thereof for a store and dental office. The Court held that the building was subject to taxation, and concluded the opinion in that case in the following language:

"The lodge claims that this property is exempt from taxation under Section (Paragraph) 3744, Code, which exempts all property, real or personal, belonging to any charitable society, used exclusively for the purposes of said society, and not for profit. The exemption cannot be maintained. It does not come within the letter

of the act. The property is used for profit, and not for charity, and so cannot be exempt. It is said in argument that the income is used for charity and that makes it the same in effect as if the property itself was used for charity. But that is not the letter of the law, or its spirit."

Again in the case of Ft. Des Moines Lodge, I.O.O.F. vs. Polk County, 56 Iowa, 1.c. 35; 8 N.W. 688, the Odd Fellows conducted and organization for charitable purposes and raised a fund to aid in such purposes. The money was used to purchase a business block in Des Moines and the income therefrom used to aid widows and orphans of deceased members of said lodge. In holding that the property was subject to taxation, the Supreme Court of Iowa said:

"\* \* \* The property being leased for business purposes and an income obtained therefrom, its status as taxable property is thereby fixed."

In the case of The Georgia Female Seminary, the same being a charitable organization, but having a house and lot that was rented and the rent used to aid in the charitable work of the institution, the Court held the property subject to taxation and said:

"\* \* \* As we have seen, it is the use made of the property and not the use made of the income from which its taxability or non-taxability must be determined." Mundy v. Van Hoose 104 Ga. 1.c. 300; 30 S.E. 787.

The Fifteenth Ward Relief Society was a charitable organization, ministering to the poor, sick and destitute members of the community. It owned a two story building, the upper floor of which was used continuously by its members in the furtherance of its charitable purposes; but the lower floor contained two store rooms which were rented out and the money used for charitable purposes. After citing numerous authorities in support of its position, the Utah Supreme Court stated:

"Only such of the society's property, therefore as is occupied and used 'exclusively' for charitable purposes is exempt from taxation.  
\* \* \* The exemption does not extend to that portion not appropriated by the society to

its own use but held as a source of revenue." Parker vs. Quinn, 23 Utah l.c. 339; 64 Pac. 962.

In the case of State ex rel. vs. Gehner, 11 S. W. (2d) 30, l.c. 37, the Missouri Court said:

"\* \* \* the test for tax exemption is not the number of good purposes to which a building may be put, nor the amount of good derived by the general public in the operation of such purposes, but whether the building is used exclusively for religious, educational or charitable purposes. If it is used for one or more commercial purposes, it is not exclusively used for the exempted purposes, but is subject to taxation."

Again in the case of State ex rel. v. Y.M.C.A. 259 Mo.233; 168 S.W. 589, the Court said:

"The facts above recited are admitted by stipulation to be correct. On those facts the defendant contends that its real estate is not subject to taxation. It asserts that renting fifteen per cent of the space in its buildings for commercial purposes, while the remaining eighty-five per cent is devoted to the purposes of the said association, does not render its real estate subject to general taxes. \* \* \* Appellant's learned counsel cite cases from other jurisdictions where it has been held that only such per cent of a building owned by a religious corporation as is used for commercial purposes shall be subject to taxation, but we cannot bring ourselves to believe that any such intent was in the minds of the framers of our Constitution."

The ruling in the case of Fitterer vs. Crawford, 157 Mo. 51, l.c. 64, holds that a building owned by a Masonic lodge on account of the charitable designs and practices of such lodge is exempt from taxation so long as it is used exclusively for such lodge purposes but when two of the floors of such building are rented for commercial purposes then the entire building is subject to taxation. In deciding that case, it was said:



"There is a very material difference between the 'use of a building exclusively for purely charitable purposes', and renting it out, and then applying the proceeds arising therefrom to such purposes. To rent out a building is not to use it within the meaning of the statute, but in order to use it, it must be occupied or made use of. Moreover, by leasing the property the lodge becomes the competitor of all persons having property to rent for similar purposes, and the plain and obvious meaning of the statute is that such property shall not be exempt from taxation."

#### Conclusion

From the foregoing, we are of the opinion as stated in the case of State ex rel. vs. Gehner, supra, that:

"The test for tax exemption is not the number of good purposes to which a building may be put, nor the amount of good derived by the general public in the operation of such purposes, but whether the building is used exclusively for religious, educational or charitable purposes. If it is used for one or more commercial purposes it is not exclusively used for the exempted purposes, but it is subject to taxation."

The Courts realize that organizations like the Salisbury lodge of I.O.O.F. relieve the taxpayers of a burden many times greater than the amount involved if the organization paid taxes on all of its property. However, the Courts feel that it is their duty to enforce the Constitution and Statute as they find the same to exist and that it does not matter how deserving an organization may be or how much good it has accomplished by the operation of its various activities, if like the Salisbury Lodge of I.O.O.F. it rents part of the property, the building is subject to taxation.

APPROVED:

Respectfully submitted,

\_\_\_\_\_  
Attorney-General

WOS-MW/mh

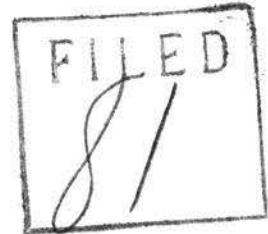
\_\_\_\_\_  
WM. ORR SAWYERS  
Assistant Attorney-General



FOOD AND DRUGS - Inspection of, applicability of Article 8 of Chapter 93 of R. S. Missouri 1929 to malted milk beverage.

10-1  
September 21, 1934.

W. F. Schlicht, M. D.  
Food and Drugs Division,  
The State Board of Health of Missouri,  
Kansas, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of September 10, 1934, such request being in the following terms:

"I wish to ask you for a ruling on Malted Milk that is being made all over the state by the Dairy and Creamery Companies. They ship in flavored malt, mix it with milk by aid of a bottling machine, cap it, and sell it in pint bottles. It is being sold at soda fountains, Ten Cent Stores and all soft drink stands. I wish to ask you if it would come under this beverage law, Sec. 13116 where it reads as follows;

All non-intoxicating beverages and flavored beverages as it must be according to the ingredients in the malt syrup, a flavored beverage. If it is a flavored beverage we should therefore collect nine tenth's cent per case of 12 sixteen ounce bottles.

The Dairy Co's have refused to pay until I receive an official opinion from your office."

Revised Statutes of Missouri 1929, Section 13116 provides as follows:

"The food and drug commissioner of this state shall cause to be inspected by chemical analysis samples of all non-intoxicating liquors or beverages or so-called 'soft drinks' of every kind manufactured or sold in this state, which shall be understood to include those containing

2. W. F. Schlicht, M. D.

September 21, 1934.

less than one-half of one per cent. of or no alcohol, including ginger ale, ginger beer, hop ale, soda water, bevo, unfermented grape juice, cider, carbonated beverages, coca-cola, unfermented cereal or malt beverages, all non-intoxicating beverages and flavored beverages, seltzer, water, mineral waters and all other waters used and sold for beverage purposes, and also all fountain syrups, flavors and extracts intended for use in the preparation and concoction of so-called 'soft drinks.'

From this Section, and especially the underlined parts thereof, and the fact that these plain words have not been altered by judicial construction, we are unable to see why there is any doubt about the applicability of this Section to the malted milk beverage referred to in your letter.

In conclusion, it is our opinion that Article 8 of Chapter 93 of Revised Statutes Missouri, 1929, relating to the inspection of beverages, applies to the malted milk beverage referred to in your letter.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY-GENERAL

APPROVED:

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ATTORNEY-GENERAL

illegal  
SEARCH AND SEIZURE: When/intoxicating liquor is found during the progress of a bona fide search for other commodities illegally possessed, it is proper for searching officers to seize the same, and evidence so obtained may be used in prosecution.

1-2  
December 28, 1934.



Mr. T.P. Schooler,  
Attorney at Law,  
Salisbury, Missouri.

Dear Sir:

This department is in receipt of your letter of November 16 requesting an opinion from this department as to the following state of facts:

"A few days ago I issued a search warrant to recover some stolen flour. While the officers were searching the man's residence therein named and located, they found and retrieved a 50 lb. sack of flour and incidentally discovered some contraband liquor. Mr. Lamkin thinks he cannot be prosecuted successfully because the search warrant did not name the liquor among the articles they were searching for. I think and believe that it is the duty of an officer when he discovers unlawful possession of liquor (under Sec. 8 or 9 of Extra session 1933) to seize the same whether he has a search warrant or not. Will you give me, a J.P., your opinion of the matter?"

The general principle with respect to this problem is well stated in 56 C.J. page 1188, as follows:

"Wherever, during the progress of a bona fide search for other commodities illegally possessed, whether with a search warrant or not, discovery is made of legal evidence of the possession of another thing, the possession of which is unlawful, the thing so found may be seized."

In the case of United States v. Charles, 8 Fed. (2d) 302, the Court followed this principle of law, and said:

\*\*\*\*But I think it by no means follows that officers making a legal search for violations of one law must deliberately shut their eyes to evidence of crimes committed against another.

\* \* \*

Wherever, during the progress of a bona fide search for other commodities illegally possessed, intoxicating liquor is found, whether a search warrant has issued or not, it would seem that its seizure not only is legal but mandatory."

In the case here under consideration, the officers were lawfully on the premises by reason of the search warrant to recover the stolen flour.

In the case of State v. Turner (Sup. Ct. Mo.), 259 S.W. 427, Judge White said:

\*\*\*\*The officers, being lawfully upon the premises, saw the whiskey in the possession of the defendant, and therefore the offense of unlawfully possessing the liquor was committed in their presence, and they had a right to seize it and produce it in evidence. Lambert v. United States (C.C.A.) 282 Fed. 413; United States v. Snyder (D.C.) 278 Fed. 650; O'Connor v. United States (D.C.) 281 Fed. 396.\*\*\*"

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that inasmuch as the intoxicating liquor was found during the progress of a bona fide search for other commodities illegally possessed, it was proper for the searching officers to seize the same. It is further our opinion that the evidence so obtained might be used in a prosecution for the possession of this illegal intoxicating liquor.

Respectfully submitted,

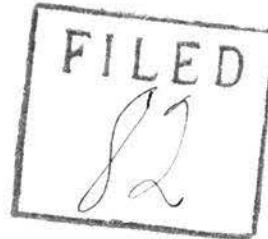
JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

\_\_\_\_\_  
Attorney General

27  
TAXATION: Penalties and Interest on 1932 taxes same as for 1933 taxes under House Bill #124.

4-5  
April 4, 1934.



Comptroller's Office  
Department of Finance  
St. Louis, Missouri

Attention: Mr. E. G. Schubkegel.

Gentlemen:

We acknowledge receipt of your request for an opinion of this office respecting House Bill #124, passed by the 57th General Assembly in Extra Session. Your request reads as follows:

"The Comptroller's office has had numerous inquiries regarding the interpretation of this bill due to the apparent difference in the intention as expressed in the title of this Act and in the actual phraseology of the Act as set forth under section (1) one.

From the title of this Act can be deducted that the intention, as clearly indicated, was to provide penalties on taxes of 1932, and prior years, only after December 31, 1933.

The actual phraseology of the bill itself fixes a penalty basis for taxes of 1932 and prior years at the same rate as applies to 1933 taxes, delinquent after December 31, 1933.

The Collector of the City of St. Louis has been requested by delinquent tax payers to accept payment on 1933 taxes at this time, the intention of the delinquent being to pay the 1932 and prior years taxes after the bill becomes effective, in the belief that the only penalties thereon would be those for the year of 1933.

In order to advise taxpayers in regard to correct interpretation of this bill, we hereby request the opinion of your office respecting House Bill #124."

April 4, 1934.

House Bill 124 passed by the 57th General Assembly in Extra Session reads as follows:

"AN ACT For relieving delinquent taxpayers whose taxes, personal or real estate, were delinquent for the year 1932, and prior years, and providing for penalties thereon after December 31, 1933.

Section 1. That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

As stated in your inquiry, the body of the act itself does not clearly indicate the scope of operation of the statute. The title indicates a remission of some kind or other for the benefit of the delinquent tax payer, but the body of the bill does not in plain words direct any such remission or waiver. We are therefore left to determine the intent of the legislature from the entire act. As stated by Judge Woodson, quoting from Thompson on Corporations, in the case of State ex rel. Major vs. Insurance Company, 324 Mo. 84, 1. c. 92:

"The prime effort of all judicial interpretation is to ascertain what the legislature really intended in using the particular language."

In seeking this legislative intent we believe that the key to the interpretation of this act is found in the words "for relieving delinquent taxpayers" contained in the title to the Act. That we may consider the title to the Act in determining the Legislative intent is well settled law in this state. We refer to the case of Thomas vs. Buchanan County, 51 S. W. (2d) 95, 1. c. 98, wherein Judge Ellison made the following statement:

"\* \* \* part of the respondents call attention to the fact that the title of the act designates the counties to which it applies as those "having a population of not less than ninety-five thousand inhabitants, and not more than one hundred and fifty thousand inhabitants, as shown by the last preceding decennial national census"  
\* \* \* whereas the body of the law omits all



reference to the census in setting out the population limits aforesaid. It is argued the title cannot be read into the text of the act, and that under the latter counties are to be classified by their actual population as locally determined, \* \* \* \* \* This position, we think, is clearly untenable. The law is well established that in construing a statute the title may be considered. \* \* \* \* \* The body of the act not stating how the population is to be determined, undoubtedly the title may be resorted to in ascertaining the legislative intent."

We may even go so far as to say that the intent indicated by the title may be presumed to be expressive of the Legislative desire. In the case of *State vs. Schwartzmann Service*, 40 S. W. 479, 1. c. 480, we find the following:

"\* \* \* \* \* If the provisions contained in the body of the act are expressed in ambiguous or doubtful language, or so as to be fairly susceptible of more than one interpretation, then it is permissible and proper to consider the title of the act as a clue or guide to the intention and meaning of the Legislature. It will be presumed that the true intent and meaning is to be found in the title, unless it is plainly contradicted by the express terms of the body of the act. \* \* \* \* \*

As we find the guide to the legislative intent in the passing of this bill in the title, the act itself must be given a construction which will effectuate that intent. If we are to construe this act as applying only to the rate of penalties and interest, we shall entirely defeat the legislative purpose as expressed in the phrase "for the relief of delinquent taxpayers", for under the provisions of previous legislation, interest and penalties on taxes for the year 1932 and prior years are required to be computed at the same rate as are interest and penalties on delinquent taxes for the year 1933. On the other hand, if we construe this act as placing taxes for the year 1932 and prior years on the same basis as taxes for the year 1933, in the computing of the penalties and interest required to be paid, definite and certain relief will be given to the delinquent taxpayers of this state, resulting in the waiver or remittitur of all interest and penalties accruing on such taxes prior to the first day

April 4, 1934.

of January 1934.

As the latter construction effectuates the purpose of the act we must adopt that as the true meaning of the law. We call to your attention that we are not passing upon the constitutionality of this enactment.

CONCLUSION.

It is therefore the opinion of this office that under the provisions of House Bill 124, personal and real estate taxes for the years 1932 and prior years are to be treated as though they were taxes for the year 1933 insofar as the assessment of interest and penalties are concerned, and that no greater interest or penalty is to be collected upon such taxes than would be collected upon 1933 taxes of the same amount.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

OFFICERS: TRUSTEES -- In towns and villages are qualified to hold office as follows:

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5-3  
May 3, 1934.



Mr. F. H. Schubert  
Village of Affton  
St. Louis County  
Missouri.

Dear Sir:

Your letter requesting an opinion is as follows:

"On the first Tuesday of this month we conducted our Village election in accordance with the statutes of Missouri, to elect five new Trustees.

"It now develops that three of the five men elected have not paid taxes, either personal or real estate, for several years. A number of our citizens are questioning the eligibility of these men and also the advisability of putting them into office. Today the attached clipping was placed on my desk together with information that another village in Missouri is contesting an election for similar reasons.

"Will you be so kind as to give us an opinion in the matter. If the contested men are not eligible, we will proceed to name three other men, properly qualified and acceptable."

The last national census shows the Village of Affton with a population of 650 and to be ~~(incorporated)~~ (unincorporated).

Your letter does not state whether you operate as a village under a special charter or under the general

provisions of law. We are assuming that you are not a village under a special charter but operate as a city under the general law.

Section 7093, R. S. Mo. 1929, provides for the qualification of trustees for villages, the size of Affton, and states:

"No person shall be a trustee who shall not have attained the age of twenty-one years; who shall not be a male citizen of the United States; who shall not be an inhabitant of the town at the time of his election, and reside therein for one whole year next preceding; who shall not be a householder within the limits of such town; and every trustee shall hold his office for the term of one year, and until a successor is elected and qualified."

Section 7096, R. S. Mo. 1929, provides as follows:

"The board of trustees shall judge of the qualifications, elections and returns of their own members, and determine contested elections; they may determine rules of their own proceedings, punish any member or other person for disorderly behavior in their presence, and, with the concurrence of four of the trustees, expel any member, but not a second time for the same cause; they shall keep a journal of their proceedings, and, at the desire of any member, shall cause the yeas and nays to be taken and entered on the journal, on any question, resolution or ordinance; and their proceedings shall be public."

Section 5, Article XIV, of the Missouri Constitution provides as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected

or appointed and qualified."

Section 11202, R. S. Mo. 1929, provides:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

CONCLUSION.

The law applicable to cities of the fourth class referred to in your request does not apply in villages and your problem must be decided in laws of Missouri relating to villages, above set out.

It is the opinion of this office that there is no qualification, either to election or holding office, placed on trustees of villages, that would disqualify those who were elected at a village election at the same time being in arrears in their village taxes.

Respectfully submitted,

APPROVED:

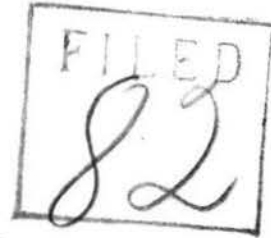
\_\_\_\_\_  
ROY McKITTRICK  
Attorney-General.

\_\_\_\_\_  
WM. ORR SAWYERS  
Assistant Attorney-General.

WOS/afj

**ELECTION: RELATING TO THE RIGHT OF ONE PERSON TO HOLD THE OFFICE OF JUSTICE OF PEACE AND POLICE JUDGE AT THE SAME TIME IN A CITY OF THE THIRD CLASS.**

7-16  
July 7, 1934.



Hon. H. W. Scott,  
Police Judge,  
Eldon, Missouri.

Dear Sir:

I wish to acknowledge receipt of your letter dated June 18, 1934, requesting an opinion based on the following communication:

"As I am a candidate for Justice of the Peace here, I am writing you to ask you if a man who holds the office of Police Judge here (population 3600) can qualify as Justice of the Peace in this township and hold that office also? Was elected Police Judge April, 1934.

It seems to me that Section 6462 R. S. Mo. 1929 very plainly prohibits this holding the two offices, and I am anxious to be right. Will you not kindly set me right on this matter?

Hoping you will answer me, and thanking you in advance for your kindness."

Your communication does not state of what class the City of Eldon happens to be. You do state that its population is 3600, and I, therefore, presume your City is one of the third class, as Section 6092 R. S. Mo. 1929, reads as follows:

"All cities and towns in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class."

If such classification of your City is correct, I find that the section to which you refer, namely Section 6462 R. S. Mo. 1929, is not applicable, in that it refers only to cities of the first class, which is a classification that does not include the City of Eldon.

I am unable to find any constitutional or statutory prohibition against a person holding the office of Justice of the Peace, and the office of Police Judge at the same time. While constitutional and statutory prohibitions do exist in reference to certain offices, I



July 7, 1934.

do not believe any of them are directed at the present instance.

This matter has been dealt with at some length by the common law. The common law rule being that the acceptance of one who holds a public office of a second public office incompatible therewith, operates ipso facto as a resignation of the first.

This rule is best set forth in the Case of State ex rel. v. Bus, 135 Mo. 325 1. c. 330, which holds as follows:

"The rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto terminate without judicial proceeding, or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. State ex rel. v. Busk, 48 Mo. 242; Mochem, Pub. Offices, Secs. 420-426; Throop, Pub. Officers, Secs. 30, 51."

"The rule, it is said, is founded upon the plainest principles of public policy and has obtained from very early times. King v. Patteson, 4 B & Ad. 9."

"The rule has been generally stated in broad and unqualified terms, that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary." 1 Dill. Mun. Corp. (4 Ed.), Sec. 225; People ex rel. v. Brooklyn, 77 N. Y. 503.

In the same case (supra) on page 538, the following conclusion is found:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the

July 7, 1934.

two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

Along the same tenor is the holding in 46 C. J., page 941, Section 46,

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

It is my opinion that there is nothing inconsistent, or incompatible with the same person holding the office of Police Judge, and the office of Justice of Peace. With such a situation existing, I can see no conflict of interest, neither office seems to be subordinate to the other, and neither office has a supervisory control over the other office. The duties of the Police Judge and Justice of Peace are clearly set forth by the statutes, and I am unable to perceive at what point there would ever be a clash or conflict, or a possible subversion of one office to the other.

It is, therefore, my conclusion that one who is now the duly elected and qualified Police Judge of a third class city is not prohibited from holding the office of Justice of the Peace, and that such party can legally hold both offices at one and the same time.

Respectfully submitted,

APPROVED:

JOHN W. HOFFMAN, Jr.  
Assistant Attorney General.

ROY McKITTRICK.

RELATING TO CERTAIN PROPERTY SUBJECT TO TAXATION

10-19

October 9th, 1934



Hon. J. B. Searcy  
Prosecuting Attorney  
Shannon County  
Eminence, Missouri

Dear Sir:

We acknowledge your letter of September 22nd., 1934,  
in which you state and inquire as follows:

"I would appreciate an opinion on the  
following questions.

Are protested county warrants such property  
as is subject to taxation?

Is cash in a restricted bank such property  
as is subject to taxation?

A reply at your convenience will be greatly  
appreciated."

Section 4 Article X of the Constitution of  
Missouri provides in part as follows:

"All property subject to taxation shall  
be taxed in proportion to its value:..."

Section 9792 Revised Statutes Missouri, 1929,  
provides in part as follows:

"The assessor shall value and assess all the  
property on the assessor's books according  
to its true value in money at the time of  
the assessment; and all other personal  
property shall be valued at the cash price  
of such property at the time and place of  
listing the same for taxation....."

In State Ex Rel, v. Stamm, 165 Mo. 1. c. 80-1,  
the court said in part as follows:

"The scheme outlined by the statute above  
referred to evidently is, that all property  
subject to taxation shall be assessed by the  
county assessor, whose judgment as to the

October 9th, 1934

value thereof should control in the first instance. In order to enable the assessor to properly discharge his duties the State and county are to furnish him with lists and plats and the property-owner with verified lists of his taxable property. To guard against an over-valuation by the assessor, the right of appeal is given to all persons believing themselves aggrieved thereby, and for that purpose a court of appeals is established to determine such appeals and correct the assessments accordingly. With a view of bringing the assessment to the attention of all persons assessed, the assessment is required to be filed in a public office accessible to every person, two months before the meeting of the court of appeals, the time and place of which is unchangeably fixed by law. To provide against undervaluation of individuals, a board of equalization is created, with power to equalize assessments by decreasing excessive valuation, and increasing valuations deemed too low."

It is the opinion of this office that it is the duty of the assessor to assess all property on his books. That all personal property shall be valued at the cash price or value of such property at the time the same is listed for taxation. The assessor in valuing protected warrants, and cash in a restricted bank, should make a careful examination of all the facts and circumstances, surrounding the same, as to protested warrants, the probability or improbability of same being paid, and as to cash in restricted banks, the amount of assets and character of same, and the probable amount that the owner will eventually receive.

If, however, the valuation placed upon same is either too high or too low, the same is subject to review by the board of equalization and board of appeals.

Very truly yours,

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W. W. Barnes  
Asst. Attorney General

APPROVED:

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Attorney General

5 QUESTIONS IN RE: COUNTY BUDGET

November 15, 1934.

11-16



Mr. Sam Schultz,  
Clerk of County Court,  
Dunklin County,  
Kennett, Missouri.

Dear Sir:

This department is in receipt of your letter of October 17, 1934 containing several inquiries relative to the classification of certain expenditures under the County Budget Law. We shall proceed to answer your questions in the order indicated in your letter.

I

"Into what class, under the Budget Law, will the expense of light, heat, water, etc. consumed at the county jail fall?"

Class 5, Sec. 2, of the County Budget Act (Laws of Mo. 1933, page 342) is as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."



It appears that the Legislature had in mind certain definite classes of expenditures for priority and accordingly designated specifically in the first four classes how and for what purposes the funds were to be expended. Classes 5 and 6 are indefinite in their nature, except that in Class 5, hereinbefore quoted, there is contained the words "for the contingent and emergency expense of the county".

The expense of light, heat, water, etc. consumed at the county jail cannot be anticipated to any degree of accuracy; however, we are of the opinion that they are contingent expenses and that they can be paid out of the funds in Class 5, Sec. 2 of the County Budget Law.

## II

"Into what class will the salary of the Supervisor of the County Farm and expense of fuel, light, etc. of the County Farm fall?"

Class 4, Sec. 2 of the County Budget Act (Laws of Mo. 1933, page 341-342) is as follows:

"The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

The County Infirmary is a public building of the county. The Superintendent is appointed by the County Court according to statute; therefore he should, by the terms of Class 4, hereinbefore quoted, be considered a county officer within the meaning of the Act. In view of this, we are of the opinion that the salary of the Superintendent of the County Farm should be paid from the funds under Class 4, supra.

As to the fuel, lights, etc. of the County Farm, what we have said under Question I is applicable in this instance, and these expenses should be paid out of Class 5, Section 2.



## III

"We are agreed that the expense of fuel, light, etc. expended in connection with the holding of our Circuit Court falls into Class 2, but all of the coal consumed by the entire court house is in and comes out of the same bin, and all of the lights of the court house, as well as the water, are on one meter and we know of no manner in which the Circuit Court expenses can be segregated on this account from the expenses of the county offices. Neither do we know into what class the expense of lights, heat, etc. for the offices of the county officers will fall, and we desire advice on this proposition."

The expenses as set out in the above question could really be put into one group and called "Court House Incidental Expenses". We know of no manner in which the lights, heat, etc. of the county court, circuit court, office of recorder of deeds, etc. could be segregated and each pay their proportionate share. It is our opinion that these expenses are incidental expenses of the county and should be paid out of the funds in Class 5, Section 2.

## IV

"This county has a County Agent who draws no salary from the county and no appropriation has been made for the expense of this office, yet certain expenses by way of office rent, traveling expenses, stationery, etc. have been and are being incurred. Into what class should this fall, if any?"

From the facts as contained in the above question, we cannot determine whether or not the County Agent is an officer of the county within the meaning of the terms of Class 5, supra. We cannot determine as to whether or not the office of County Agent has been abolished in your county. In the event this office has been abolished, the county would not be liable for any expenses of any nature whatsoever; however, assuming that this office is still in existence, even though the Agent draws no salary from the county, it is the opinion of this department that the expenses of the County Agent, as detailed in your inquiry, may be paid out of the funds in Class 4, Section 2, supra, except as to traveling expenses, and we know of no legal authority for the county to pay the traveling expenses of the County Agent.

## V

"The county is maintaining a health unit, a county doctor, nurses, rest room, etc. Into what class should the salary of the doctor, nurses, rent, light, heat, etc. fall, if any?"

Section 9025, R.S. Mo. 1929 was repealed and a new section enacted in lieu thereof known as Section 9025, Laws of Mo. 1933, page 271 under which it is the duty of the county court in each county of the state to appoint a deputy state commissioner of health at the February Term thereof. We construe Class 4, Sec. 2 of the County Budget Act to be broad enough in its scope to include a deputy health commissioner as a county officer within the meaning of the Act; therefore, the salary of said officer should be paid from the funds in Class 4, supra.

The same logic and argument is applicable to the salary of the county nurse. As to the other expenses of the Health Unit, it is our opinion that they should be paid out of the funds under Class 5, supra, for the same reason that we offer in answering your first question.

We think when the Legislature passed the County Budget Act and referred to "county officers" in Class 4 it intended by the expression "payable out of the ordinary revenue of the county" to not only include the elective officers, but the statutory appointive officers. We concede that it is difficult to determine the classification of the various items as mentioned in your request and our classification may be contrary to the opinion of your Prosecuting Attorney, but we have attempted to classify the various expenditures independently of his suggestions.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General

APPROVED:

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ROY ~~W.~~ TTRICK,  
Attorney General

OWN:AH

TAXATION: Personal property of World War Veteran not exempt from taxation.

November 9, 1934.

Hon. Abe Shafer, Jr.,  
Judge, County Court,  
Platte City, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of November 5, 1934, such request being in the following terms:

"A question has arisen whether or not certain Real and Personal Property of a Soldier is taxable. In this instance the Soldier was disabled in the Military Service during the world war. He has been permanently and totally disabled since the war, and has been confined in the Veterans Hospital at Knoxville, Iowa. His disability is mental. Please render an opinion regarding this matter, and oblige."

The question presented in your letter has been ruled on by us in an opinion dated October 10, 1933, addressed to Honorable George A. Moore, Assessor of Jefferson County, Hillsboro, Missouri. In that opinion the issue also was whether real and personal property in this State belonging to a disabled soldier who, as a person non compos mentis, was under the care of a guardian, was subject to taxation under the laws of this State. In the opinion to Mr. Moore, a copy of which we enclose, the conclusion of this Department is stated as follows:

"We are therefore of the opinion that the funds of the ward whether invested by the guardian in real property or in personal property are proper subjects of taxation."

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTICK  
Attorney-General

COUNTY TREASURER: Duty to receive and receipt for money  
tendered him, asserted to be county money.

September 13, 1934.



Honorable William Short  
County Treasurer  
Randolph County  
Huntsville, Missouri

Dear Sir:

Your request for an opinion is as follows:

"I am seeking some information in regards to some office holders in this County and also this State.

"We have a condition in this County that no other County has or I do not think ever did have during the History of the State.

"On the 11th day of Aug. 1934, Marion Hulen and Oak Hunter went to Jefferson City and had with them the resignation of Herbert Lamb County Collector and asked the Governor to appoint Mrs. Wayland a lady in the office to fill out the term of Herbert Lamb from now to the 1st of next March, and got a commission from the Governor for her to fill out the term. She has not been sworn in or give a bond or Herbert Lamb has not been checked out or Mrs. Wayland checked in so as I see it we have no County Collector and when Mrs. Wayland comes in here on the 5th. of this month with the distribution for Aug. whose name will be signed to the check to make it lawful to me. Unless I get some information from you by that time I will not sign receipts for her or take the check from her if either one of the names or on the check Herbert Lamb or Lois Wayland as neither of them are County Collector now."

Section 12136, R. S. Mo. 1929, provides as follows:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the courthouse or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Section 12149, R. S. Mo. 1929, provides as follows:

"He shall make duplicate receipts in favor of the proper person, for all moneys paid into the treasury, and keep the books, papers and moneys pertaining to his office at all times ready for the inspection of the court, or any judge thereof."

Section 12153, R. S. Mo. 1929, provides as follows:

"All collectors, sheriffs, marshals, clerks, constables and other persons chargeable with moneys belonging to any county shall render their accounts to and settle with the county court at each stated term thereof, pay into the county treasury any balance which may be due the county, take duplicate receipts therefor, and deposit one of the same with the clerk of the county court within five days thereafter."

It is true that our courts have never construed the above statutes in determining the duty of a County Treasurer to receive "all money payable into the county treasury," and when receiving the same our courts have never construed the phrase, "proper person", when applying the above Statute requiring the Treasurer to "make duplicate receipts in favor of the proper person, for all moneys paid into the treasury."

On the other hand the duty to receive money and issue duplicate receipts does not require the County Treasurer to act in a judicial capacity every time he is tendered money which the party tendering asserts to belong to the county. It is not for the treasurer to question whether such money tendered is at all events properly payable into the county treasury, nor is it for him to judicially determine, before accepting same, that it is being tendered by the "proper person". The County Treasurer is but an administration officer and when he has followed the Statute literally, he has sufficiently exercised his duty. When the person tendering money to him asserts that he is tendering money which is payable into the County Treasury, the County Treasurer must assume that it is being tendered by the proper person.

The fact that all persons chargeable with moneys belonging to the County have a prior duty to render this account to and settle with the County Court does not impose any duty on the County Treasurer to see to it that those who tender him money have complied with their duty to account and settle with the County Court. Because someone else has failed to do their duty, do not excuse the County Treasurer from following the Statute and doing his duty.

Our Supreme Court in the case of County v. Dallmeyer, 101 Mo. 57; 13 S. W. 687 l. c. 689, which was a case where the County Treasurer took it upon himself to receipt the retiring County Treasurer's executor for money received in settlement and on said receipt he included the following phrase, "being in payment of the following balances found due the following funds", said:

"Although this receipt professes to be a receipt in full for the balance due the interest fund, still it shows the exact amount paid on that fund, and if



Honorable William Short

-4-

September 13, 1934.

there is in fact a balance still due, the receipt is no obstacle in the way of recovering that balance. The receipt is but prima facie evidence."

It is true that it is the duty of your County Collector to pay to you as County Treasurer, the balance due the county, after settling with the County Court, but the law does not require you to give a receipt in full. You can give duplicate receipts in the amount to the person tendering the money, and the receipt may show that it is for an amount which the person tendering claims that he owes the county. The law does not state that you must receipt him "in full" or "for balance due", and any such notations are rebuttable if the county seeks to recover any balance due.

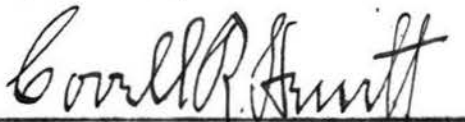
CONCLUSION.

Whenever the alleged County Collector or any other person offers you, as County Treasurer, money which he claims to be due the County, it is your duty to take it, and to issue said person duplicate receipts in said amount.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:



(Acting)  
Attorney General

WOS:H

**SPECIAL ROAD DISTRICTS:**

Road Commissioner in a Special Road District cannot work on the roads in his district and draw compensation therefor. Special road districts are political subdivisions of the State with reference to the Nepotism Amendment.

September 17, 1934.



Honorable Arch M. Skelton  
Prosecuting Attorney  
Lafayette County  
Lexington, Missouri

Dear Sir:

This department is in receipt of your letter of August 25, 1934, wherein you state as follows:

"I have had several complaints from persons in different parts of Lafayette County with reference to Road Commissioners in Special Road Districts of the county working on the roads and drawing compensation therefor. They are also hiring their sons and members of their families. I hate to bother you for an opinion at any time but it seems that it is necessary that I now do so. I would like your opinion upon the following questions as soon as possible:

First: Can a road commissioner in a special road district work on the roads in his district and draw compensation therefor?

Second: Is a special road district considered a political subdivision of the state with reference to nepotism amendment?"

I.

ROAD COMMISSIONER CANNOT  
DRAW COMPENSATION FROM DIS-  
TRICT.

Section 3076 R. S. Mo. 1929, provides in part as follows:

"\* \* \* Said commissioners may advertise for bids for such contract in any manner they may choose; and the contract shall in no case be let to any commissioner, nor shall any commissioner, directly or indirectly, have any pecuniary interest therein other than the performance of his official duties as herein required.\* \* \*"

Section 8078 supra, sets out the policy and intention of the legislature to keep the commissioners disinterested directly or indirectly in the letting of road contracts and from having any pecuniary interest therein.

Section 8079, R. S. Mo. 1929, provides for the compensation of commissioners and reads in part as follows:

"\* \* \* Commissioners of road districts incorporated under this article shall receive no compensation for their services, but shall be paid any and all expenses they may incur in transacting business of the district including reasonable attorney's fees.\* \* \*"

Section 8079 supra, limits the compensation of the commissioners of road districts to expenses incurred in the transacting of the business of the district and to reasonable attorney's fees and provides specifically that they shall receive no compensation for their services.

In view of the above two sections, we are clearly of the opinion that a commissioner for a special road district cannot work on the roads in his district and draw compensation for his services. To hold otherwise would be contrary to the intention of the Legislature, which was to have the commissioners, an impartial body, interested only in faithfully, honestly and impartially discharging their duties as commissioners according to law.

## II.

### COMMISSIONERS OF ROAD DISTRICT SUBJECT TO SECTION 13 ARTICLE XIV CONSTITUTION OF MISSOURI.

Article XIV, Section 13 of the Constitution of Missouri provides as follows:

"Any public officer or employee of this State or any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the state or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

The above section applies to any public officer or employee of this state or of any political subdivision thereof who has, by virtue of his office or employment, a right to name or appoint a person to render service to the State or to any political subdivision thereof.

Section 8062 R. S. Mo. 1929, dealing with special road districts declares that the same are political subdivisions and reads in part as follows:

"\* \* \* Whenever an order is so made incorporating a public road district such district shall thereupon become, by the name mentioned in such order, a political subdivision of the state for governmental purposes with all the powers mentioned in this section and such others as may be conferred by law." \* \* \*

Our Supreme Court in the recent case of State ex rel. vs. Special Road District, 6 S. W. 594, has stated that such is the case, 1. c. 596:

"The special road district contemplated by article 8, c. 98, R. S. 1919, is 'a political subdivision of the state for governmental purposes'--a municipal corporation. Section 10834. It is brought into existence through the exercise of legislative power." \* \* \*

Without question, the Commissioners of the road district are public officers. Embree v. Road District, 257 Mo. 593, 1. c. 623:

"Under these statutes all such road districts are public corporations, organized under the unquestioned authority of the Legislature. (Harris v. Bond Co., 244 Mo. 664.)"

And as was held in that case, the commissioners appointed or elected in the manner provided for by section 10613 are public officers for the purposes mentioned in said article 7. \* \* \*

While we are not unmindful of the fact that road districts, levee districts, school districts and other public or municipal corporations have not been held to be "other political subdivisions of the State" as used in Section 12 of Article VI of the Constitution of Missouri, expecting the jurisdiction of the Supreme Court of this State, it is our firm belief that such cases have no bearing upon the term "political subdivision" as used in the phrase "of any political subdivision thereof" as contained in Section 13 of Article XIV of the Constitution respecting the practice of nepotism.

The cases respecting the jurisdiction of the Supreme Court are all bottomed on the proposition that the phrase "or other political subdivision of the State" used in Section 12 of Article VI following the word "county" mean such political subdivisions as having power similar to those of a county. On the other hand, in Section 13 of Article XIV the phrase used is "any public officer or employee of this State or of any political subdivision thereof." \* \* \* These terms are simple but comprehensive and were undoubtedly used to cover every possible situation wherein the evil existed which was sought to be remedied. Such has been the decision of our Supreme Court in the case of State ex rel. McKittrick vs. Whittle 63 S. W. (2) 100. In this case the Respondent was a director in a school district and had voted for the employment of a teacher in the school who was related to him within the prohibited degree. Concerning the evil to be remedied the Court stated, 1. c. 101:

"It is a matter of common knowledge that at the time of the Constitutional convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions."

And after distinguishing between the term "other political subdivisions of the State" as used in Section 12 of Article VI, and "any political subdivision thereof" as contained in Section 13 of Article XIV, the Court held, l. c. 102:

"Thus it appears that a school district is a political subdivision of the state within the meaning of section 13, art. 14 of the Constitution."

Our Supreme Court has placed a liberal construction upon the nepotism amendment and there can be no distinction between its application to school districts and its application to road districts. As has often been said, relating to a statute, which seems equally applicable to the construction of this constitutional provision:

"It is a golden rule of judicial exposition to discern what the common law was, what was the mischief and defect for which the common law did not provide, what remedy the statute appointed to cure the disease of the commonwealth and what was the reason of the remedy so provided. When these things are discerned by the judge, it is but trite and venerable doctrine that his office is to so construe the new statute as to suppress the mischief, advance the remedy and 'to suppress subtle inventions and evasions for continuance of the mischief,...and to add force and life to the cure and remedy according to the true intent of the makers of the act, pro bono publico.' (Heydon's Case, 3 Coke, 7b.)"

The foregoing is an excerpt from the opinion of Judge Lamb in the case of Shohoney vs. Railroad, 231 Mo. 131, l. c. 157.

#### CONCLUSION.

It is therefore the opinion of this office that a road commissioner is entitled to no compensation for service rendered the district because of the provisions of Sections 8078 and 8079 R. S. Mo.



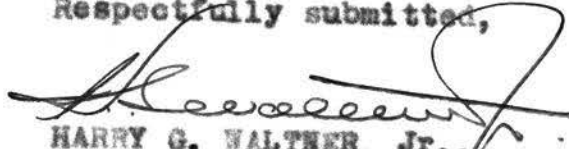
Hon. Arch M. Skelton,

-6-

September 17, 1934.

1929, and that such commissioners are public officers of political subdivisions of the State of Missouri, and are subject to the provisions of Section 13 of Article XIV of the Constitution of the State of Missouri.

Respectfully submitted,



HARRY G. WALTNER, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

HGW:MM

CRIMINAL COSTS: Liability of state for defendant's costs where case "continued generally".

1-24  
January 22, 1934.



Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This Department is in receipt of your letter of recent date with request for an opinion, which letter is as follows:

"We would be pleased to have the opinion of the Attorney General upon the following question:

Where a criminal case is continued generally, is the state liable for costs incurred on behalf of the defendant, and if so, would the state be liable for all the costs which had accrued since the beginning of the case, or only those of the term at which the order of general continuance was made?

The statutes apparently most applicable to this matter are as follows: Secs. 3653, 3655, 3828, and 3841.

The case of State ex rel v. Gordon, 254 Mo. 471, 162 S. W. 629, which touches somewhat on this question, holds that the state must pay costs of continuance when had upon its application, though defendant is later convicted.

I understand that, under Auditor L. D. Thompson, defendant's costs were disallowed in cases where there was a general continuance, but prior to that time, under Auditor Gordon, such costs were allowed, if the general continuance was taken on motion of the prosecuting attorney.

In order that the Attorney General may see the immediate practical application of the above question, we are enclosing cost bill from Ozark County, which was just recently presented for payment, in which defendant's costs total more than \$1200.00, most of which was incurred at the term just prior to that at which the order of general continuance was made. Attached, also, is a copy of the judge's docket entry, showing continuances, as furnished by the circuit clerk of Ozark County."

There are very few cases in Missouri construing the statutes in regard to costs in criminal cases.

Section 3825 R. S. Mo. 1929, provides as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 3826 R. S. Mo. 1929, provides as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced

to imprisonment in the county jail, work-house or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

By Section 3828, R. S. Mo. 1929, it is provided that, in the event of an acquittal, in capital cases and those in which imprisonment in the Penitentiary is the sole punishment for the offense, the costs shall be paid by the state.

The particular question involved in the first part of your letter is whether in a criminal case, where the case is "continued generally", the state is liable for the costs incurred on behalf of the defendant.

The only section of the statute in which the words "continued generally" are used, so far as we are able to find, is Section 3841 R. S. Mo. 1929, which is as follows:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the

prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

This section directs the clerk, before the next succeeding term, to tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, to make out and deliver an itemized statement forthwith to the prosecuting attorney of the proper county. This section does not adjudge the payment of the costs on either the state or the county, or on the defendant, but is merely a direction to the clerk to make out the fee bills in criminal cases after each term of court.

Section 3653 R. S. Mo. 1929, provides as follows:

"Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct."

This section was construed by the Supreme Court in the case of State ex rel. Selleck v. Gordon, 254 Mo. 471, in which the court held that where, on the application of the state, the case was continued, and under this section of the statute, i. e. Section 3653, supra, the costs were properly adjudged against the state at that term of court, and although the defendant was later convicted and also able to pay the costs incurred upon his behalf, yet the judgment for costs against the state was valid and fixed the payment of the same against the state.

And, in the case of State v. Barker, 63 Mo. App. 535, where the defendant in a criminal case had been granted two continuances at his costs, notwithstanding the case was afterwards dismissed by the state, the costs of the terms of court at which the case was continued by the defendant were chargeable

January 22, 1934.

to him and not to the state..

It is the opinion of this Department that where the case is "continued generally" without any statement as to whether or not it was continued upon the application and cost of the state, that the state would not be liable for the costs incurred by the defendant at the term in which the case was "continued generally," but, if the case was "continued generally" upon the application of the state, the court would have a right to adjudge the costs against the state under Section 3653, supra. Inasmuch as it is our opinion that the state is not liable for the costs incurred by the defendant at the term in which the case was "continued generally," unless the court adjudged the costs against the state, it would necessarily follow that the state would not be liable for the costs incurred by the defendant since the beginning of the case, unless specifically adjudged against the state previously thereto by the court.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

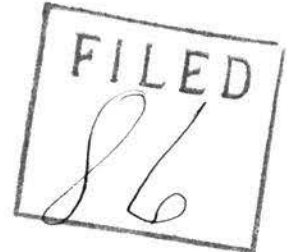


X  
BLIND PENSION:

Section 12-U House Bill 127 which seeks to divert from the Blind Pension Fund money for the prevention of blindness in the hands of the Missouri Commission for the blind, is unconstitutional.

2-9  
February 7, 1934

Honorable Forrest Smith  
State Auditor of Missouri  
Jefferson City, Missouri



Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I have been requested by Hon. H. O. Maxey, Representative of Bates County to secure from you an opinion as to the constitutionality of Section 12-U H. B. 127 appropriating \$50,000 from the Blind Pension Fund to the Board of Managers of State Eleemosynary Institutions."

Section 12-U House Bill 127 provides as follows:

"There is hereby appropriated out of the State Treasury chargeable to the Blind Pension Fund the sum of \$50,000 for the use of the Board of Managers of State Eleemosynary Institutions for work among the inhabitants of Missouri, looking to the prevention of blindness."

We call your attention to the fact that the above appropriation is chargeable to "Blind Pension Fund." The Blind Pension Fund was created under Section 47 of Article IV of the Constitution of Missouri, which among other things provides:

"Provided further, that nothing in this constitution contained shall be construed as prohibiting the General Assembly from granting or authorizing the granting of pensions to the deserving blind, as may be provided and regulated by law: Provided further, that the General Assembly of the State of Missouri shall cause an annual tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation of the taxable property of the state, to be levied for the purpose of providing a fund to be devoted in the manner provided by law to the pensioning of the deserving blind. If any balance shall exist in any fund after the deserving blind have been pensioned, then the same or so much thereof as may be necessary may be used for the support of the Commission for the blind. And if there shall be a balance in said fund after the blind have been pensioned and the Commission for the Blind have received adequate support, then the same shall be transferred to the Public School Fund. Said tax shall be levied and collected annually in the same manner as other state taxes are levied and collected, and such fund shall be subject to appropriation for above purposes by the General Assembly."

The foregoing constitutional provision levies a tax for the purpose of providing a fund to be devoted "to the pensioning of the deserving blind." The provision further provides that any balance existing after the deserving blind have been pensioned, shall, or so much thereof as is necessary, may be used "for the support of the Commission for the Blind." If there is a further balance left after the Commission has received adequate support then such funds shall be transferred to the Public School Fund. The last sentence of the constitutional provision expressly directs that the Legislature may make appropriation out of said fund for the above purposes.

The Act itself provides how the fund shall be created and how the proceeds of the fund shall be disbursed. We find no authorization within said section which expressly or by implication would authorize the Legislature to make an appropriation out of this Blind Pension Fund for the purpose of preventing blindness.

In State ex rel. v. Pemiscot Land and Cooperage Co. 295 S. W. 78, the Supreme Court held that a constitutional provision authorizing a special tax is a limitation on the power of the Legislature, the court saying at page 80:

"It will be noted that this section of the Constitution, in plain and simple language, provides in addition to taxes authorized to be levied for county purposes (under section 11 of Article X of the Constitution), the county courts may levy and collect as state and county taxes are collected, a special tax of not more than twenty-five cents on each one hundred dollars valuation, to be used for roads and bridges but for no other purpose whatever; and the power thus conferred on the county courts is declared to be discretionary. This is an express grant of power to the county courts and is a limitation on the power of the Legislature \* \* \* \* \*"

In McGrew v. Railroad 230 Mo. 1. c. 27, the Supreme Court in quoting from Williams v. Mayor of Detroit 2 Mich. 560, says:

"That the imposition by the constitution upon the Legislature, of certain specific duties, limitations, restraints and regulations in certain important particulars, binds the Legislature of course in those particulars."

It will be observed therefore that not only is the Legislature bound by the express provisions of Section 47 of Article IV of the Constitution, which only authorizes the use of the Blind Pension Fund for the three purposes above mentioned,

but the court's holding, as above pointed out, that where the constitution levies a tax for a particular purpose or contains a particular mandate, that the Legislature is bound in those particulars and such provisions are limitations upon the authority of the Legislature to deal with the funds in any other manner.

The fund created under Section 47 of Article IV of the Constitution is for the "pensioning of the deserving blind". In *State ex rel. v. Kimbell* 256 Mo. 611, 631, the Supreme Court defines a pension as,

"A stated allowance out of the public treasury granted by Government to an individual or to his representatives for his valuable services to the country, or in compensation for loss or damage sustained by him in public service."

In Webster it is defined:

"A regular stipend paid by a government to retired public officers, disabled soldiers, the families of soldiers killed in service, etc.; a payment regularly made to any person; as; To one by way of subsidy or allowance, whether as a means of securing good will, cooperation, or the like, or as a gratuity."

The term 'pension' therefore, as used in the constitutional amendment means a stated allowance or payment made by the Government to a person, and while pensions may be ordinarily understood to be rewards for past services, yet at the same time a regular payment made by a Government either as a gratuity or for the support of a blind person, will be deemed a pension. The Act provides for the payment of pensions to the deserving blind. In *Shelley v. Missouri Commission for the Blind* 309 Mo. 612, 620, the Supreme Court held that the Legislature had the right to define who were the deserving blind, the court saying:

"The Constitution, Article IV, Section 47, authorizing the General Assembly to 'grant pensions to deserving blind, as may be provided and regulated by law'.

Under that provision of the Constitution, the Legislature no doubt had a right to define 'deserving blind' to determine who and by what tests one should come within the provisions of any law it might enact to pension blind persons."

The Legislature in Section 8894 Revised Statutes 1929, defines who are 'deserving blind' as follows:

"No person shall be entitled to a pension under this article who has vision with or without proper adjusted glasses greater than what is known as light perception; that light perception as used in this section means not more vision than is sufficient only to distinguish light from darkness and recognize the motion (not the form) of the hand of the examiner at a distance not greater than one foot from the eye; and no person shall be entitled to receive a pension except upon scientific vision test supported by the certificate of a competent oculist, approved by the commission, that such person does not possess a greater vision than that provided above in this section; and every person passing the vision test and having the other qualifications provided in this article, shall be entitled to receive a pension of three hundred (\$400.00) dollars per annum, payable quarterly."

Under the above section the Legislature has declared "that no person is a deserving blind person who has vision with or without adjusted glasses greater than what is known as light perception." Any person therefore who has greater sight



than as defined in that section is not a deserving blind person under the provisions of Section 47 of Article IV, or of Section 8894.

Under the express terms of the above constitutional provision funds derived from the tax levied by the constitution are not to be used for other than for pensions for deserving blind people. Persons therefore whose degree of sight is greater than that defined in Section 8894, can not come within the benefit of the pension fund. If the proceeds of the Blind Pension Fund could be diverted and used for the prevention and treatment of blindness, in persons who have greater sight than is defined under Section 8894, then such funds would be used for persons who were not 'deserving blind' under the above constitutional and statutory provisions.

The above appropriation bill is clearly in conflict with Section 47 of Article IV above, because it seeks to divert from the Blind Pension Fund certain money and use it for a purpose not authorized by the constitution. The fund created by the above constitutional provision must; first, be devoted to the pensioning of the deserving blind, secondly, after the deserving blind have been pensioned then the fund or a portion thereof, may be used for the support of the Commission for the Blind, and third, after the Commission has been adequately supported then the balance of the fund shall go to the Public School Fund. The taxes levied under said provision must go for those purposes and in the order named, and for no other. The constitution does not levy a tax for the prevention of blindness among the people of this state, nor can anyone who is approaching blindness come within the classification of deserving blind until he has met the test laid down in Section 8894.

While the purpose evidenced by this appropriation bill is a noble one and as a practical matter the prevention of blindness might result in greater protection to the Blind Pension Fund created by the Constitution, yet we must hold that under Section 47 of Article IV the people of Missouri have made no provision for the prevention of blindness, and that the attempt by the Legislature to divert from the Blind Pension Fund the moneys appropriated under Section 12-U of House Bill No. 127 is of no effect, and that Section 12-U



Honorable Forrest Smith

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February 7, 1934

of House Bill No. 127 is unconstitutional as being in conflict with Section 47 of Article IV of the Constitution of Missouri.

Very truly yours,

FRANK W. HAYES  
Assistant Attorney General,

APPROVED:

ROY McKITTRICK  
Attorney General.

FWH:LC

SALES TAX ACT: Sales to churches, schools, court houses, clubs, fraternal organizations, post offices, to municipalities for municipal purposes of electricity, gas and water exempt, under sub-section(b) Section 2a House Bill No. 5

3-8  
March 7, 1934.



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Missouri.

Dear Sir:

This department acknowledges receipt of your letter of February 27, 1934, which reads as follows:

"I would be pleased to have the opinion of the Attorney General upon the following question: What, if any, of the following sales of electricity, gas or water made by a public utility is taxable under the Missouri Retailers' Occupation Tax Act (House Bill No. 5): (1) sales to churches, (2) to schools, (3) to court houses, (4) to clubs or fraternal organizations, (5) to post offices, (6) to municipalities for municipal purposes such as electricity to light the city streets or water to extinguish fires?"

In the original opinion prepared by this department relating to general interpretations of the various phases of the Act, we defined "domestic consumers" as follows:

"'Domestic consumers' are those who consume electricity or electric current for household or domestic purposes,"

and "commercial consumers" as follows:

"'Commercial consumers' are those who use electricity or electric current for trade or commercial purposes",

and "industrial consumers" as follows:

"Industrial consumer" is one who uses electricity or electric current for manufacturing, power and like purposes."

Bearing these definitions in mind, in 61 C. J. 168 it was said:

"A tax cannot be extended by a construction to things not described as the subject of taxation."

In *Converse, et al. v. Northern Pacific Railway Co.*, 2 Fed. (2nd) 959, the court said:

"It is an unbroken rule of the Federal courts that no property is subject to taxation unless the legislative intent to tax it is clearly made manifest."

And again in the same case, we find the following:

"With the State practically all powerful in its selection of the subjects of taxation and the amount of tax which shall be levied, the helplessness of the citizen demands, for his protection, that if the Legislature intends to tax him, it shall at least be required to say so, in clear and unmistakable terms."

It is to be borne in mind that this is not a property tax. It is a privilege or occupational tax wherein the amount of the service rendered and the charge therefor become the measuring stick as to the amount of the tax which shall be paid, but we think the general principles regarding taxation are applicable to the occupational tax. As was said in the case of *State ex rel. v. Alt*, 224 Mo. 493:

"It is axiomatic that the authority to tax a citizen must be found in the regular laws and not be made to depend on a matter of inference or implication."

Finally the question resolves itself as to whether or not sales of electricity to the various institutions as mentioned in your letter can be classified in any one of the three consumers as mentioned in sub-section (b) of Section 2a of the House Bill, which is as follows:

"Sales of electricity or electrical current, water, sewer service, gas (natural or artificial), to domestic,

commercial or industrial consumers."

The institutions which you mention manifestly could not be classed as commercial or industrial consumers unless organized for profit or gain. The only remaining classification concerning which there might be a doubt being 'domestic' consumers.

In the case of *Erie v. Gas Company*, 78 Kans. 1. c. 354, the court discusses the question in the following language:

"In presenting its estimates for the computation of profits counsel for the plaintiff deduct from the amount of sales within the city the amount received from sales to manufacturers. The defendant now contends that there should be a reduction for gas sold to churches, the opera house, stores and offices--that these are not 'domestic purposes.' The term was properly used with reference to the ordinary distinction usually made in the sale of gas for light and heat for the comfort and convenience of individuals in their homes, offices, stores, churches and the like, and sales made to manufacturers to generate power. Usually, reductions are made for the latter purpose from the schedule of prices for the former. The term 'domestic' has a widely varying meaning, and while its primary significance relates to the house or home, it is often used in a vastly broader sense. Its significance must always be determined with reference to the subject-matter and the relation in which it appears. In this contract, and with reference to this subject, the more reasonable view is that it applies not only to the homes of the city, but to other places named where its principal use is for heating and light, and not for power. It appears that the parties construed the term to exclude only manufacturing purposes."

In reading the case in its entirety we are of the opinion that it deals with a somewhat different situation as it appeared

that both parties to the contract sued on had originally intended that the term 'domestic purposes' included gas furnished for homes, churches, stores, offices and opera houses where its principal use is for heating and lighting and not for power. Since the legislature saw fit in the particular sub-section quoted above, which relates to electricity, to place restrictions on the gross receipts of the services derived from the same, namely, to domestic, commercial or industrial consumers, we are to imply that by said restrictions the legislature evidently intended that some instances would not come under these three classifications, and hence would be exempted. The other sub-sections of Section 2a of the act appear to have no restrictions and to be all inclusive. The Civil Code of Idaho, Section 2591, defines the phrase 'domestic purposes' as contained in the chapter dealing with water rights and irrigation,

"Shall be construed to include water for household in a sufficient amount for the use of domestic animals kept with and for the use of the household."

The decision in the case of Mitchell v. Tulka Water Company, 95 Pac. 961, the court said the following:

"The language of an ordinance granting a franchise to a waterworks company that water 'to supply domestic use' shall be supplied from wells, adjacent to a particular river, does not include water to supply the streets, lanes, alleys, squares and public places of the city, or to be used in extinguishing fire."

#### CONCLUSION

In view of the authorities compelling a clear legislative intent before a return should be made for the tax, and the decisions herein cited, we are of the opinion that the institutions mentioned in your letter, namely;

(1) churches, (2) schools when not privately owned or organized for gain or profit, and we would include all state, city and public schools, (3) court houses, jails, almshouses, eleemosynary institutions, (4) fraternal organizations, (5) clubs when not organized for profit or gain, (6) post-offices and all federal court houses and buildings, (7)

Hon. Forrest Smith

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March 7, 1934.

municipalities: the lighting of city streets, parks, city courts and all other municipally owned institutions which are organized and conducted not for gain or profit, the gross receipts from the same should be deducted by the electrical, gas or water company in making their returns.

This conclusion relates solely to subsection (b) of Section 2a of House Bill No. 5 and is not construed to be applicable to all of the other subsections contained in said Section 2a.

Respectfully submitted,

OLLIVER W. NOLEN  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

OWN:AH



SALES TAX: Magazine Advertising.

310

March 9, 1934



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

We are replying to your inquiry as to whether or not magazine advertising is to be construed as being newspaper advertising within the meaning of the Missouri Occupation Tax Law.

A magazine is defined in Webster's New International Dictionary to be:

"A storehouse of information on any subject; formerly used in titles of books. A pamphlet published periodically containing miscellaneous papers, especially critical and descriptive articles, stories, poems, etc., designed for the entertainment of the general reader."

In the case of Houghton v. Payne 194 U. S. 89, 48 L. Ed. 888, the Supreme Court of the United States defining a periodical, at page 96 of the opinion stated:

"A periodical is defined by Webster as 'a magazine or other publication which appears at stated or regular intervals,' and by the Century dictionary as 'a publication issued at regular intervals in successive numbers or parts, each of which (properly) contains matter on a variety of topics and no one of which is contemplated as forming a book of itself!'"

And further on the same page,

"By far the largest class of periodicals are magazines, which are defined by Webster as 'pamphlets published periodically, containing miscellaneous papers or compositions.' "

After holding a magazine to be a periodical the Court at page 97 of the opinion said:

"A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature or some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects."

Webster defines a newspaper to be:

"A paper printed and distributed, at stated intervals, usually daily or weekly, to convey news, advocate opinions, etc., now usually containing also advertisements and other matters of public interest."

Honorable Forrest Smith

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March 9, 1934

In our opinion the advertising contained in a periodical or magazine, as above defined, and where the magazine carries no element of what is generally known as news on any subject would not be newspaper advertising within the meaning of the Missouri Occupation Tax Law.

It will, of course, be necessary for you to apply the facts in each particular case to the foregoing definition of a magazine or periodical in order for you to determine whether return should be made of the receipts from such advertising.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

COUNTY CLERK:

printed

Not Entitled to count/words in calculating fees  
under Section 9877, page 421, Laws of Missouri,  
1933.

3-22

March 20, 1934.



Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

Acknowledgment is herewith made of your recent inquiry  
to this office requesting an opinion on the following matter:

"On August 30, 1933 your Department rendered us  
an opinion in which you established a basis for  
the words and figures that the County Clerk was  
entitled to under Section 10007.

The 57th General Assembly repealed Sections  
9876 and 9877, R. S. Missouri, 1929, and wrote  
two new Sections in lieu thereof in which they  
eliminated the old process whereby the County  
Clerks extended the taxes in the Assessor's  
Book and then made a copy of that book for the  
use of the Collector and supplemented in these  
Sections a new process whereby the County Clerk  
makes his extensions in the Assessor's book and  
then turns that book to the Collector as the tax  
book.

In Section 9877 of the 1933 Laws is specified  
the Clerk's compensation as follows:

'The Clerks of the County Courts shall re-  
ceive ten cents per hundred words and fig-  
ures for all words and figures extended by  
him in making out the tax book.'

Some of the County Clerks contend that in the  
words and figures for which he is allowed com-  
pensation under the new law should include the  
words and figures entered in that book by the  
Assessor and also the printed words and figures  
entered when the book was made, basing their claim  
upon the opinion above referred to.

We would like to have an opinion from your Department which will construe for us clearly the "words and figures" referred to in Section 9877 of the 1933 Laws."

The pertinent parts of Sections 9876 and 9877 as found on pages 421 and 422 Laws of Missouri, 1933, read as follows:

"As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax book for the use of the Collector;" \* \* \* "

"The clerks of the county courts shall receive ten cents per hundred words and figures for all words and figures extended by him in making out the tax book, one-half thereof to be paid by the state and other half by the counties, respectively: Provided, that compensation of clerks for making out and certifying to the auditor an aggregate abstract of the tax book shall be paid by the state."

As stated in your letter, the purpose of the change in these two sections was to do away with the copy of the tax book heretofore required to be made by the clerk, and to constitute the Assessor's book, when duly extended by the County Clerk, the tax book itself. No "copy" of the tax book is contemplated at all by these sections and the Clerk for his services is limited to ten cents per hundred words of the words and figures "extended by him." It is a recognized rule that any official must be able to lay his finger on the statute allowing him compensation. It is equally a well recognized rule that all such laws are to be strictly construed against the official. As stated in the case of State ex rel. vs. Brown, 146 Mo. 401, 1. c. 406:

"It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed." \* \* \* "

It would be very difficult to give Section 9877 a liberal enough interpretation so as to include compensation to the County Clerk for words and figures other than those actually extended by him. It is apparent that we must construe this section strictly and in doing so we conclude that he is only entitled to compensation for the words and figures actually written by him.

No confusion should arise by reason of the previous opinion of this office respecting Section 10007. That opinion was applicable only to an interpretation of that section. On the face of it it is apparent that it applies only to the copy of the tax book for the use of the Collector as was contemplated by Section 9876 R. S. Mo. 1929, prior to the 1933 amendment, while Section 9877 herein considered applies to the original tax book itself as contemplated by Section 9876 as changed by the 1933 Legislature. We believe that no serious difficulty arises as to the interpretation of the instant law.

We also refer to the well recognized rule that where a statute particularly provides for a mode of compensation that mode or compensation is exclusive and compensation cannot be claimed in any other manner or under any other law. As stated in the case of King vs. Riverland Levee District, 279 S. W. 195:

"\* \* \* our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking vs. McCracken, 80 Mo. App. loc. cit. 656, to the effect that the rendition of services by a public officer is to be deemed gratuitous unless a compensation therefor is provided by statute, and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing the same. State ex rel. Evans vs. Gordon, supra."

Compensation being particularly provided for the Clerk under Section 9877, that compensation is exclusive and other or different compensation could not be calculated under the provisions of Section 10007.



Hon. Forrest Smith.

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March 20, 1934.

CONCLUSION.

It is therefore the opinion of this office that County Clerks shall receive ten cents per hundred words and figures for making the extension in the tax book as provided in Sections 9876 and 9877, Laws of Missouri, 1933, pp. 421 and 422, and that in calculating this compensation, words and figures written by the Clerk are to be included, but printed words and figures or those written in by the Assessor are to be excluded.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

STATE AUDITOR:

State institutions and appointive and county officers required to set up and maintain records and forms as prescribed by State Auditor under Section 11479 and may be compelled by the State Auditor in mandamus to so do.

3-26

March 23, 1934



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated March 19, 1934, as follows:

"Section 11479 on page 417 of the 1933 Laws of Missouri, provides that the State Auditor shall formulate and set up a uniform system of bookkeeping for all state institutions and for each and every county office.

I would like an opinion from your department as to whether I can force a county official to set up this uniform system of bookkeeping, and how to proceed should they refuse to comply with this section."

1.

An answer to your request involves the application of both Sections 11478 and 11479 Laws Missouri 1933, page 417.

Section 11478, in part, provides:

"It shall be the duty of the State Auditor at least once every two years \* \* \* to visit, examine, inspect and audit the accounts of the various institutions of the state \* \* \* and such other officers of the state as receive their appointment from any elective officer, and also at least

once during the term for which any county officer is chosen to examine, inspect and audit the accounts of the various county officers of the state, supported in whole or in part by public moneys,\* \* \* county clerks, circuit clerks, recorders, county treasurers, county collectors, sheriffs, public administrators, probate judges, county surveyors, county highway engineers, county assessors, prosecuting attorneys, county superintendents of schools, in every county in the state which does not elect and have a county auditor.\* \* \*

Audits, however, may be made in counties having a county auditor whenever a proper petition shall be made for such audit.

Section 11479, above referred to reads:

"The State Auditor shall formulate a simple and complete system of accounting and reporting for all state institutions and appointive officers referred to in Section 11478, and for each and every county office. This system shall be uniform in its application to offices of the same grade and kind and of accounts of the same kind. He shall prescribe the form of books, receipts, vouchers and documents required to separate and verify each transaction, and forms of reports and statements required for the administration of such officer, or for the information of the public. He shall also prescribe a uniform method and plan of publishing the county financial statement each year for the information of the public."

Section 11479 was undoubtedly enacted in order that the state auditor might more completely and efficiently carry out and perform the duties imposed upon him by Section 11478.

Whenever it is necessary in the discharge of official duties that records be kept such officer is required to keep records of his official acts either by specific statute or by necessary implication. For instance, with reference to county treasurers Section 12143 Revised Statutes Missouri 1929,

provides:

"The county treasurer shall keep a just account of all moneys received and disbursed, and regular abstracts of all warrants and scrips drawn on the treasury, and paid or received by him, and shall cancel the same by writing in ink 'paid' across the fact thereof, when paid or received."

2.

The keeping of such books and records is a ministerial duty and involves no discretion on the part of an official. A ministerial duty or act is defined in *Burton Machinery Co. v. Ruth* 194 Mo. App. 184, 199, to be:

"\* \* \* one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate or legal authority, without regard to or the exercise of his own judgment upon the propriety of the acts being done."

On the same subject in 46 C. J. 1036, Section 304, it is stated:

"Permissive words in a statute are construed as mandatory, where a duty is coupled with the power and the exercise of the power is necessary to affect the public interests or the rights of third persons. A positive act of the legislature may not be nullified or suspended by neglect of an official to perform a duty enjoined on him by law."

In *Burton Machinery Co. v. Ruth*, supra, at page 197 it is further held:

"It is well settled rule that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do the act, he is liable in damages

at the suit of a person injured. In such cases a mistake as to his duty and an honest intention is no defense."

3.

We come now to consider the available remedy in the event any one in charge of the above named institutions or if any officer referred to in Sections 11478 and 11479 should fail or refuse to set up or maintain his records, books and forms, after you have discharged your duties under Section 11479.

(a) Article IX of Chapter 7 Revised Statutes Missouri 1929, provides for the issuance of writs of mandamus by certain of the courts of this state.

Recognizing the right of the Supreme Court of this state to issue writs of mandamus and further recognizing the right to issue the same against an officer to compel the performance of a ministerial act, in State ex rel v. Tracy 94 Mo. 217, 220, it is said:

"Mandamus, however, is in no sense a writ of review, nor does it perform the functions of an appeal or writ of error. When addressed to a ministerial officer, as in this case, it simply commands him to perform some specific act, the performance of which is required of him by law."

The case of State ex rel v. Adams 161 Mo. 349, was an action by mandamus to compel a county treasurer to pay the warrant there in question. The court at page 364 of the opinion held:

"It is the well settled doctrine of this state that county treasurers are simply ministerial officers, and can be compelled to perform their duties."

State ex rel v. Williams 232 Mo. 56, involved a petition for mandamus to compel the county treasurer to pay a warrant. Discussing a foreign case with reference to the

duties of a clerk of a court, the court at page 66 of the opinion quoted with approval the following:

"The act referred to requires him to receive and record these papers; his duties are purely ministerial, and the court below properly awarded the peremptory mandamus."

While Section 11479 does not specifically provide that the officers shall set up or keep their books according to the systems and forms prescribed by you under the latter section, yet, it is unmistakable that such was the purpose and intent of the Legislature and the direction to the various officers to follow the systems of bookkeeping and forms prescribed by you necessarily follows and must be read into Section 11479.

(b) In reference to who may maintain an action for mandamus the Supreme Court of Missouri in State ex rel Clark v. Smith 104 Mo. 661, 666, held:

"The remedy by mandamus will only be allowed against a public officer in case the one claiming its benefits shows himself to be directly interested in the performance of the thing demanded, and that he has no other adequate, specific and effective remedy at law by which he may obtain the result sought."

#### CONCLUSION

From the foregoing, we are of the opinion that the state institutions, appointive officers referred to in Section 11478 and each and every county officer in the state are required to set up, use and maintain the bookkeeping systems and forms when the same have been prescribed by you in accordance with Section 11479 Laws Missouri 1933, page 417; that the setting up and keeping of such records and forms are ministerial duties on the part of the officials named; that a refusal of those in charge of such institutions or a refusal of such officers so to do, after the lapse of a reasonable time in



Honorable Forrest Smith

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March 23, 1934

which to put the systems and forms prescribed by you into effect and operation, would subject those in charge of such institutions and such officers to an action in mandamus to compel the performance of such duties on their part, and that such action in mandamus could be maintained by yourself as State Auditor, provided that the failure or refusal of the persons in charge of such institutions or such officers to set up and keep records and forms, as prescribed by you, is the fault of such person or officer.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL : LC

PENITENTIARY: (1) Use of convicts as servants by officers of Penitentiary; (2) Paying of subsistence to officers for convicts used as servants.

4-5  
March 31, 1934.



Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter, dated March 19, 1934, as follows:

"I am enclosing a letter from Hon. S. B. Hunter, Director of the Penal institutions of this state, with a request for information relative to allowing subsistence to the officers of the penal institutions of this state."

The letter from Hon. S. B. Hunter, referred to by you, discusses two questions: (1) Use of convicts as servants in the families of officers (Director, Warden and Deputy Warden) of the Missouri State Penitentiary, and (2) allowing of subsistence per month per convict servant.

I.

USE OF CONVICTS AS SERVANTS.

Laws of Missouri, 1933, page 327, Section 8316, provides in part as follows:

"There is hereby created and established a department to be known as the Department of Penal Institutions, \* \* \* \* \* shall be under the control and management of a Commission composed of three

members, not more than two of whom shall belong to the same political party, \* \* \* \*, and who shall have and exercise the powers, and perform the duties and functions in this article provided, and as otherwise authorized by law. The commissioners of the department of penal institutions shall reside in Jefferson City and devote their entire time to the duties of their respective offices."

Section 8317 provides in part the following:

"The governor shall designate one of said commissioners as director of penal institutions, and the commissioner so designated shall by virtue thereof be chairman of said commission and reside and have his official residence in the house near the Missouri state penitentiary."

Section 8317, supra, is the only provision of the law that we find that concerns or refers to the official residence owned by the State of Missouri. The history of the building of this residence is a little obscure. In 1885 when the big heavy stone wall (that surrounds the Penitentiary) was remodelled and enlarged it was recommended in the biennial report of the board of inspectors of the Missouri State Penitentiary (1885-1886) that purchase of ground convenient to the prison be made for the purpose of building a warden's residence. In 1887, Section 22, of the Session Laws, this item is found, "for warden's house, seven thousand, five hundred dollars (\$7,500)." The warden's house was built in 1887-1889 (Report of Board of Inspectors, 1887-1888) which contains this:

"The new Warden's residence is nearing completion. It is built of stone and brick, the product of convict labor, and all the work done upon it has been done by convicts, with the exception of some few instances, where we have found

it necessary to employ skilled labor. There has been no money drawn from the treasury for this building, it having been paid for out of the earnings of the penitentiary."

In 1879 (Session Laws, 1879, page 118) the Legislature provided that the warden should "reside within the precincts of the penitentiary in a house provided for that purpose." This was Section 12467, R. S. 1919, which was repealed in 1921 (Laws of Missouri, 1921, p. 554).

Thus, so much for the history of the mansion. Now the director of penal institutions, by virtue of Section 8317, has the right to live therein.

Laws of Missouri, 1933, page 101 et seq., is the appropriation for the state penal board and penitentiary. Page 103 provides this:

"D. Operation:

General expense; including communication, printing and binding, regulative, transportation of things, travel, and other general expense; material and supplies, consisting of household supplies . . . . . 425,000",

which is payable out of the state revenue. The above provision is the only one that makes any reference to the mansion, to-wit, "household supplies." However, the Legislature evidently had in mind the mansion owned by the State of Missouri, and connected with the Penitentiary. However, herein we do not express an opinion as to the meaning of these words, and only call attention to same in order to support our conclusion on the questions which you request our opinion.

Section 8406, R. S. Mo. 1929, provides in part as follows:

"The board is hereby authorized to use the labor of convicts, not otherwise employed, at any of the \* \* \* \* \*

on improving any of the public grounds belonging to the state, \* \* \* \* \*; or otherwise, as the board deems advisable;"

Section 8397, R. S. Mo. 1929, provides in part as follows:

"Said board shall classify the convicts in their labor \* \* \* \* \*, into as many classes as they deem advisable. And the board shall use its best endeavors to the end that the expenses of the penitentiary may be paid out of the proceeds of the labor of the convicts \* \* \* \* \*; but nothing in this article shall be construed as forbidding the warden and deputy warden from using convicts as servants in their own families, subject to such rules as may be prescribed by the board."

Thus, the Legislature has given to the warden and deputy warden, under such rules as may be prescribed by the board, the right to the use of convicts as servants. The regulation of the number of the servants is left to the board. The director, due to changes in the law, now occupies the position formerly occupied by the warden, that is, before the enactment of the 1933 Law, the warden occupied the residence now occupied by the director; so that we believe, and it is our opinion, that the director would be entitled to convicts as servants in the mansion, and it is our further opinion that the warden and deputy warden would likewise be entitled to convicts as servants in their home.

## II.

### SUBSISTENCE <sup>not</sup> ALLOWED FOR CONVICT SERVANTS.

Constitution of Missouri, Section 19, Article X, provides in part the following:

March 31, 1934.

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law;"

Appropriation laws for the Missouri State Penitentiary, as well as the statutory law, make no provision for the payment of upkeep or subsistence for the convicts used as servants in the director's mansion or the deputy warden's or warden's home. The words, "household supplies", as used in the appropriation act of 1933, in our opinion, do not include paying of subsistence for upkeep of convicts used as servants. And, if the Legislature intended reimbursement to, or paying subsistence to, officers who use convicts as servants, it would have made provision for such. The Legislature intimates the contrary--and, in fact, guards against a diversion of not only the moneys of this State, but also the supplies, fuel, provisions or manufactured articles of the Penitentiary.

Section 8419, R. S. Mo. 1929, provides:

"Neither the warden nor the superintendent of industries shall sell or give to any of the officers or employees of the prison any fuel, forage, provisions or manufactured articles under his charge, nor permit such things to be taken or used except for the use and benefit of the state. Any alleged violation of this provision may be examined into by said board, and if found to be true, shall be held to be just cause for the removal of the warden or superintendent of industries, or both, as the case may be."

Therefore, in view of the above constitutional provision and statutes, it is our opinion that the board has no right, grant or authority, by statute or otherwise, to allow any sum per month for subsistence of convict servants.

Yours very truly,

APPROVED:

JLH:EG

ROY MCKITTRICK  
Attorney-General

James L. HornBostel  
Assistant Attorney-General



SALES TAX: TAX MAY NOT BE ADDED TO ARTICLES SOLD.

4-16



April 16, 1934.

Hon. Forrest Smith  
State Auditor  
Jefferson City, Mo.

Dear Mr. Smith:

I have received your letter of April 7, in which you submit the following question:

"We would be pleased to have the opinion of the Attorney General upon the question as to whether or not a taxpayer under the Missouri Retailers' Occupation Tax Act may add such tax on his invoice or sales slip as a separate item, and if so, could you approve a statement such as that enclosed herewith as being a fair statement of the situation."

With reference to the statement adding the Sales Tax to the invoice price of the article purchased, I respectfully advise that this department cannot approve such a statement.

The seller has no authority or right to add the Retailers' Occupation Tax as a tax to any article sold. It would be just as legal and reasonable to add dog tax, automobile license tax, state taxes, school taxes or any other tax, to the purchase price of goods sold, in the form of taxes, as to add the Sales Tax.

The retailer has no legal authority to constitute himself as an agent of the State to collect the Sales Tax.

Yours respectfully,

Roy McKittrick  
Attorney General

RM:EMV

TAXATION: 6% rebate under Senate Bill 52, Laws of Missouri 1934 p. 153 Extra Session, allowable if taxes paid during June or July.

May 11, 1934. 5-12

Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri



Dear Mr. Smith:

Acknowledgment is herewith made of your recent request for an opinion of this office reading as follows:

"S. B. 52 found on page 153, of the Extra Session 1934 Missouri Laws provides that any person paying his tax at due date shall be liable for rebate of 6% on such tax.

The Statute provides that taxes in Kansas City become due and payable on the first day of June of each year. I am advised by the Collector that the tax books will not be completed before July 1.

I would like an opinion from your office as to whether the 6% rebate on the County and School taxes in Kansas City could apply up to August 1, one month after tax books are completed."

Senate Bill 52 found at page 153, Laws of Missouri 1933-34 Extra Session, repealed and reenacted Section 10152 R.S. Mo. 1929, and deals with the collection of taxes in counties containing a city with a population of not less than two hundred thousand nor more than seven hundred thousand inhabitants. By the provisions of this law taxes are due on the first day of June of each year and are delinquent if not paid on or before the thirty-first day of December of that year. With specific reference to your inquiry we quote the last portion of this enactment found at page 154:

Hon. Forrest Smith.

-2-

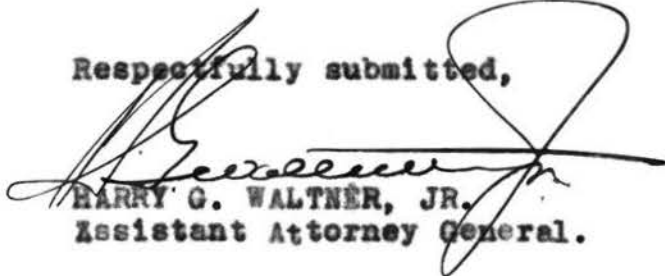
May 11, 1934.

"\* \* \* Any person paying County and School taxes for any year in the year for which such taxes are levied and payable shall be entitled to receive and it is hereby made the duty of the collector to allow such person a rebate of six per cent of such taxes on County and School taxes so paid during the first and second months in which said taxes are payable. The rebate allowable to the taxpayer on County and School taxes shall be given only in case the full amount of the State, County and School taxes are paid."

It therefore seems that it was the legislative intent to allow this rebate of six per cent on county and school taxes if the county, school and state taxes were paid during the months of June or July of the years for which the taxes were levied.

It is therefore the opinion of this office that the six per cent rebate on county and school taxes in counties containing a city with a population of not less than two hundred thousand nor more than seven hundred thousand would apply up to August first provided the total state, county and school taxes were paid in full.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

INDIRECT - Sales for resale

5-21

May 15, 1934.



Hon. Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Sir:

This department acknowledges receipt of your letter requesting an opinion based on the following:

"Are sales of food products to a restaurant or hotel, the latter intending to cook such food products and resell it to customers, within the Missouri Retailers' Occupation Tax Act so as to require the seller of the products to the hotel or restaurant to make return to the Auditor of his gross receipts therefrom?"

In the original opinion rendered by this department we said, in passing on the question of the definition of a sale for resale:

"By the term, 'and not for resale in any form', as used in the Act, is meant that if tangible personal property is purchased for resale in its original form, or substantially in the same form as when purchased, then it is not necessary to make return of the gross receipts from the original sale, but if the original merchandise purchased be utilized and becomes one of the elements of a finished product and becomes tangible personal property, then the selling of the finished product is not a resale within the meaning of the Act, and the gross receipts from the sales of such finished product should be returned."

May 15, 1934.

If there is a question of whether or not sales to restaurants and hotels are sales at retail, the burden is upon those asserting such sales are not sales at retail. Section 8 of the Missouri Retailers' Occupation Tax Act is as follows:

"The burden of proving that a sale of tangible personal property, services, substances or things was not a sale at retail, shall be upon the person who made the sale. For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed, it shall be presumed that all gross receipts are subject to the tax hereby imposed until the contrary is established. If the Auditor is not satisfied with the return and payment of the tax made by any person, he is hereby authorized and empowered to make an addition assessment of tax due from such person, based upon the facts contained in the return or upon any information within his possession or that shall come into his possession. The Auditor shall give to the person written notice of such additional or revised assessment, together with written notice of the time and place where the person may be heard on a petition by him for re-assessment. Such notice may be served upon the person personally, or by registered mail addressed to the person at his address as the same appears in the records of the Auditor."

The courts of our state, or of any other state, have never passed directly on this point and until the matter has been adjudicated in the court of proper jurisdiction, we shall continue to adhere to the ruling made in our original opinion.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

STATE AUDITOR- SALES TAX - Tax to be paid by receivers,  
executors, etc., when.

5.21

May 17, 1934



Honorable Forrest Smith  
State Auditor  
Jefferson City  
Missouri

Dear Mr. Smith:

This Department acknowledges receipt of your letter dated May 11, 1934 concerning the Missouri Occupation Tax Law, which letter is as follows:

"We would be pleased to have your opinion upon the question of whether or not a receiver, executor, administrator or assignee for the benefit of creditors is required to make return and pay tax where such officer continues the business taken over by him or is engaged in liquidating the same.

We note that several other states having a tax of this nature require such persons to make return but in opposition to this view we note also the following cases:

Howe v. Atlantic, Pacific & Gulf Oil Company et al (State of Missouri et al, Interveners) District Court, W. D. Missouri, W. D. May 4th, 1933, 4 Fed. Sup. 162

In the matter of Flatbush Gum Company, Inc., Bankrupt (U.S. District Court, Eastern Dist. of N. Y., March 29, 1934. (See copy attached hereto, case not being yet reported). "



May 17, 1934

Subdivision (a) of Section 1, Laws Missouri 1933, in Extra Session, page 156, being the Missouri Occupation Tax Act, defines the word "person" in the following language:

" 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

By subdivision (c) of the same section, the word "business" is defined as,

" 'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect."

The case of *Howe v. Atlantic, Pacific and Gulf Oil Company, et al*, reported in 4 Fed. Supp. 162, was reversed by the United States Circuit Court of Appeals by an opinion filed March 30, 1934, the Circuit Court of Appeals directing that the receiver pay the taxes upon gasoline already sold and to make reports as to future sales. The Circuit Court of Appeals in the course of its opinion said:

"Federal receivers authorized to conduct and carry on the business of a corporation as a going concern as such are not exempt from the payment of taxes legally assessed and levied against them by city ordinance or state Laws."

And again,

"The ordinance here involved is all comprehensive. It says: 'Every person, firm or corporation' shall pay the tax. The fair intendment of the ordinance was to include all persons. That term is broad enough to include this receiver. A construction of this ordinance which would permit the receiver to avoid the payment of the one cent city and two cents state tax would give him such an

May 17, 1934

unconscionable and inequitable advantage over his competitors as to render such a construction unreasonable. The ordinance is broad enough to include this receiver. Liberty Central Trust Company et al., v. Gilliland Oil Company, 279 Fed. 432; Michigan v. Michigan Trust Company, receiver, supra; Coy v. Title Guarantee & Trust Company, 212 Fed. 520."

It appears that the receiver in the case quoted from was operating the business as a going concern and was not undertaking to liquidate its affairs.

We are of the opinion that where a receiver, executor, administrator, assignee or trustee is put in charge of a then going business and if such person continues to operate such business as a going business concern, then the amount of the sales made in the course of the conduct of such business should be returned to the State Auditor, but, on the other hand, if such person, upon taking over and in charge such business, proceeds in good faith to liquidate and close out such business, then the sales made in the course of such liquidation and closing out would not be made in the conduct of a business as that term is defined by the Missouri Occupation Tax Law.

No hard and fast rule can be laid down in determining the question you present but each case should be disposed of according to the facts peculiar to each case.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

APPROPRIATIONS: Appropriation under Sec. 12 B of H.B. 127, Extra session, 1933, does not meet requirements of Constitution; likewise, appropriations under Secs. 12A1 and 12 are void and of no effect.

May 19, 1934. 5-19



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Mr. Smith:

This department acknowledges receipt of your letter of May 12, 1934 requesting an opinion on the following facts:

"The regular session of the Legislature on page 92, Section 4, appropriating to the Board of Barbers' Examiners \$8,550 for personal service and \$9,450 for operation, making a total appropriated for above board of \$18,000. In the extra session of the Legislature on page 12, Section 12B they appropriated \$3,000 from the general revenue fund to the Board of Barbers' Examiners fund.

"Will you please advise me if this appropriation under Sec. 12B increases the appropriation to the Barbers Board to \$21,000.

"The same thing that applies to the Barbers' Board applies to a number of other boards, all set out in H.B. 127."

Section 4, Laws of Mo. 1933, p. 92 provides for the following appropriation:

"Board of Barber Examiners.--There is hereby appropriated out of the state treasury, eighteen thousand dollars (\$18,000.00) chargeable to the state board of barber examiners fund, the following amounts for the purposes herein expressed:

A. For personal service:  
For the per diem of the board members and other necessary employees, and the salaries of stenographers, and deputy barber examiners.....\$8,550

D. For Operation:  
General Expense, including communication, printing and binding, traveling expenses and other general expense. And Material and supplies consisting of stationery and office supplies 9,450

Total.....\$18,000 "

In House Bill 127, same being in the nature of an omnibus appropriation bill (Laws of Mo. 1933, Extra Session, Sec. 12B, page 12), the Legislature made a purported appropriation of \$3,000, said section being as follows:

"There is hereby appropriated out of the state treasury, chargeable to the general revenue fund, the sum of three thousand (\$3,000.00) dollars to the Board of Barbers Examiners Fund."

As you state in your letter, there are some other boards which received similar appropriations in House Bill 127, and as they will be affected by the opinion relating to the Board of Barber Examiners, we mention the same briefly in this opinion. Section 12, Laws of Mo. 1933 (extra session), page 12, provides:

"There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund and payable to the Board of Chiropractic Examiners Fund, the sum of Five Thousand Dollars (\$5,000.00)"

Section 12A1, Laws of Mo. 1933 (extra session), page 21 is as follows:

"There is hereby appropriated to the Grain and Warehouse Inspection Fund, out of the State Treasury, chargeable to the General Revenue Fund, the sum of Eighteen Thousand Dollars (\$18,000.00)"

The above purported appropriations appear to have been appropriated in almost identical language. There are a number of other appropriations made which refer to the original appropriation which are treated as additional appropriations and refer to the items contained in the original appropriation. To draw the line of distinction, we quote several of the same.

Section 10A, page 12, Laws of Mo. 1933 (extra session) is as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, and in addition to any and all other appropriations heretofore made for the purpose herein stated, to the State Oil Department for operating expenses, the sum of five thousand (\$5,000.00) dollars."

Section 12A, page 12, Laws of Mo. 1933 (extra session) provides as follows:

"There is hereby appropriated out of the state treasury, chargeable to the General Revenue Fund the sum of Fifteen Thousand Dollars (\$15,000.00) to the Bureau of Building & Loan Supervision Fund for personal services."

There are also a number of other appropriations made, each referring to the original appropriation as to items and purposes. We will not quote them here for the reason that they are not of such importance as to justify encumbering this opinion in order that the point in controversy may be clarified.

Section 19 of Art. X of the Constitution of Missouri is as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."



We construe the phrase used in said section - "and every such law, making a new appropriation, or continuing or reviving an appropriation" - to be sufficient authority for the Legislature to pass an additional appropriation, and we think the intention of the Legislature under Sec. 12B, supra, was to give the Board of Barber Examiners' Fund \$3,000 in addition to the appropriation made at the regular 1933 session. The same is likewise true of Sec. 12, supra, and Sec. 12A1, supra; however, the Legislature, in the appropriation which we are treating as additional, have not so designated, and we base our conclusion that it is an additional appropriation solely on the fact that no reference is made to the original appropriation and that the two sections are not in conflict. Assuming that they are additional appropriations, do they meet the requirements of the Constitution and the decisions of our state?

Referring again to the constitutional section, we find that it contains these phrases: "and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated and the object to which it is to be applied" and "it shall not be sufficient to refer to any other law to fix such sum or object". The appropriations in the three sections quoted specify the sum appropriated, but do not state the object to which it is to be applied nor the items as contained in the original appropriation, nor do they in any wise refer to the original appropriation.

In the decision in the case of State ex rel. Broadwater v. Seibert, 99 Mo. 122, wherein the question of the legality of a reappropriation was discussed, the Court, referring to Sec. 19 or Art. X of the Constitution, made the following observations (l.c. 125):

"It is obvious, from the reading of the foregoing provision, that a reappropriation of an unexpended balance of a former appropriation is upon the same footing as the original appropriation as to the necessity of stating the object for which such reappropriation is made. That question must be determined by the terms of the act of reappropriation and resort cannot be had to the first act for that purpose. By the terms of the reappropriation in this case, the object stated is 'to pay the balance due under the contract made for the enlargement of the capitol building.' When this reappropriation was made, there was nothing due the relator upon any contract for the enlargement of the capitol building, nor had there been any contract whatever made with him by the commissioners."

In the case of State ex rel. Kessler v. Hackmann, 304 Mo., 453, the Court said (l.c. 458-459):



"Section 19, Article X, of the State Constitution, provides: 'No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law.'

"Relators cite the case of State ex rel. v. Wilder, where this court had under consideration funds of the Insurance Department, to show that the money in the Insurance Department was not public money in a sense that it was subject to be appropriated for any general purpose. That was a mandamus proceeding seeking to compel the State Auditor to issue a warrant in payment of an account incurred by the Insurance Department. In that case, however, there was an appropriation by act of the Legislature.

"On the other hand, this court has held that a fund, raised by an act for a special purpose, could not be paid out of the State Treasury except upon an appropriation by an act of the Legislature. (State ex rel. Fath v. Henderson, 160 Mo. 190, l.c. 214; State ex rel. v. Gordon, 236 Mo. 142, l.c. 158). In the case last cited the court had under consideration a fund for the support and maintenance of the Game Department. It was held that the creation of a special fund is not a continuing appropriation of the fund, or of any part of it, to pay accounts drawn against it. That the creating of the fund is one thing, and the appropriation of money to pay accounts against the fund is quite another thing."

In the case of Meyers v. Kansas City, 18 S.W. (2d) 900, the Court, in speaking of an ordinance, said (l.c. 901):

"The ordinance, No. 55,585, in which proposition 8 appears, contains no grant of power, other than that clearly comprehended within the words employed. There is no room, therefore, for the application of the doctrine of implied powers. This is especially true of a grant of powers to a corporation, municipal or otherwise, and if any doubt arises out of the use of the words employed, it is to be resolved in favor of the public and in limiting the

expenditures of the appropriation to the express terms for which it was made. State ex inf. Harvey v. Missouri Athletic Club, 261 Mo. 576, 598, 170 S.W. 904, L.R.A. 1915C, 876, Ann. Cas. 1916D, 931."

Likewise, in the case of State ex rel. Publishing Co. v. Hackmann, 314 Mo.33, l.c. 45-46:

"The fact that the appropriation acts for the support of the Highway Commission during the biennial periods of 1923 and 1924 (Sec. 95, Laws 1923, p.40) and 1925 and 1926 (Sec. 4, Laws 1925, p. 90), mention printing as a part of same and were enacted separately from the general appropriation acts is urged as a reason why the commission should not be required to conform to the requirements of the Public Printing statute (Chap. 89). It is difficult to ascertain with becoming patience wherein lies the logic of this convention. An appropriation act does no more than to set apart or designate the amount and the purposes for which the authorized expenditures may be made by the department named. Whether this be done in a general or a special appropriation act is immaterial in determining the manner in which the fund shall be expended. The manner of its expenditure is usually prescribed in the act creating the department or in a general statute, as at bar, applicable to all departments of a class."

In the beginning of this opinion we quoted sections 10A and 12A relating to appropriations in House Bill 127 which, along with a number of others, state the amount of the appropriation and the object to which it is to be applied. In Sec. 10A it is stated definitely that said appropriation is "in addition to any and all other appropriations heretofore made". The sections in controversy, as before stated, do not allude, refer or state for what purpose the appropriation is made.

In the case of the appropriation to the Board of Barber Examiners, what is the \$3,000 for? Why was the appropriation made? How is it to be used? It is placed in the hands of the Board with no instructions or directions, and what can the Board legally do with it? The original appropriation contains two items--one for personal service, in the amount of \$8,550--the other for operation in the amount of \$9,450. Granting the appropriation is legal, can the \$3,000 be pro-rated between the two items? Can the Board devote all of the \$3,000 for personal service, or all for operation? The other appropriations made in House Bill 127 state the item and the purpose for which it is to be used.

Sec. 43, Art. IV of the Constitution, subdivision 7, is also an authority for making appropriations, and we maintain that the appropriations in controversy do not meet the requirements of this section of the Constitution, the pertinent part of which is as follows:

"For the pay of the General Assembly, and such other purposes not herein prohibited as it may deem necessary; but no General Assembly shall have power to make any appropriation of money for any purpose whatsoever, until the respective sums necessary for the purposes in this section specified have been set apart and appropriated, or to give priority in its action to a succeeding over a preceding item as above enumerated."

#### CONCLUSION

It is the opinion of this department that the appropriation made under Sec. 12B of House Bill 127 does not meet the requirements of the Constitution of Missouri as interpreted by our courts in that said appropriation fails (1) to make any reference to the original appropriation; (2) there is no object or purpose mentioned for the appropriation; (3) there are no items mentioned; (4) there is nothing to warrant the conclusion that it is a part of or an additional appropriation; (5) the purported appropriation is too indefinite and does not conform to the law regarding appropriations.

For the same reasons, we are of the opinion that the appropriations made under Secs. 12 and 12A1 of House Bill 127 are likewise void and of no effect.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

STATE AUDITOR:  
REGISTRATION OF BONDS: )

Injunction suit without writ issued  
does not prevent Auditor from registering bonds.

5-21  
May 31, 1934.



Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This Department is in receipt of your letter of May 18th, 1934, with request for an opinion on the question submitted therein; which letter is as follows:

"The Missouri Utilities Company, a corporation, has filed a petition for injunction against the City of California, Missouri, a municipal corporation, the mayor, clerk, and members of the Board of Aldermen of said city, and Forrest Smith, State Auditor of Missouri, said petition being filed on May 15, 1934 in the Circuit Court of Moniteau County, Missouri; that said petition for injunction is returnable to the September Term, 1934, of said Circuit Court, commencing on the first Monday of September, 1934.

"The purpose of said petition for injunction is to enjoin Forrest Smith, State Auditor of Missouri, his assistants and employees from registering an issue of \$100,000.00 of bonds of the City of California, reported to be authorized by Ordinance #352 and Ordinance #354, passed and approved by the Board of Aldermen of the City of California and pursuant to an election held in said city.

"The bonds have not been presented for registration.

"The petition for injunction has been duly and properly served upon the State Auditor. I would appreciate your opinion as to whether or not the State Auditor of Missouri is bound to withhold the registration of the proposed issuance of bonds when presented, upon the mere serving of the petition for injunction, and in absence of any court order, temporary or permanent, having been served upon the State Auditor. Also whether or not the State Auditor would be held in contempt of Court, or be legally liable in any manner for registering said proposed issue of bonds, if, and when, in his opinion the transcript of proceedings and the bond form are in proper legal form and in full compliance with all of the laws relating thereto.

"It has been the policy of the State Auditing Department for many years to withhold the registration of bonds pending any litigation.

"I trust that we may have your opinion at the earliest possible date, for the reason that the City of California, Missouri is very insistent that our policy be changed, in order that they may fully comply with certain agreements entered into with the Federal government."

You have made a complete statement of the facts in your letter and you ask two questions based on said statement: (1) Whether or not the State Auditor of Missouri should withhold the registration of the proposed issuance of bonds when presented under the facts set forth in your letter, and (2) whether or not the State Auditor would be held in contempt of court, or be legally liable in any manner for registering said proposed issue of bonds, if, and when, in his opinion the transcript of proceedings and bond form are in proper legal form and in full compliance with all of the laws relating thereto.



Section 2915, R. S. Mo. 1929, provides as follows:

"Before any bond hereafter issued for any purpose whatever by any county, city, village, school district, township, special or common road district, or by any levee or drainage district organized and incorporated under the laws of this state, shall obtain validity or be negotiated, such bond shall be presented to the state auditor, who shall, if in the issuance thereof all of the conditions of the law have been complied with, register the same, in a book or books, to be provided for that purpose; and the auditor shall certify, by indorsement on such bond, that all the conditions of the laws have been complied with in its issuance, if such be the case, and that the evidence of that fact has been filed and preserved by him. But such certificate shall be prima facie evidence only of the facts therein stated, and shall not preclude nor prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bond, or the power of the county court, city council, board of aldermen, board of trustees, school board, board of supervisors of any drainage or levee district, the board of commissioners of any special road district, or other authority, to issue such bond; and the remedy by injunction shall also lie at the instance of any taxpayer of the respective city, town, village, school district, township, special or common road district, levee or drainage district, to prevent the registration of any bonds alleged to be illegally issued or funded under any of the provisions of this article."

It is our opinion that this section means that upon a proper petition for injunction being filed in a court of competent jurisdiction by any taxpayer of the respective city, town, village, school district, township, special or common road district, levee



May 31, 1934.

or drainage district, may have the remedy by injunction to prevent the registration of any bonds, and the term "remedy by injunction" means a writ of injunction issued by the court or judge thereof, in vacation, having jurisdiction of the subject matter.

In the petition for injunction in question the plaintiff Missouri Utilities Company, a Corporation, has merely filed a petition in the Circuit Court of Moniteau County, Missouri, against the City of California, Missouri, a municipal corporation, and the Mayor and Board of Aldermen of said city, in which it has joined Forrest Smith, State Auditor of Missouri, as one of the defendants, and service has been had on you and you have been summoned to appear in the Circuit Court of Moniteau County to be begun and held on the first Monday in September, A. D. 1934, in said court.

In another petition for injunction the same plaintiff, Missouri Utilities Company, a Corporation, has filed a petition in the Circuit Court of Cole County against Forrest Smith, State Auditor of Missouri, and service has been had and you have been summoned to appear in the Circuit Court of Cole County, Missouri, to be begun and held on the first Monday in October, A. D. 1934.

The plaintiff, Missouri Utilities Company, a Corporation, in both of the above suits, as we understand, is the owner of a privately owned light plant at California, Missouri; in neither of said suits has the plaintiff asked for a temporary restraining order from the Circuit Courts of Moniteau County or Cole County, respectively, or from the Judge thereof, in vacation, having jurisdiction in Moniteau or Cole County, Missouri, and no writ of injunction, of course, has been issued, and no injunction bond has been given in either case as required by Section 1507, R. S. Mo. 1929. Therefore, you are not restrained, in taking whatever action you see fit, by the Circuit Courts or Judge thereof, in vacation.

We think that if, in your opinion, the transcript of proceedings and the bond form are in proper legal form and in full compliance with all the laws relating thereto that you may register said

Hon. Forrest Smith

-5-

May 31, 1934.

bonds notwithstanding the filing of the petitions for injunction and summons duly and properly served on you for your appearance at the next term of both the Moniteau County Circuit Court and the Cole County Circuit Court.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General

CRH:EG

Recorder of Deeds

1. Where offices of Circuit Clerk and Recorder are consolidated due to population they may not be separated until the next decennial census but at that time are separated as a matter of law if the population requirement is met.
2. Salary of Circuit Clerk in county of 19940 population is \$1900 and same where clerk is ex-officio recorder.

June 16, 1934.

6-25



Miss Veda P. Smith  
Recorder of Deeds  
Carrollton, Missouri.

Dear Miss Smith:

We have your letters of May 21, 1934, and May 22, 1934, respectively in which an opinion is requested as follows:

"Will you please give me the following information:- The Recorder's and Circuit Clerk's office in the County of Carroll, will probably be united, even tho' about 300 population is lacking in the required quota of 20,000.

"If a County should reach 20,000 population after the offices have been consolidated, does the state law require said county to finish out term with both offices united, or will they be divided again according to population?

"Who appoints the Ex-Officio Recorder, and does politics rule the selection of the same?

"What salary is paid the Circuit Clerk under the new rule, and what salary is the Ex-Officio Recorder supposed to get?

"What advantage is this consolidation, and what becomes of the fees outside of Ex-Officio Recorder's salary?

"Who's duty is it to unite the two offices, the retiring Recorder or newly elected Circuit Clerk, and does this change occur Jan. 1, 1935 or after?"

The question of the separation of the offices of Circuit Clerk and Recorder of Deeds cannot arise until the next decennial census is taken which will not be until 1940. Until that time we are of the opinion that there is no way within legal comprehension to compute the population for such purpose, hence it cannot be legally ascertained until that time whether or not the required twenty thousand mark has been reached. Since there is no special gauge for population set out in

the particular laws on this subject we are of the opinion that only the decennial census remains. We are further led to this conclusion by the fact that in the somewhat kindred article relating to the salaries and fees of circuit clerks and such we find the following provision, Laws 1933, page 370:

"Sec. 11808. Last decennial census to determine population.- The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants."

Of course in the interim should the legislature pass a law providing for the determination of population for this purpose in some other manner the difficulty would be obviated.

Article XIV, Sec. 5 of the Constitution of Missouri, provides as follows:

"Sec. 5. Tenure of office.- In the absence of any contrary provision, all officers now or hereafter elected or appointed subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."  
(underlining ours).

The coming election in your county will place the circuit clerk in office not only as clerk but also as ex-officio recorder of deeds; in other words he might be therefore said, in view of the constitutional provision above quoted, to be entitled to hold both offices for the full official terms. Could a population of over twenty thousand therefore be ascertained, either by act of the legislature so allowing or after the next census, the question would then arise whether the clerk would be entitled to serve out the full terms in his dual capacity, or whether the offices should be immediately separated. In this connection we call your attention to the words in the above quoted constitutional provision, i.e. "In the absence of any contrary provision."~~REPEATED~~

In this instance we feel that there is such a contrary provision, and refer you to the following two sections, Laws 1933, page 360:

"Sec. 11526. Office of recorder of deeds.- There shall be an office of recorder in each county in the state containing 20,000 inhabitants or more, to be styled, "The office of the Recorder of Deeds."

"Sec. 11528. Circuit clerks to serve in certain counties:-  
The clerks of the circuit courts shall be ex-officio recorders in their respective counties, except in counties containing 20,000 inhabitants or more."

The above two sections plainly state in effect that when the population shall be twenty thousand or more the offices of circuit clerk and recorder of deeds shall be separate. We feel that these sections take the situation out of the constitutional provision. In other words, when the population can be properly and legally ascertained to be twenty thousand or more then ipso facto the separation of the offices is accomplished by operation of law.

Your question as to who appoints the ex-officio recorder of deeds has already been answered, i. e. when the circuit clerk is elected and takes office he does so in the dual capacity as one and the same person.

As to the salary to be paid the circuit clerk and ex-officio recorder we refer you to Laws of 1933, page 369, as follows:

"Sec. 11786. Fees of circuit clerk in certain counties:- The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. In counties having a population of less than 7,500 persons, the sum of \$1000.00; in counties having a population of 7,500 and less than 10,000 persons, the sum of \$1100.00; in counties having a population of 10,000 and less than 12,500 persons, the sum of \$1300.00; in counties having a population of 12,500 and less than 15,000 persons, the sum of \$1500.00; in counties having a population of 15,000 and less than 17,500 persons, the sum of \$1700.00; in counties having a population of 17,500 and less than 20,000 persons, the sum of \$1900.00; in counties having a population of 20,000 and less than 25,000 persons, the sum of \$2100.00; in counties having a population of 25,000 and less than 30,000 persons, the sum of \$2300.00; in counties having a population of 30,000 and less than 70,000 persons, the sum of \$2500.00; in counties having a population of 70,000 and less than 80,000 persons, the sum of \$3000.00; provided, that in any county wherein the clerk of the Circuit Court is ex-officio recorder of deeds, said offices shall be considered as one for the purpose of this section."

As to what is the advantage of this consolidation we can of course not say what the legislature had in mind but the saving of money to the county and state would seem to be an important factor. The extra fees are to be returned to county and state.

Concerning whose duty it is to unite the two offices we feel it is the duty of the newly elected circuit clerk. Section 11534, Laws 1933, page 361, provides that present recorders shall serve out



their terms as separate officers. Since therefore there is no consolidation until after the present recorder has left office it of necessity remains for the new circuit clerk to effect the consolidation.

The change occurs on the first Monday in January or January 7, 1935, the date on which the newly elected circuit clerk takes office. (Sec. 11664 Revised Statutes of Missouri, 1929). Since the newly elected circuit clerk is the successor of the recorder, the recorder will hold over until that time.

Trusting the above is the information you desire, we are

Very truly yours,

Chas. M. Howell, Jr.,  
Asst. Attorney General.

Approved:

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Attorney General.



Sl.

ATOR:

1. State Auditor cannot issue a warrant under sub-section D, Laws 1933, page 151, which section appropriates money for the operation expense of the motor vehicle registration department, to cover a loss due to robbery.
2. A warrant, can, however, be issued under such section to pay collection charges on checks during the bank moratorium.



June 29th, 1934.

Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Missouri.

Dear Sir:-

We have your letter of November 16, 1933, in which was contained a request for an opinion as follows:

"Enclosed is a copy of a letter from V. H. Steward, Commissioner of Motor Vehicles, which is self-explanatory.

In view of the fact that a robbery existed in the Branch office at Clayton, Missouri, and the amount taken was in excess of \$113.50 insurance carried, please advise me if a warrant can be issued from the 1933 Laws, page 151, sub-section D under Operations to Richard R. Nacy for the amount of the loss of this robbery.

Also please advise if from this same appropriation the charge of \$32.18 can be paid for the collection charges on checks during the bank moratorium.

(Signed) Forrest Smith."

(Enclosure):

Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Missouri.

October 2, 1933.

This is to certify that on May 24, 1933, the safe in the branch office at Clayton, Missouri, was opened and robbed. The amount taken from the safe was \$113.50 in excess of insurance carried. We respectfully ask that you issue a warrant payable to Richard R. Nacy, State Treasurer, for this amount.

This statement of facts is true to the best of my knowledge and belief.

(Signed) V. H. Steward  
Commissioner of Motor Vehicles."

Hon. Forrest Smith--#2

June 29th, 1934.

Article X, Section 19, of the Constitution of Missouri, provides that no money shall be paid out of the state treasury except in pursuance of an appropriation made by law.

Sub-section D of the appropriation act for the Motor Vehicle Registration Department, Laws 1933, page 151, provides in part as follows:

"D. Operation:

General expense, consisting of communication, printing and binding, transportation of things, traveling expenses of commissioner of motor vehicle department, his representatives, within and without the state, and other general expenses including rent on branch offices and payment of premiums on surety bonds and insurance for branch office managers at seven cents per pair, for refund of overpayment and to redeem checks...\$ 408,800

In the case of Meyers vs. Kansas City, 18 S. W. (2nd) 900 (1929) the Supreme Court of Missouri sitting in banc stated concerning appropriation acts, at page 901, as follows:

"Another general rule in the construction of statutes, applicable as well to municipal ordinances, is that acts of the character here under review are to be strictly construed."

Having considered the above, we are of the opinion that a warrant cannot be issued under the section in question for the amount of loss, or any part thereof, occasioned by the robbery. There is no provision in the appropriation section which could be construed to include such, even did our courts permit a loose construction of such acts. In so much, therefore, as we cannot justifiably bring the situation within the act of appropriation no warrant can issue legally or constitutionally.

As to whether a warrant can issue under such section for the purpose of paying collection charges on checks during the bank moratorium we are disposed toward a different view. We feel that the wording and general purview of the section would permit a warrant to be issued for such a purpose. The general words "for refund of overpayment and to redeem checks" are used, and since paying the collection charges on the checks in question is certainly an essential part of the proper administration and operation of the department, we find no hesitation in

Hon. Forrest Smith--#3

June 29th, 1934.

approving the issue of such a warrant. The divergence between issuing a warrant for this purpose and issuing one to compensate for a robbery is, in our opinion, apparent.

Very truly yours,

CHARLES M. HOWELL, Jr.,  
Assistant Attorney-General.

APPROVED:

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Attorney-General.

- R-7
- I. RELATING TO PAYMENT OF TAXES BY TAXPAYERS IN SPECIAL ROAD DISTRICTS IN COUNTIES UNDER TOWNSHIP ORGANIZATION.
  - II. RELATING TO SPECIAL ROAD AND BRIDGE TAXES, LEVY AND PAYMENT:

July 2, 1934

FILED  
SL

Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We acknowledge your letter of date June 29th, 1934, in which you state and inquire as follows:

"We are in receipt of a request from a County Clerk for an opinion from your office establishing the tax to be paid in a Special Road District which comprises a part of a Township, this County having Township organization. The taxpayers within this Special Road District, of course, are subject to taxation under the regular procedure for State, County and School taxes.

The first question is, do the taxpayers in the Special Road District pay to the Township the levy made by the Township Board for Township general purposes?

The second question is, do the taxpayers in this Special Road District pay the special road and bridge tax levied by the Township Board in addition to the levy which might be made by the Special Road District?"

I

Taxpayers in Special Road Districts, under Township organization, pay to Township trustee and ex officio treasurer taxes levied by township board for general purposes.

Section 12299 Revised Statutes, 1929, provides as follows:

"In each township in this state, organized under the provisions of this chapter, there shall be a board of directors, composed of the township trustee and members of the township board, whose duty it shall be: First, to audit all accounts of township

Hon. Forrest Smith

July 2, 1934

officers for services rendered as such officers except the township assessor, for services as such assessor; second, to audit all other accounts or demands legally presented to them against the township; third, to levy all taxes for township, road and bridge purposes, and all other duties provided by this chapter for the township board of directors to perform."

Section 12288 Revised Statutes, 1929, provides as follows:

"The township trustee and ex officio treasurer of each township shall receive and pay over all moneys raised therein for defraying township expenses: Provided, that before entering on the duties of his office he shall execute such bond as is required in section 12279; and in case of default, it is hereby made the duty of the township clerk to institute suit thereon, in the name of the township, in any court of competent jurisdiction."

From section 12299 (Supra) it will be observed power is vested in the township board to levy taxes for township, road and bridge purposes, and under and by the provisions of section 12288 (Supra) the township trustee and ex officio treasurer of the township shall receive all moneys raised for defraying township expenses.

## II.

Taxpayers in Special Road Districts in Counties having township organization, pay the taxes levied by the township board for road and bridge purposes, in addition to Special Road and Bridge tax, provided under section 22 Article X of Constitution.

Section 22 of Article X of the Constitution of Missouri, provides as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article X of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion,

Hon. Forrest Smith

July 3, 1934

levy and collect, in the same manner as State and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

In State Ex Rel Kersey v. Land & Cooperage Company, 317 Mo. 1. c. 47, the court said:

"Section 22 of Article 10 of the Constitution expressly grants an absolute discretion to the county court to levy a tax or not to levy a tax for road purposes, as its judgment may suggest. The tax of twenty cents on the one hundred dollars' valuation will be sufficient for road purposes in many of the counties; even a less sum may be sufficient. However, there may be counties during a certain time in need of more funds for road purposes than can be realized from a levy of twenty cents on the one hundred dollars' valuation, authorized by Section 10683, Revised Statutes 1919. Many emergencies may arise causing the need of more money, for such purposes, than can be realized under the levy authorized by said section. It is no answer that the Legislature in that event could raise the maximum of twenty cents on the one hundred dollars' valuation for road purposes. The rate fixed for county purposes in counties having ten million dollars and not exceeding thirty million dollars is fifty cents on the one hundred dollars' valuation, hence only thirty cents on the one hundred dollars valuation is left for other general county purposes. It is not likely the Legislature could, in fairness to other demands for county purposes, fix the maximum rate for road purposes higher than twenty cents on the one hundred dollars' valuation. Again, if a higher rate was fixed it would apply to all counties in the state, and many of these counties would not need the amount of money realized from a higher rate of taxation. Therefore, we conclude that the power granted to the county courts of this state by Section 22 of Article 10 of the Constitution to levy and collect, in their discretion, a special tax not to exceed twenty-five cents on the one hundred dollars' valuation for road and bridge purposes, is a power to be used in emergencies, as in the judgment of the court



an emergency exists; and that this power was lodged by the organic law with the county courts that these emergencies might be speedily taken care of. The fact that the fund realized from a levy under Section 22 of Article 10 of the Constitution is for county purposes, is not controlling or even persuasive. Certainly, it cannot be classified under general county purposes, for this classification is fixed by law (Sec. 12866, R.S. 1919); and the Constitution classifies it as a special road and bridge tax."

What the Supreme Court said in the foregoing case with reference to the power granted to county courts of this State, by section 22 of Article X of the Constitution to levy and collect, in their discretion, a special tax not to exceed twenty-five cents on the one hundred dollars' valuation for road and bridge purposes applies with equal force to township boards in counties having township organization.

It will be observed that the tax levied by the Township Board of directors, under and by provision of Section 22 of Article X of the Constitution, is in addition to any road and bridge tax that may be levied by the commissioner of a special road District as provided in section 8182 R.S. 1929, which reads as follows:

"The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; and, whenever such commissioners shall, at any time between the first day of January and the first day of March of any year, file with the clerk of the county court a written statement that they have levied such tax, and stating the amount of the levy for each hundred dollars assessed valuation, the county clerk, in making out the tax books for such year shall charge all property taxable in such district with such tax, and such tax shall be collected as county taxes are collected. Whenever it shall be made to appear to the state auditor that the board of commissioners has failed or neglected to comply

Hon. Forrest Smith

July 2, 1934

with this section in making provision for the payment of interest on and the principal of bonds issued it shall be the duty of the state auditor, on or before the first day of May, to perform and discharge the duties of the board of commissioners in so far as it is its duty to levy special taxes for the purpose of paying the interest on and the principal of bonds issued."

In view of the said statutory authority, and the grant given to Township Boards in their discretion to levy a special road and bridge tax, not to exceed twenty-five cents on each \$100 valuation, we hold that this tax is in addition to any road and bridge tax, levied by the commissioners of a special road district organized under and by virtue of Article 16, R.S. 1929.

Respectfully submitted,

W. W. Barnes

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Assistant Attorney-General

APPROVED:

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Attorney-General

WB/AS

EXPENSE VOUCHERS: ARE MEMBERS OF THE ADVISORY BOARD TO THE STATE BUILDING COMMISSION REQUIRED TO FILE SUCH FOR REIMBURSEMENT OF EXPENSE MONEY?

STATE EMPLOYEES: CAN SUCH BE EMPLOYED BY TWO DIFFERENT <sup>STATE</sup> DEPARTMENTS SIMULTANEOUSLY?

July 12, 1934.



Hon. Forrest Smith, Auditor  
State of Missouri,  
Jefferson City, Missouri.

Dear Sir:

Your letter of June 11, 1934, received. In this letter you state and inquire as follows:

"Will you please advise me whether the Advisory Board appointed by the State Building Commission will come under the provisions of Sec. 11405 R. S. Mo. 1929, relative to filing vouchers for reimbursement of money paid out as expenses.

Also please advise me whether an employee of any department of the state can receive compensation and traveling expenses from another department of the state government, or in other words, draw money for the same period from two different departments of the state government."

I.

"Whenever any official, employe or any other person shall travel at the public expense of the state and is paid or reimbursed from any public funds derived from taxes, fees, licenses, or in any other manner prescribed by law, the provisions herein set forth shall govern and no other. \* \* \* \* \*  
(underscoring writer's own).

\* \* (c) Before any payment or reimbursement is made to any person on account of any traveling expenses, the original written authority provided herein shall be filed with the state auditor. \* \* \* \* \*"  
R. S. Mo. 1929, Sec. 11405.

The language in this statute seems fairly clear and inclusive. The words employed in the introductory paragraph clearly negative the existence of any other statutory provision governing reimbursement of expense money to persons in the service of the state. Subsection "C" of the statute clearly provides for the filing with the state auditor of the written authority provided for in the statute.

The only remaining question would seem to be as to whether members of the Advisory Board to the Building Commission are entitled to expense money.

" \* \* \* \* \* The members shall receive no compensation for services on the commission, but shall be allowed reimbursement for all traveling and other expenses actually incurred in carrying out the purposes of this act."  
Laws of Missouri, Extra Session - 1933 - 1934,  
p. 107, Section 1.

The quoted portion of this section indicates clearly that the members of the Building Commission are to be allowed reimbursement for expenses incurred in carrying out the purposes of the act. Reasonably, therefore, so long as the members of the Advisory Board are engaged in aiding the Commission to carry out the purposes of the act, they are entitled to reimbursement for expenses in accordance with the procedure laid down in Section 11405, supra.

## II.

With reference to your second query:

"That no person elected or appointed to any office or employment of trust or profit under the laws of this State, or any ordinance of any municipality in this State, shall hold such office without personally devoting his time to the performance of the duties to the same belonging."  
Constitution, Article II, Section 18.

This provision of the Constitution appears to be at least a partial limitation on the right of one person to be employed in two different departments of the state government, since in many cases it would be impossible to give personal attention to the duties of two offices.

"No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any office under this State, or any municipality thereof; and no member of Congress or person holding any lucrative office under the United States, or this State, or any municipality thereof (militia officers, justice of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or remain a member thereof, after having accepted any such

office or seat in either house of Congress."  
Article IV, Section 12.

Thus it is seen that no member of Congress may lawfully hold any other state office of employment.

"In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia." Article IX, Section 18.

By this provision it is made unlawful for one person, in cities or counties having more than 200,000 population, to be a state officer, and at the same time be an officer of any county, city, etc. It will be noted that there are certain exceptions, however.

At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. *State v. Bus*, 135 Mo., 325; *State v. Lusk*, 48 Mo., 242. In both of these cases it was stated that "the rule at common law is well settled that one who, while occupying a public office, accepts another which is incompatible with it, the first will, ipso facto, terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first." Where the functions of two offices are inconsistent, they are regarded as incompatible. *State v. Run*, 277 Mo., 38. The inconsistency which at common law makes offices incompatible does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other, or to audit the accounts of the other. *State v. Lusk* (supra); *Attorney-General v. Henry*, 150 N. E., 539; *State v. Jones*, 110 N. W., 431; *State v. Wittmer*, 144 P., 643; *Hermann v. Lampe*, 194 S. W., 122.

It is very difficult to give an intelligent discussion of the question considered in this division of the instant opinion without information as to what two particular offices are under consideration. The writer has been compelled to limit himself to a broad, general statement of the law in order to reply to the broad question put. To under-



Hon. Forrest Smith,

-4-

July 12, 1934.

take to set out an exhaustive list of compatible or incompatible offices, which would meet any situation, is an obvious impracticability.

It is, therefore, the opinion of this department that Article II, Section 18 of the Constitution refers only to full time employees, who, by statute or contract, are to give their full and exclusive time to the one department of the State. It cannot apply to part time employees of the State. Certain offices named in Article IV, Section 12 and Article IX, Section 18 of the Constitution cannot be filled by the same person, because of the Constitutional provision. The question of whether or not two part time offices of the State would be incompatible is a question of fact, which will on necessity have to be determined by a construction of the duties and powers delegated to the particular office, position or department involved.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

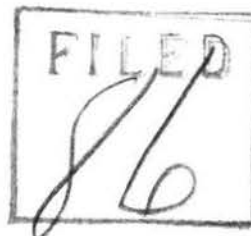


BLIND PENSIONS:

Effect of Finding of Eligibility by Commission made in ignorance of death of applicant.

8-2

July 27, 1934.



Honorable Forrest Smith, State Auditor,  
Jefferson City, Missouri.

Dear Sir:

A request for an opinion has been received from you under date of July 12, 1934, such request being in the following terms:

"We would like very much to have the opinion of the Attorney General upon the liability of the state to pay blind pension to the estate of a pensioner where it appears that such pensioner had died just prior to the finding of the Commission that he was eligible for pension.

The usual procedure is for the blind pension applicant to apply either to the Probate Court or the Blind Commission. He is then examined by a competent oculist at the direction of the Commission. Thereafter an investigator appointed by the Commission investigates the particular case. With the consequent reports before it, the Commission then makes its finding as to the eligibility of the applicant for enrollment. In the question involved here the pension applicant died just prior to the time the Commission rendered its finding, which was rendered without any knowledge of his death. The law (Sec. 8896, R. S. Mo. 1929) provides that after a pensioner is enrolled, his pension shall commence from the date of his application. After the name of such pensioner had been certified to the Auditor, it was discovered that he was deceased. Should the Auditor proceed to make payment for the period from the date of application to death, or was the applicant ever validly enrolled so as to require any warrant to be drawn at all?"

L.

RIGHT TO RECEIVE BLIND PENSION IS PERSONAL RIGHT.

While there is no provision in the statutes expressly stating the purpose of the provisions relating to blind pensions, such purpose is implicit and indicates the desire of the state to aid and assist such persons as combine the misfortunes of poverty and blindness. The Constitution of Missouri, Article IV, Section 47, authorizes a tax to raise a fund for the "pensioning of the deserving blind." For a person to be a member of the class of the deserving blind, such person must personally need the assistance of the state. There is no intention displayed in the statutes to help the families or personal representatives of the deserving blind. Thus it would seem entirely clear that if a blind person died without having applied for a pension the right so to apply and receive the pension would die with him, and his executor or administrator could not bring an original application on the ground that the decedent himself would be entitled to make such application. Whether or

July 27, 1934.

not a right given by statute survives the death of the person to whom it is given depends on the intention displayed in the statute. See *Siberell v. St. Louis-San Francisco Ry. Co.*, 9 S. W. 2d, 912 (1928), 320 Mo. 916, wherein the court said:

"It may be conceded that the question as to whether a particular cause of action, dependant upon a statute survives the death of the plaintiff, or of the beneficiary for whose benefit the action is brought, is a question of right, and not of procedure, depending upon the substance of the cause of action, and its solution must be sought in the statute giving the right of action." (9 S. W. 2d, 917)

It would thus seem clear that if the application had not been made before the death of the blind person all rights to receive the pension would be extinguished.

## II.

EFFECT OF FINDING OF COMMISSION.

Had the Commission for the Blind at the time it was called upon to make a decision as to the eligibility of this applicant been advised of his death, it could not have found him eligible for a pension for the reasons outlined above, because it would no longer be possible to pay a pension to him, and his personal representatives and heirs would have no claim to it. The question then remaining is whether or not the finding of the Commission that the applicant was eligible for a pension created any rights in his personal representatives or heirs, when such finding was based entirely on a mistake of fact, and when such finding would not and could not have been made had such mistake not existed. It is submitted that The Commission on its own motion could set aside its finding as erroneous, and that the decisions of the courts involving the setting aside of judgments based on mistakes of fact would serve as a persuasive analogy. In the case of *State ex rel Potter v. Wiley*, 219 Mo. 667, 118 S. W. 647 (1909) the question of setting aside a judgment which had been rendered against a person who is dead, the court having no knowledge of his death at the time of rendering the judgment, was raised, and the court said:

"The great preponderance of authority is to the effect that, where the court has acquired jurisdiction of the subject-matter and the persons during the lifetime of a party, a judgment rendered against him after his death is, although erroneous and liable to be set aside, not void nor open to collateral attack." (219 Mo. 685).

In the case of *Dugan v. Scott*, 37 Mo. App. 663 (1889) the following facts were before the court:

"This is a proceeding in the nature of a writ of error coram nobis begun in the circuit court of Pettis county. By reference to the statement in the cause, it will be seen that the party

July 27, 1934.

defendant, principal in interest in the cause, died after service had upon him, but before the judgment was rendered. He had made no appearance to the suit, and the fact of his death was not known to the court at the time of rendering the judgment, and nothing from which it could be ascertained appeared of record until this proceeding originated." (669)

The lower court set aside its own judgment on the ground it was erroneous and based on mistake of fact, and the appellate court sustained such ruling.

There would apparently be no reason why the Commission for the Blind could not follow the precedent of the courts in setting aside a finding based on mistake of fact. Since the Commission is only authorized to find a "person" eligible for a pension, and since there was no person in existence who could be the subject of this particular finding at the time it was made, it would likewise seem to be the duty of the Commission to set aside its finding, and when this is done even although by Revised Statutes of Missouri 1929, Section 8896, the finding of the Commission causes the pension payments to begin as of the date of the application, when the finding is set aside it could no longer have any effect, retroactive or otherwise, and there would be no justification to you after such event for making any payments.

CONCLUSION.

It is our opinion that where a finding is made by the Commission for the Blind that a person is eligible for pension in ignorance of the fact that such person has died between the date of the application and the date of the finding that the Commission has the power and is under a duty to set aside and vacate such finding, that the Auditor should, upon receiving notice of the setting aside of such finding, strike the name of such petitioner from the rolls, and that no payments to the personal representatives or heirs of such applicant would be authorized or justified.

Yours very truly,

EDWARD H. MILLER

APPROVED:

ASSISTANT ATTORNEY GENERAL.

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ATTORNEY GENERAL.

OCCUPATION TAX: Individual truck haulers subject to payment of the tax when transporting persons or freight for the public but not when transporting freight or persons under a contract with employer.

7-31

July 30th, 1934



Hon. Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Sir:

This Department acknowledges receipt of your letter of July 10th relating to the question as contained in your letter as follows:

"We would be pleased to have the opinion of the Attorney General upon the question of the applicability of the Retailer's Occupation Tax Act to individuals transporting property for hire. The law, under Section 2-A (g), requires 'truck lines, and all character of transportation companies engaged in the transportation of \* \* \* freight for hire' to make return and pay tax, but we are in doubt about whether or not individuals such as contract haulers or persons owning a truck and working for a contractor are subject to the tax."

Section 2A of the Occupation or Privilege Tax Act is as follows:

"For the privilege of a person engaging in the business of rendering the services, furnishing or selling the substances and things hereinafter in this section designated or defined, a tax is hereby imposed upon such person at the rate of one-half of one per cent of the gross receipts of any such person from the sale and/or the furnishing of the services, substances and things hereinafter in this section designated or defined, sold and/or furnished in this state on and after the effective date of this act to and including December 31, 1938.

The tax imposed by this section as to the sale of services, substances and things shall apply to the businesses of:

- (a) Sales of admission tickets, cash admissions, charges and fees to places of amusement, games and athletic events.
- (b) Sales of electricity or electrical current, water, sewer service, gas (natural or artificial), to domestic commercial or industrial consumers.
- (c) Sales of service to telephone subscribers and others for the transmission of messages and conversations, both local or long distance, and upon the sale, rental or leasing of all equipment or services pertaining or incidental thereto.
- (d) Sales of service for transmission of messages by telegraph companies.
- (e) Newspaper advertising and newspaper service.
- (f) Commercial laundry, cleaning and dyeing service.
- (g) Sales of tickets, fares and services by railroad companies, express companies, bus lines, truck lines, and all character of transportation companies engaged in the transportation of persons or freight for hire.
- (h) Bill board and all other kinds of outdoor advertising."

The Section of 2A to which you refer is subsection (g) which is as follows:

"(g) Sales of tickets, fares and services by railroad companies, express companies, bus lines, truck lines, and all character of transportation companies engaged in the transportation of persons or freight for hire."

Subsection (g) quoted supra, appears to refer to various transportation companies and not to individuals. However, the last phrase states "and all character of transportation companies engaged in the transportation of persons or freight for hire", and also the phrase "for the privilege of a person engaging in the business of rendering the services."

July 30th, 1934

The Act under Section 1 is Section (a) which defines "person" as follows:

" (a) 'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number."

We are of the opinion that if an individual hauls and operates a truck and transports freight or persons for hire and solicits the general public's business of this nature, he would come within the terms as contemplated by the Act and a return should be made of the gross receipts derived therefrom.

As to the portion of your letter, "or persons owning a truck and working for a contractor", we are of the opinion that such person or persons do not come within the terms of the Act for the reason that the owner and his truck are employed by the contract hauler by special contract and do not hold themselves out to the public and solicit business generally and as a consequence are employees and therefore no return should be made to you on the gross receipts.

Respectfully submitted,

OLLIVER W. NOLLEN  
Assistant Attorney-General

APPROVED:

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ROY McKITTRICK  
Attorney-General

OWN:mh



Recorder of Deeds

Proper fee for recorder to charge for marriage license is \$1.00 but where recorder conscientiously retains doubt as to age he may take affidavit as to age at a charge of \$ .25 additional.

8-13  
August 4, 1934



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Missouri.

Dear Sir:

We have your letter of May 17, 1934 in which is contained a request for an opinion as follows:

"Will you please advise us what, in your opinion, is the proper fee for a recorder of deeds to charge for the issuance of a marriage license. In making county audits we find that some recorders charge \$1.00 under Section 2979, while others charge \$1.50 or \$2.00, justifying the additional charge over \$1.00 by Section 11804 which provides 'for every certificate and seal - 50¢.' The recorder in these latter cases, requires an affidavit from the applicant as to his age where the matter is in doubt.

"In this connection we particularly call your attention to Section 2980 wherein it is provided that should a recorder neglect or refuse to issue a license on payment or tender of the fee of \$1.00, he shall be deemed guilty of a misdemeanor."

Section 2978 Revised Statutes of Missouri 1929 provides that recorders shall issue marriage licenses to persons legally entitled thereto.

Section 2979 Revised Statutes of Missouri 1929 provides as follows:

"Sec. 2979. Licenses to be recorded. The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of one dollar, to be paid for by the person obtaining the same."

Section 2980 Revised Statutes of Missouri 1929 provides that if any recorder willfully refuse or neglect to record or issue to a person legally entitled thereto a license, on payment of the fee provided, he shall be deemed guilty of a misdemeanor and fined not less than five dollars nor more than one hundred dollars.

Section 2983 Revised Statutes of Missouri 1929 provides among other things that no recorder shall issue a license to any female under the age of eighteen or any male under the age of twenty-one

Mr. Forrest Smith - #2  
August 4, 1934

years without a written consent from parent or guardian.

Section 2984 Revised Statutes of Missouri, 1929, provides among other things that any recorder issuing a license contrary to said provisions shall be deemed guilty of a misdemeanor and fined not exceeding five hundred dollars; that in addition he shall be subject to a civil action by the parent or guardian with recovery limited to five hundred dollars.

The above sections are all contained in Chapter 19 Revised Statutes of Missouri, 1929, said chapter being entitled "Marriage and Marriage Contracts."

On the face of the matter we have a rather anomalous situation in that the recorder is required to do certain things, is penalized if he does not do them, is penalized if through some circumstance not necessarily within his control he makes a mistake, and yet no provision appears in the chapter for any steps the recorder may take to safeguard himself in the performance of his duties. In other words, when a person states himself or herself to be of legal age, unless the recorder knows the parties personally, he has no way of knowing whether or not they speak the truth. Where a conscientious doubt exists in the mind of the recorder he could of course refuse to issue and record the license, and such would probably not be deemed "wilful" so as to subject him to the penalty of Section 2980. An affidavit as to age could then be required merely as a matter of proof in order to obviate further difficulty. For such authority on the part of the recorder we go to the general statutes.

Section 11562, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 11562. Recorder may administer oaths, when.- Hereafter whenever, under any law of this state relating to the duties of the recorder of deeds in any county of this state, it becomes necessary for any person to be sworn to any statement, affidavit or other papers of any kind, the recorder of deeds shall be authorized to administer an oath to any person in matters relating to the duties of his office, with like effect as clerks of courts of record: Provided, he use his seal of office to the jurat, as clerks of courts of record do. He shall receive the same compensation allowed by law for like service as clerks of courts are now allowed."

We are on the opinion that the affidavit as to age in the situation above referred to is necessary under the laws relating to the duties of recorders and is hence within the above section. We do not mean to say that in every case of the issuance of a marriage license the recorder may require an affidavit or affidavits. We merely refer to cases where the matter of age is in doubt and the necessity for the recorder to protect himself arises.

Mr. Forrest Smith - #3  
Aug. 4, 1934

The question then arises as to how much the recorder is entitled to charge for each affidavit. Section 11562 above quoted fixes the compensation as that allowed to clerks of courts of record for a like service.

Section 11781, Revised Statutes of Missouri, 1929, relating to fees of clerks of county courts provides in part as follows:

"For oath and certificate to an affidavit.... \$ .25."

Section 11785, Revised Statutes of Missouri, 1929, relating to fees of clerks of circuit courts and courts of common pleas, provides in part as follows:

"For oaths and certificate to affidavit ....\$ .25."

The fee then, to be charged by the recorder for each affidavit is twenty-five cents. The law is so explicit on this that we feel it takes precedence over the allowance of fifty cents for certificates and seals generally in Section 11804 referred to in your letter. Specific wording as in the sections above quoted will always take precedence over general wording as to a particular situation.

In this connection, however, it is well to note Section 7500, Revised Statutes of Missouri, 1929, which provides that in all cities having a population of over 100,000, certain officers, including the recorder of deeds, are authorized and required to administer oaths in connection with the business of their offices free of charge.

In view of the above, therefore, we are of the opinion that the proper fee for a recorder to charge for the issuance of a marriage license is \$1.00. If a recorder conscientiously needs an affidavit from each party the top charge would be \$1.50; but in no case could the charge be \$2.00.

Very truly yours,

CHAS. M. HOWELL, JR.  
Assistant Attorney General

CMH-Jr:LKL

Approved: \_\_\_\_\_  
Attorney General

PUBLIC SERVICE COMMISSION - Appropriation Act, construction thereof.

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8-12  
August 9th, 1934.



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We have your request of July 25th, 1934 for  
an opinion upon the following facts:

"I would like an opinion from  
your office as to whether the  
salary of the Secretary, General  
Counsel, Assistant Counsel, rate  
experts, stenographers and clerks  
of the Public Service Commission  
can be paid out of the appropriation  
given to the Public Service Commission  
to operate the motor bus and truck  
traffic."

In the construction of the Appropriation Act  
involved, Sections 23 and 24, p.p. 158-160, Laws Mo. 1933,  
we set out the following constitutional statutory pro-  
visions: Article X, Section 19:

"No moneys shall ever be paid out  
of the treasury of this State, or  
any of the funds under its manage-  
ment, except in pursuance of an  
appropriation by law; \* \* and every  
such law, \* \* shall distinctly speci-  
fy the sum appropriated, and the ob-  
ject to which it is to be applied; \* \* "

**#2 - Honorable Forrest Smith**

Section 11404 R. S. Mo. 1929, relating to the general duties of the State Auditor, provides that in all warrants drawn by him on the treasury, he shall,

" \*\* express in the body of every warrant which he may draw upon the treasury the particular fund, appropriated by law, out of which the same is to be paid; \*\* "

Section 23 of the Appropriation Act, Laws Mo. 1933, p. 158, makes appropriations as follows:

"Salary of general counsel.....\$8,100  
Salary of the Secretary..... 6,480 "

Thus, by a specific appropriation under the mandatory requirements of the State Constitution, the Legislature has provided that the salaries of the general counsel and the secretary shall be paid from Section 23 of the Appropriation Act, supra.

Similar appropriation is made in Section 24 for the assistant counsel, rate experts, stenographers and clerks of the Public Service Commission, all of which are payable out of the motor bus and truck traffic fund - Laws Mo. 1933, p.p. 159-160.

The general rule is that appropriations for specific purposes may only be spent for those purposes, and is found well stated in 4 C.J. p. 1460:

"An appropriation of funds is an authority from the legislature, given at the proper time and in legal form to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the state; \*\* "



#3 - Honorable Forrest Smith

In State Board of Health v. Frohmlor, State Auditor, 23 Pac. (2d) 941, l.c. 942, the Supreme Court of Arizona said:

"When the Legislature has specifically stated the amount that may be spent for any purpose, \* the department, institution, or office must operate within that sum and may not take from an appropriation for another purpose to supplement it. "

It is, therefore, the opinion of this office that the salaries of the general counsel and secretary of the Public Service Commission are to be paid out of the funds appropriated under Section 23 of the Appropriation Act, supra, and that the salaries of the assistant counsel, rate experts, stenographers and clerks of the Public Service Commission may be paid out of the appropriation set out in Section 24 of the Appropriation Act, and that the salaries of the general counsel and the secretary of the Commission cannot be paid from Section 24 of the Appropriation Act relating to motor bus and truck traffic.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTICK  
Attorney General

FER:FE



STATE BOARD OF HEALTH - Compensation and license fees for  
certificates.

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8-17  
August 10th, 1934



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

Your request of July 25, 1934 for an opinion  
is as follows:

"I would like an opinion from your  
office as to whether the State Board  
of Health has the right to charge a  
per diem for grading papers, or so  
much per certificate for signing  
medical licenses, midwife and chiropody  
certificates.

If so, how much per certificate are  
they entitled to charge?"

We shall subdivide the opinion, for convenience,  
into the following divisions:

- I. Compensation of State Board of Health.
- II. License fees which may be charged  
for medical licenses and certificates  
of midwifery and chiropody.

I.

Compensation of State Board of Health

#2 - Honorable Forrest Smith

Section 9020, Laws Mo. 1931, p. 239, relating to the compensation to be paid members of the Board of Health, is as follows:

" \* \* members of the board shall receive no compensation for their services, but their traveling and other expenses while employed on the business of the board shall be paid. \* \* "

It is now well settled in this state that a public officer is presumed to render his services gratuitously unless some specific statutory authorization is made for the payment for such services. King v. Riverland Levy District, 279 S. W. 195, l.c. 196 (1926). We have been unable to find any statutory authority authorizing the State Board of Health to charge a per diem for grading papers.

It is, therefore, the opinion of this office that the State Board of Health is without authority to charge a per diem for such services.

## II.

License fees which may be charged for  
medical licenses and certificates of midwifery and  
chiroprody.

Section 9119, relating to the examination of persons applying for a license to practice medicine in this state, is in part as follows:

" \* \* said board shall charge each person applying to and appearing before it for examination for a license to practice medicine and surgery a fee of fifteen dollars, \* \* "

#3 - Honorable Forrest Smith

For those asking for a license to practice midwifery, Section 9123, R. S. Mo. 1929 provides:

" \* Every person desiring to practice midwifery as a profession shall make application to the state board of health for examination and pay a fee of five dollars. \* \* "

Those desiring to engage in the practice of chiropody, under the provisions of Section 9077, R. S. Mo. 1929,

" \* \* shall, upon payment of fee of fifteen dollars, be examined, and if found qualified, shall be registered, and shall receive in testimony thereof a certificate signed by the chairman and secretary of the board."

We have been unable to find any statutory authority authorizing the Board of Health to make a charge for issuing a certificate to successful applicants who have applied for and taken the examinations given in medicine and surgery, midwifery and chiropody.

In the absence of such statutory authorization, it is the opinion of this office that the State Board of Health is without authority to make a charge for such service.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

PER:FE

LIQUOR CONTROL ACT: Intoxicating liquor purchased for purpose of securing evidence to prosecute violators may be paid for out of appropriation under sub-section D, Sec. 12M Laws of Mo. (Ex.Sess) 1933-34.

525  
August 23, 1934.



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Missouri.

Dear Mr. Smith:

This department is in receipt of your letter of July 7, 1934, requesting the opinion of this department as to the following state of facts:

On Page 15, Section 12 M Extra Sessions 1933-34 Missouri Laws, is an appropriation of \$100,000 to the Department of Liquor Control divided as follows:

\$50,000 for personal services  
5,000 for additions  
45,000 for operations

On the expense accounts filed by two of the deputies employed in that department, there appears the item, 'For purchasing liquor by the drink in Jackson County.'

I would like an opinion from your office as to whether this money expended for purchasing liquor by the drink can be paid out of this appropriation and if so, whether it will come from Additions or Operations."

Section 12 M, Laws of Missouri 1933-34 (Extra Session), page 15, provides:

"There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, the sum of One Hundred Thousand Dollars (\$100,000.00), to the Department of Supervisor of Liquor Control, to pay for personal service, additions and operating expenses required in connection with the administration of the Liquor Control Law, passed by the Fifty-seventh General Assembly, Extra Session, as follows:

A. Personal Service:

For salaries and wages of accountants, auditors, bookkeepers, inspectors, stenographers, clerks and other necessary employees.....\$50,000.00

B. Additions:

Original purchase of transporting and conveying equipment, and necessary office furniture and equipment.....5,000.00

D. Operation:

General expenses consisting of communication, binding and printing, transportation of things, travel, stationery, office supplies and other general and miscellaneous expenses.....45,000.00

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Total.....\$100,000.00 "

It will be noticed that the Legislature in enacting this appropriation act uses the words "to pay for personal service, additions, and operating expenses required in connection with the administration of the Liquor Control Law." Under sub-section D \$45,000.00 is appropriated for, among other things, "general and miscellaneous expenses". The question here under consideration is whether or not the Department of Liquor Control may purchase liquor under this act, the liquor to be used as evidence in the prosecution of violators of the Liquor Control Act of Missouri.

In the first place, we wish to make the observation that the courts of this State have commended the purchase of intoxicating liquor by state officers for the purpose of founding a prosecution thereon. The Court, in the case of State v. Richie, 180 S.W. 2, 1.c. 3, said:

"A sale of liquor to a person who purchases with the sole intention of securing a conviction of the seller is an offense the same as if the liquor were bought to be drunk. The fact that the purchaser gets a reward for securing the conviction does not constitute a defense, or make his evidence incompetent. The purchaser in such cases is not an accomplice in the crime. That the purchaser is an officer is immaterial in law and commendable in morals, where done to detect and suppress crime."

Section 18 of the Liquor Control Act of Missouri provides:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license."

The Supervisor of Liquor Control, by reason of Section 13, is given authority to make such rules and regulations as are necessary and feasible for the carrying out of the provisions of this act. It is the intent and purpose of the act to require every one selling intoxicating liquor in the State of Missouri to do so under the provisions of the Liquor Control Act. The enforcement of this law devolves itself upon the Supervisor of Liquor Control, and it is his duty to do everything in his power to see that this law is enforced.

It stands beyond cavil that before a person may be prosecuted for selling intoxicating liquor in this state without a license, evidence must be obtained, and the usual method of obtaining this evidence is for the deputies of the Supervisor to buy intoxicating liquor and file the evidence with the Prosecuting Attorney of the county wherein the illegal sale was made.

In construing the appropriation act here under consideration, it should be remembered that the intention of the law makers is to



be deduced from a view of the whole statute and of its every material part, and that statutes in pari materia should be construed together; the object of the rule is to ascertain and carry into effect the intention of the Legislature, and it proceeds upon the supposition that the several statutes relating to one subject were governed by one spirit and policy and were intended to be consistent and harmonious in their several parts and provisions. 25 R.C.L. 1060.

In deciding, therefore, whether or not this expense of buying evidence is properly included in the appropriation act, it is necessary to look at the Liquor Control Act to determine the intention of the Legislature. This rule is well expressed in the case of *State, ex rel. Bradshaw v. Hackmann*, 276 Mo. 600, wherein the Court said (l.c. 608):

"Therefore, both by an express statute and the decisions of this court, in order to ascertain where and upon what business travel may be done at the expense of the State, we are at last relegated to the law creating the office of Warehouse Commissioner.

So again we say, it is not to the appropriation act (save at times as a legislative construction, persuasive in determining the meaning of an otherwise obscure statute) that we must look, but to those statutes which created the office of Warehouse Commissioner and which define his duties, and the duties of the Grain Inspection Department of which he is the head."

And in the case of *State v. Eggers*, (Sup. Ct. Nevada) 136 P. 100, that Court said:

"Sections of the general appropriation act are in pari materia with the general acts controlling the purposes for which the appropriation is made. They are therefore to be considered in connection with the general provisions of law to which they relate, and unless there is such a manifest repugnance as to leave no room for reasonable construction otherwise, they will be construed so as to carry out the provisions of the general law. This is the view taken by this court in former decisions where the provisions of the general appropriation act had been called in question."

In the case of State, ex rel. Allebaugh v. Gallet (Sup. Ct. Idaho), 209 P. 723, the Court held that the general provision in the appropriation bill for the State Historical Society for expenses other than salaries was intended by the Legislature to include expenses which the Trustees might incur in the performance of their duties. The Court said:

"The appropriation being only for expenses other than salaries, without including any words showing an intent to extend the purposes for which it was made, it must be held that it is limited to making provision for the expenses specified in the charter of the Society."

In the very early case of Com. ex rel Greene, appellant, v. Gregg, et al, decided by the Supreme Court of Pennsylvania in 1894, Mr. Justice Mitchell said, in construing an appropriation bill:

"It cannot be assumed that the Constitution meant to compel the Legislature even to supervise all the details of the government. That is properly the function of the executive and judicial branches. What work there is to be done and what clerical force is requisite to do it is a question of detail as to which much must necessarily be left to the head of each department."

The intention of the Legislature, as revealed by the Liquor Control Act of Missouri, is clear and unambiguous, and technical definitions of words used in the appropriation act must yield to the will of the Legislature. "Every technical rule as to the construction or force of particular terms", said Mr. Justice Story, "must yield to the clear expression of the paramount will of the Legislature." Wilkinson v. Leland, 2 Pet. 627, 7 U.S. (L. Ed.) 542.

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that the purchase of intoxicating liquor for the purpose of the prosecution of violators of the Liquor Control Act of Missouri is an expense clearly authorized by the Liquor Control Act of Missouri, and as such may be properly paid under sub-section D of the appropriation act as found in Section 12 M, Laws of Missouri, (Extra Session) 1933-34.

Aug. 23, 1934.

We do not mean to say, however, that the purchase of liquor by the drink, to be consumed on the premises by the purchaser, is a proper expenditure for the reason that this expense can only be authorized where the intoxicating liquor is bought to be used as evidence--that is to say, in the original package, or some other like container, and thus capable of being filed in the office of the Prosecuting Attorney.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

COUNTY CLERK: County Court can make contract with County Clerk to make second tax book if it believes the extra book is necessary for the collection of the taxes.

10-5  
September 19, 1934.



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Sir:

This department acknowledges receipt of your letter of some time ago, same being as follows:

"Sections 9876 and 9877 as revised by the 1933 Session of the Legislature establishes a new method for the making of the tax books by the County Clerk which eliminates the second book, a complete copy, which has been made in previous years.

However, our attention has been called to the fact that some of the county courts have authorized their county clerks to continue to make this second book, the county court agreeing to compensate the county clerk for this service. Does the county court have such authority and can the clerk retain the fee allowed him by the county court?"

The sections to which you refer were repealed in 1933 and two new sections designated as Sections 9876 and 9877 were enacted in lieu thereof. Section 9876, Laws of Mo. 1933, p. 421 is as follows:

"As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extensions, which book, with the taxes so extended therein, shall be authenticated by the

seal of the Court as the tax book for the use of the Collector; and when the Assessor's book is in two or more volumes, such extension shall be made in all such volumes, and each volume shall be authenticated by the Clerk with the seal of the Court. And upon a failure to make out such extension of taxes in the Assessor's book or books, as the case may be, and deliver same to the Collector in the time specified, the County Court shall deduct twenty per centum from the amount of fees which may be due the Clerk for making such extension, and such Assessor's book, with the taxes so extended therein, shall be called the "Tax Book".

Section 9877, Laws of Missouri 1933, page 422 is as follows:

"When the books or lists for the collectors are completed, the county clerk, except in St. Louis City, shall make a complete statement of the assessment and taxes charged, on blanks and in conformity to instructions, furnished him by the State Auditor. The clerk shall record said statement and forward it to said auditor. The clerks of the county courts shall receive ten cents per hundred words and figures for all words and figures extended by him in making out the tax book, one-half thereof to be paid by the state and other half by the counties, respectively: Provided, that compensation of clerks for making out and certifying to the auditor an aggregate abstract of the tax book shall be paid by the state."

Section 9876, R.S. Mo. 1929, which was repealed, contained one phrase which was eliminated in the new section, the pertinent part of which is as follows:

"As soon as the Assessor's books shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within 90 days thereafter, make a fair copy thereof with the taxes extended thereon.\*\*\*"

We assume that the phrase "make a fair copy thereof" is the authority for the expression in your letter "which eliminates the second book"; therefore, the question arises: Has the county court authority to continue to make this book and compensate the county clerk for making the same?

We are confronted at the outset that no county officer can collect any fees when the statute does not expressly provide for the same. This is such a well known principle of law that we will not quote the authority for same here. Your letter does not state that the county clerk is to receive these fees in addition to his salary or that the fees become a part of his legal salary; however, we assume that they are to be in addition thereto.

We do not know why the county courts desire the extra book, but we assume there is a valid reason and that the book will facilitate in some manner the collection of taxes.

Under the title of "Powers and Functions", 15 Corpus Juris, page 456, we find the following:

"Except as otherwise provided by law, a board of county commissioners or county supervisors ordinarily exercise the corporate powers of the county. It is in an enlarged sense the representative and guardian of the county, having the management and control of its property and financial interests, and having original and exclusive jurisdiction over all matters pertaining to county affairs. Within the scope of its powers, it is supreme, and its acts are the acts of the county. While acts outside their statutory powers are without validity, yet, within the limits of the jurisdiction conferred on them by law, county boards have a wide, or at least a reasonable, discretion; and courts will not interfere with such boards in the lawful exercise of such jurisdiction, on the sole ground that their actions are characterized by lack of wisdom or sound discretion, it being permissible for equity to interfere only in cases of fraud or a clear abuse of discretion. The county board cannot exercise its constitutional jurisdiction within the territorial limits of another county, nor can it justify its failure to perform a statutory duty, on the ground that obedience to the law is not necessary."



Likewise, there is a statutory limitation section in 15 Corpus Juris, p. 457, which is as follows:

"Provided it violates no constitutional provisions, the legislature may, after conferring powers on a county board, limit, enlarge, or curtail them, as it sees fit; and it may even take away the statutory powers of the board, although the board exists by virtue of a constitutional provision. It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution and the statutes of the state, or such powers as arise by necessary implication from those expressly granted or such as are requisite to the performance of the duties which are imposed on it by law. It must necessarily possess an authority commensurate with its public trusts and duties. Therefore it possesses inherent authority to perform acts to preserve or to benefit the corporate property of the county intrusted to it. However, where there is doubt as to the existence of its authority, it should not be assumed. Acts done outside its statutory authority are void and not binding on the county. \*\*\*\*\*"

In the case of State ex rel. v. County Court of Clinton Co., 193 Mo. App., l.c. 378, the Court said:

"We are of the opinion that since the county court can exercise only such powers as are expressly or impliedly granted it by the Legislature, and since the Legislature has seen fit to delegate to such court the power to license pool tables, and has not granted the right to prohibit, the county court cannot, in a case where it is admitted there is no discretionary reason for refusing, withhold such license in order to prohibit the keeping of pool tables together. Where a county court has, in the rightful exercise of its discretionary power, refused to grant a license, its action therein is final since there is no method of appeal or review provided by the statute. But it cannot refuse a license where, under all the circumstances, it would grant it were it not attempting to prohibit that which the legislative power has not seen fit to have prohibited."

Sept. 19, 1934.

The foregoing case is not directly in point on the question involved; however, from the decision we glean that the county court can exercise only such powers as are expressly or impliedly granted to it by the Legislature.

#### CONCLUSION

As stated in the beginning of this opinion the question arises as to whether or not the making of this extra book is necessary to facilitate and aid in the assessment and collection of taxes. This is largely a question of fact. If the county court conscientiously believes that the extra book is necessary for the expeditious collection of the taxes, for the general welfare of the county and its financial interest, then it is the opinion of this department that the county court has the right to make the contract and pay the county clerk for the same by its implied powers.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

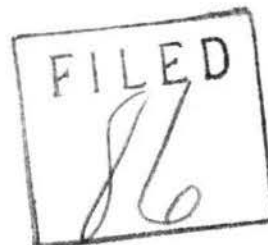
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ROY MCKITTRICK,  
Attorney General

OWN:AH

HOUSE BILL NO. 5 (Sales Tax) Receipts from sales of admission to football games and other athletic events not subject to tax when same are conducted for and on behalf of colleges, universities and high schools.

9.26  
September 21, 1934.



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Missouri.

Attention: Mr. G.H. Bates,  
Chief Clerk

Dear Sir:

This department acknowledges receipt of your letter of September 8, which is as follows:

"Now that the football season is approaching, the question arises as to whether or not admissions charged for University, College and High School football games are subject to the Missouri Retailers' Occupation Tax.

Since it has been ruled that college papers are subject to the Mo. R.O. Tax, it also appears to me that we will have to hold admissions to football games within the act. However, I would like to have your opinion on the subject."

Section 2A of House Bill No. 5 reads as follows:

"For the privilege of a person engaging in the business of rendering the services, furnishing or selling the substances and things hereinafter in this section designated or defined \*\*\*\*\*  
(a) Sales of admission tickets, cash admissions, charges and fees to places of amusement, games and athletic events.\*\*\*\*\*"

Section 1, subdivision (c) provides:

"'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect."

In considering the question presented in your request for an opinion, we will consider its two principle elements, (a) are football games and other athletic events conducted by universities, colleges and high schools of such a nature that it may be concluded that they are conducted as a business, and (b) are they conducted for the benefit, gain or profit of an individual or a corporation?

It must be conceded that athletic events in recent years have become prominent, if not too prominent, in all colleges and universities; however, the primary object of a university or college is to educate and improve the mind and athletic events are merely incidental thereto. We are therefore of the opinion that no college or university is engaged in the business of conducting athletic events, and accordingly we dispose of this phase of your inquiry.

It may be said that colleges and universities conduct athletic events for the gain and benefit of such institutions and in recent years the receipts from admissions to athletic events have played an important part in the financial structure of colleges and universities; however, conceding that to be true, no individual gains financially thereby. Universities are maintained by the State - colleges chiefly by religious denominations, being more or less charitably maintained. We are therefore of the opinion that the athletic events mentioned in your letter are not conducted for gain or profit within the meaning of the Act.

A case bearing on this subject, but which we must differentiate in order to make clear our position, is that of *Radcliffe v. Query*, 150 S.E. 352. In this case it is clear that a Chautauqua is conducted for gain and profit as a business, while in the instant case colleges and universities are not engaged in the business and no individual or individuals profit thereby. The Court said:

"On hearing the demurrer to the complaint in the above entitled action I am of the opinion that the statute (35 St. at Large, p. 139) levies a tax of 10 per cent. on any person, firm, or corporation operating a place of amusement, based on the admission charges paid him, when the admissions were to the benefit of any individual. The statute is broad enough to include

all classes of public exhibitions, such as are usually conducted on a stage for the observation and amusement of the public. 26 R.C.L. 699, to 'amuse' is to occupy the attention with something pleasing; an 'amusement' is anything that amuses, as an entertainment or spectacle. Entertainment being largely mental, so an 'attraction' is that which attracts or draws a pleasing or alluring object--so we may say the play was the attraction. A 'Chautauqua' is a series of meetings of an educational character in imitation of the Chautauqua assembly, and its literary and scientific circle. The contract attached to the complaint as an exhibit shows that plaintiff undertook to furnish to local committee of citizens in different towns in this state, a three-day Chautauqua with two attractions each afternoon and evening, with a change of attractions each day, upon the committee furnishing a site for a tent, ushers, and ticket collectors, and paying any license fee or tax, if required by law in consideration of the committee paying plaintiff \$550--as compensation for the 'Chautauqua'; the committee to charge \$2 for each adult season ticket, and 75 cents for single admissions to all performances. The Chautauqua was a place of amusement operated by the plaintiff for profit, and the \$550 was paid to him for admissions to the place of amusement and is subject to the tax paid by him."

For the reasons above stated, we are of the opinion that the gross receipts derived from the sale of admissions to football games and other athletic events conducted by colleges, universities and high schools are not subject to the tax when such games are conducted for and on behalf of the college, university or high school, and no return should be made to the State Auditor. However, we call your attention to the fact that this opinion does not apply to professional football games and athletic events which are not of a charitable nature and which are conducted

Hon. Forrest Smith

-4-

Sept. 21, 1934.

purely for gain or profit to an individual, group or association.

We note you call attention to our former opinion regarding college papers being subject to the tax. We direct your attention to the fact that in most instances college papers are conducted for gain and profit, for instance the "University Missourian."

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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(Acting)  
Attorney General

OWN:AH



COUNTY COLLECTOR: Compensation under subdivision XIV, Section 9935  
R. S. Mo. 1929 for back tax collections.

10-23  
October 23, 1934.



Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

My Dear Mr. Smith:

On the 16th of November, 1933, you requested of this office an opinion respecting the interpretation of Subdivision XIV of Section 9935 R. S. Mo. 1929. On November 18, 1933, this office rendered an opinion to you wherein it was held that the collector was not entitled to retain a deductible commission on back tax collections in counties falling within the fourteenth subdivision of that Section. Since that opinion was issued this office has been favored with briefs on the point. Additional facts have also been disclosed. In view of this additional information and of the equities of the situation, we have reconsidered this matter and hereby withdraw the opinion dated November 18, 1933, and submit the following as the opinion of this office on the subject. Your request reads as follows:

"Section 9935, R. S. Mo. 1929, and the same Section as amended by the 1933 Laws of Missouri on page 454 of the 1933 Session Acts establishes by classes the amount of commission for the various County Collectors of the State.

Class one to thirteen inclusive establishes this commission upon 'the total amount of all such taxes and licenses levied for any one year.'

Class fourteen classifies the Collector's commission in an entirely different manner wherein it allows a prescribed commission first on current and tax revenues, second on licenses and all other dues wherein it states that the two afore mentioned commissions on tax classes 'shall be deducted and retained by such Collector out of the amounts collected,' then it precedes to the third tax class which establishes the Collector's Commission 'on all back taxes and all other delinquent taxes' \* \* \* which shall

be added to the face of the tax bills and collected from the party paying such tax."

We would like to have an opinion from your department advising us if this 3% allowed on back tax collections which is taxed as costs constitutes the total commission allowed the Collector on these back tax collections or is he entitled to also retain a deductible commission on a basis as established by the first mentioned tax class."

Section 9935 is what may be termed a general law, classifying the counties of the state into fourteen subdivisions for the purpose of determining the rate of compensation to be paid to county collectors. This Section was amended by the 57th General Assembly, and a new section is found at page 454, Laws of Missouri, 1933, but no change was made which is material to your inquiry. A portion of Subdivision XIV reads as follows:

"XIV. In all counties or cities wherein the total amount of all such taxes and licenses levied for any one year exceeds two million dollars, the collector of revenue shall receive, collect and retain as full compensation for his services for collecting all revenues and other dues which he is authorized to collect belonging to the state, school, county and city the following commissions, viz: On current and tax revenues, as follows: On all sums collected up to and including eighty per cent. of the total amount of such tax bills placed in his hands, one-half of one per cent. commission; on all sums collected over eighty per cent., and up to and including ninety-five per cent one per cent commission; on all sums collected over ninety-five per cent., two per cent commission. On licenses and all other dues, except delinquent and back taxes, collected in any one year as follows: When the amount collected for the city or county aggregates eight hundred thousand dollars or less, two (and) one-half per cent. commission; on all licenses and other dues collected for the city or county in excess of eight hundred thousand dollars, four per cent commission; on all such licenses collected for the state, three per cent commission. All such commissions hereinbefore enumerated shall be deducted and retained by such collector out of the amounts collected for state, school, county and city, respectfully, and upon settlement with such collector shall be credited

to his account and charged to the respective revenue accounts. On all back taxes and all other delinquent taxes, he shall be allowed a commission of two per cent., which shall be added to the face of the tax bill and collected from the party paying such tax as a penalty in the same manner as other penalties are collected and enforced.\* \* \* \*

Thus the collector of revenue in counties falling within that classification are allowed a deductible commission ranging from one-half of one per cent to two per cent on current tax revenues, and a penalty commission of two per cent on back taxes which is to be added to the face of the tax bill and collected from the party paying the same. The problem to be determined is whether or not a deductible commission is allowable in addition to the penalty commission for the collection of back taxes. We are unable to find any reported cases wherein this issue has been determined. The first thirteen subdivisions of this Section, which deal with smaller counties, have on occasion been before our courts. The most enlightning case upon this issue is that of State ex rel. Shannon County vs. Hawkins, 169 Mo. 615. The issue in that case was whether the deductible commission allowable under Subdivision V was to be paid in addition to the back tax or penalty commission payable under what is now Section 9935 R. S. Mo. 1929. Subdivision V, together with the opening paragraph of this Section, read as follows:

"The collector shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

\* \* \* \* \*

V. In all counties wherein the total amount of all such taxes and licenses levied for any one year exceeds twenty-five thousand dollars and is less than forty thousand dollars, a commission of six per cent. on the first twenty-five thousand dollars collected and three and one-third per cent. on whatever amount may be collected over twenty-five thousand dollars."

Section 9969, a part of the Article on delinquent and back taxes, at that time read in part as follows:

"Fees shall be allowed for services rendered under the provisions of this article as follows: To the collector, except in such cities, four per cent. on all sums collected; in such cities two per cent. on all sums collected--such per cent. to be taxed as costs and collected from the party redeeming." \* \* \*

Shannon County took the position that the phrase "except back taxes" excluded the collector from any compensation under the provisions of Section 9935 upon the collection of back taxes--proceeding upon the theory that the deductible commission thereby allowed was only payable on current taxes and that the compensation allowed by Section 9969 was the only commission payable on delinquent taxes. The Court, in construing what are now Sections 9935 and 9969 stated, page 620:

"\* \* \* It seems to us that section 9260 deals alone with the commissions to be retained by the collector out of revenues collected. Section 9309 deals with the costs allowed him for his extra services in addition to his commissions, and these are to be paid by the delinquent," \* \*

The decision of the Court was that the deductible commission allowed by the first thirteen subdivisions of Section 9935 should also be allowed on all back taxes collected, and should be in addition to the four per cent penalty allowed to the collector by Section 9969. In arriving at this conclusion, the Court stated, l. c. 621:

"Another reason suggested by counsel for defendant is quite persuasive, and it is this: the state and county allow the collector commissions at different rates of per cent in proportion to the amount collected, and this merely for receiving and paying over the taxes, but when we come to these costs and fees, they are at the same rate, whether the amount is one thousand dollars or one million--which we think demonstrates that this fee is allowed for extra labor and not in lieu of that commission which the State has agreed to allow her collectors out of all taxes which they collect, whether current or back taxes.

So far as the State is concerned, she pays no more and no less on either kind, but she visits upon the delinquent a penalty and allows that in addition to the collector who must necessarily render extra services.\* \* \* \*

This must be considered as a judicial interpretation of the legislative intent in the enactment of this law. All subdivisions of this Section including the one under consideration allow a deductible commission, the amount of which varies with the amount of taxes collected. This deductible commission has been construed by the foregoing decision as compensation for "receiving and paying over the taxes," but the penalty commission which is a set amount regardless of the amount collected "is allowed for extra labor and not in lieu of that commission which the state has agreed to allow her collectors out of the taxes which they collect." This being the apparent theory upon which the legislature operated, the words and phrases used in Subdivision XIV should be construed to harmonize with and further this legislative intent. It is not clear from the wording of Subdivision XIV that the two per cent commission allowed on back taxes is to be in addition to the deductible commission allowed on current taxes. In this Section we have some fifteen subdivisions, each of which are as much a part of the Section as are the various sections a part of the article. Each must be considered in determining the legislative theory behind the whole enactment, and each must be given a consistent construction thereto. It has been determined that it was the legislative intent, in the passage of the first thirteen subdivisions, that the deductible commission be allowed in addition to the penalty commission. The logic of the Hawkins case, supra, is applicable alike to all subdivisions, and as that legislative intent has been shown to exist in respect to the first thirteen paragraphs we must conclude that the fourteenth subdivision is imbued with the same plan. There would be no reason or logic in holding that the collectors of the other thirteen subdivisions would be entitled to the deductible commission and holding that the collectors of the counties falling within the fourteenth subdivision should be deprived of this compensation.



We believe the decision in the case of Glaser vs. Rothchild, 221 Mo. 180, is applicable to the instant case. The plaintiff Glaser instituted an action for damages against the defendant, alleging that he had fallen into an open pit in the basement of defendant's building; that the defendant was negligent in failing to protect said pit with a guard rail which was required to be maintained by virtue of the provisions of Section 5 of an Act of 1881 entitled

"Inspection: Health and Safety of Employees.  
An Act relating to manufacturing mechanical, mercantile and other establishments and places, and the employment, safety, health and work hours of employees."

Plaintiff was not an employee, but as the Court held, a mere licensee. Defendant took the position that the act referred to was only for the protection of employees and that therefore plaintiff could not take advantage of the requirement respecting the guard rail. Plaintiff to further the contention that the act afforded protection to all persons also referred to Section XIX of the Act which provided that scaffolds should be constructed so as to

"insure the safety of persons working thereon, or passing under or about the same, against the falling thereof or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection etc. of any building shall exercise due caution and fear so as to prevent injury or accident to those at work or nearby."

In reply to this contention the Court stated, l. c. 211:

"The wording of this section is general, and if read in its literal sense it is broad and comprehensive enough to embrace all persons who are at work upon the building, and also all persons who might be 'near by' whether working or not; but when we read this section in connection with the entire act, as we did section 5, then we are of the opinion that the persons referred to by the words 'all persons who might be near by' mean all employees who might be near by.\* \* \* \* \*"



The decision of the Court was that the phraseology of Sections 5 and 19 of the Act were to be limited in their operation because the other sections of the act clearly indicated that it was to deal exclusively with employees and the safety thereof. It was accordingly found that there was no liability to the Plaintiff because of defendant's failure to comply with Section 5 of the act. In the courts of the opinion this statement was made, page 212:

" ) \* \* The authorities hold that a statute should not be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to finish in itself all the light needed for its construction. \* \* \* "

In the instant case we have a direct application of this rule. The first thirteen subdivisions of Section 9935, show an evident intent to allow a deductible commission in addition to the penalty commission for the collection of back taxes. They have been so construed by the courts. It was the general scheme to allow collectors a deductible commission plus a penalty commission for the collection of back taxes. We must therefore construe the general phraseology of Subdivision XIV so as to consummate this plan of compensation. That the intent of the legislature in this matter was correctly conceived in the Hawkins case supra, cannot be doubted, the re-enactment by the legislature of these same provisions without any change or amendment gives legislative approval of the interpretation given by the Courts. Section 9935 R. S. Mo. 1929, was repealed and a new section by the same number was enacted by the 57th General Assembly in regular session. (Page 454 Laws of Missouri, 1933) It is to be noted that the first thirteen subdivisions of this Section were re-enacted without any change and that subdivision XIV has been re-enacted without any change to the part herein considered. By the re-enactment of this law the legislature has given its approval to the construction given the law by the Court. This rule is well recognized and is generally stated in State vs. Schenk, 238 Mo. 429, 1. c. 455:

October 23, 1934.

"We regard as significant the fact that notwithstanding the construction which has been put upon these laws by the decisions of this court referred to; by the acts of the various Governors making appointments, and by the certificates contained in the official publication of the session acts, the Legislature, in 1909, adopted the same phraseology in the declaratory act and also in the general act concerning the time when laws should go into effect. According to the ordinary rules of construction, it must be held that the Legislature re-enacted these laws with the construction which had been so placed upon them." \* \* \*"

A word should possibly be said as to the construction placed upon this section by the persons charged with duties under the law. While it is true that for a number of years the Collector of the City of St. Louis has not retained any "deductible" commission on "back taxes", we find that for a period of many years the Collector of Jackson County has retained such commissions. In view of such conflicting precedent, we are of the opinion that "executive construction" cannot be considered in determining the issue here involved.

#### C O N C L U S I O N

It is therefore the opinion of this office that Collectors in counties falling within Subdivision XIV of Section 9935 R. S. Mo. 1929, are entitled to retain the deductible commission therein set up in addition to the penalty commission allowed on back taxes which is added to the tax bill and collected from the taxpayer.

Respectfully submitted,

  
HARRY G. WALTNER, Jr.,  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK,  
Attorney General

HGW:MM

INCOME TAX: Section 10144, R.S. Mo. 1929 prohibits State Auditor from divulging information contained in an income tax return to persons other than the taxpayer.

11-9

November 3, 1934.

Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Mo.



Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"This office has been requested by an income tax payer to disclose in a court proceeding his income tax return for the year 1933, for the purpose of showing that in that return he claimed to be a resident of the State of Missouri, the question of his residence apparently being material in the litigation.

Sec. 10144, Revised Statutes 1929 provides that it shall be unlawful for any persons, including officers, to divulge any information relative to, or the contents of, any income tax return filed under that article.

I would like to have your opinion as to whether, at the request of the taxpayer himself, it is permissible under the law to disclose in a court proceeding the fact that the taxpayer made a return and to disclose, if he requests it, the contents of the return itself."

Section 10144, R.S. Mo. 1929 provides in part as follows:

"It shall be unlawful for any person, persons, or officers to divulge, give out or impart to any other person, or persons, any information relative to or the contents of any income tax return

filed under this article, or to permit any other person, or persons not connected with his office to see, inspect or examine the same;

\* \* \*

It shall be unlawful for any board of equalization, or any member thereof, or any officer to in any way permit the inspection of any such return or to use the same in any way in making assessments other than the assessment of the tax provided for in this article, and any person violating the provisions of this section shall be deemed guilty of a felony and upon conviction thereof shall be fined a sum of not less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000) or by imprisonment in the penitentiary for a term of not less than two years and not more than five years, or both such fine and imprisonment as the court may deem proper; \*\*\*\*\*

It is clear that this statute absolutely prohibits the use of an income tax return made to the State of Missouri for any purpose whatsoever even though evidence contained in said return might be very material in a trial before a court of justice.

These statutes are not uncommon, but in fact are to be found in practically every income tax law in the United States; however, in many of the statutes of the different states exceptions are made allowing the use of the income tax return for certain purposes. There is a deep public policy underlying the enactment of this type of statute, and that policy is that where the government needs information for the conduct of its functions and the persons possessing the information need the encouragement of privacy in order to be induced to make full disclosures, the protection of the privilege should be accorded.

Isadore Loeb, in an article entitled "Tax Administration in Missouri", proceedings of the National Tax Association in 1924, page 44, said:

"Many taxpayers are apprehensive regarding publicity of matters if included in their income tax returns. While the law provides penalties, it is notorious that such provisions are not taken seriously in many localities and persons naturally tend to omit information, which if published, might prove prejudicial to their interests."

Wigmore, in his work on "Evidence, (V), Sec. 2377, has this to say anent this policy:

"In that well settled common-law application of this policy, the privilege concerned information relating to the conduct of third persons. But many situations exist where the information can best be obtained only from the person himself whose affairs are desired to be known by the government. And where the ultimate purpose to be served is administrative, and not penal, it may well be that the government can afford to promise secrecy in respect to purposes, penal or litigious, as the price of readily achieving its administrative purpose when it demands a report of the truth. It is some such principle that justifies the modern creation of a number of privileges, all statutory in origin, covering sundry matters required by law to be reported to some administrative official."

Jones, in his work "Commentaries on Evidence", Sec. 2201, says:

"It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated."

As we have seen, the public policy behind the enactment of a statute of this description is for the purpose of affording full protection to the taxpayer in order that the taxpayer may feel free to disclose his business affairs to the state government without fear that such disclosure might later prove prejudicial to him. The statute, however, as enacted by the Legislature has attempted to treat income tax returns in the same manner as other governmental secrets and to forbid disclosure for any reason whatsoever, even though the taxpayer himself might request such disclosure.

In other words, the law in its application has gone far beyond the intendment of the public policy underlying its enactment. It has become a law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial, and it



would seem to substantially deprive a taxpayer of due process of law. 10 R.C.L. 864.

Section 10, Article II, Constitution of Missouri provides as follows:

"The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

In the recent case of *In Re French*, decided by the Supreme Court of Missouri *En Banc*, 315 Mo. 75, the court had before it a statute similar to the one under consideration. That statute, Section 11679, R.S. Mo. 1919, as amended by the Laws of 1925, required the State Bank Commissioner to keep secret all information obtained by him in the examination of banks except when called as a witness in a criminal proceeding or trial, and subjected him to a fine for misdemeanor and forfeiture of office for giving such information. The Court said:

"It is also argued that the statute is in conflict with Section 10, Article II, of the Constitution of Missouri, which is as follows: 'The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay.'"

We may say that the provision of the act which prevents the court in a civil case from procuring evidence, in the conduct of the trial, is an unwarranted interference with the functions of the court. A leading case on this subject is *Brown v. Circuit Judge of Kalamazoo County*, 5 L.R.A. (Mich.) 226, 1.e. 230, where it is said: 'It is within the power of a Legislature to change the formalities of local procedure, but it is not competent to make such changes as to impair the enforcement of rights.'

If a litigant in a civil case is forbidden by statute to obtain evidence, otherwise available, then the power of the court to enforce his rights is impaired, and a 'certain remedy' is not 'afforded'.



This is not an attempt by the Legislature to enact a rule of evidence, nor to define the effect of a certain character of evidence in making out a prima-facie case. It is an attempt to say the courts shall not have or use certain evidence, however pertinent or necessary for the proper determination of a case. It is an unconstitutional encroachment upon the proper functions of the courts."

\* \* \*

"The only theory upon which the commissioner can be restrained from divulging what he learns in his examination of banks, and from producing in court the records in his custody, is on the ground of public policy; that some public interest may be adversely affected by the revelations which would ensue. We are unable to conceive of any reason why general knowledge of the affairs of a defunct bank discovered in a trial in court, would injuriously affect the public morals, public health or public safety."

In the case of State v. Sevier, decided by the Supreme Court of Missouri, 69 S.W. (2d) 662, the court held that the trial court could, by proper order, compel the Commissioner of Securities to permit inspection and the making of copies of documents and papers on file in his office relating to the cause, notwithstanding such papers were placed in a separate file and marked "confidential". The court in its opinion referred to the case of In Re French, supra, and said:

\*\*\*While the constitutionality of section 7739 is not questioned in this proceeding, if we should hold that it expresses a legislative intent to empower the commissioner to place whatever official information he might deem confidential beyond the reach of a court order authorized by section 928, which statute has superseded the old method by bills of discovery (State ex rel. Railroad Co. v. Hall, et al., 325 Mo. 102, 106, 27 S.W. (2d) 1027), such construction would render the section vulnerable to such attack when properly raised.

\* \* \* \*

CONCLUSION

While we do not conceive it to be the duty of the Attorney General as a general policy to declare laws of the State of Missouri to be unconstitutional, nevertheless, when a law so infringes upon the rights of citizens of the State of Missouri as to become violative of our state Constitution, we cannot do otherwise than to declare said act to be, in our opinion, unconstitutional.

The principle of law as declared by the Supreme Court of Missouri in the case of *In Re French*, supra, is, in our opinion, the correct principle underlying the problem here under consideration and it would seem that the only theory upon which the State Auditor can be restrained from divulging information furnished by a taxpayer in an income tax return and from producing in court the returns in his custody is on the ground of public policy--that some public interest may be adversely affected by the revelations which would ensue. Absent this public policy, the statute violates Section 10, Article II of the Constitution of Missouri.

Therefore, in view of the foregoing, it is the opinion of this department that insofar as Section 10144, R.S. Mo. 1929 prohibits a taxpayer from requiring the State Auditor to divulge information furnished by said taxpayer in his income tax return to the State of Missouri, the said statute is violative of Section 10, Article II of the Constitution of Missouri; however, as to the prohibition with reference to persons other than the taxpayer, the public policy underlying the enactment of the law excepts said section in this respect from the operation of Section 10, Art. II of the Constitution of Missouri, and the State Auditor is prohibited thereby from divulging this information to persons other than the taxpayer.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General

COLLECTORS \* Compensation of county collectors for collecting income taxes, current and delinquent.

10-27  
December 4, 1934.



Hon. Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Sir:

A request for an opinion has been received from you under date of November 21, 1934, such request being in the following terms:

"Section 10133, R. S. Missouri 1929, relating to the compensation of Assessors and Collectors in regard to the assessing and collecting of income taxes reads as follows:

'Assessors and Collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the Assessors and Collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by Assessors and Collectors whose salary is not fixed by law, and which fees so charged by said Assessors and Collectors for services rendered in assessing and collecting income tax shall be paid by the State.'

In checking the annual settlements of the various Collectors, we find that some of them have charged a deductible commission of one per cent on current income and two per cent on delinquent income collected, and the question has arisen, should the Collector take as a deductible commission the commissions provided for in Section 9935, R. S. Missouri 1929, in regard to the collection of income taxes or should the Collector be allowed one per cent deductible commission on current taxes and two per cent on delinquent income collected?

We would appreciate an opinion from your office advising us as to the amount of deductible commis-

2. Hon. Forrest Smith, State Auditor.

December 4, 1934.

sion that should be allowed the Collectors for the collection of income taxes."

## I

### COMPENSATION OF COLLECTOR FOR INCOME TAXES.

R. S. Missouri, 1929, Section 10133, quoted in your letter, is the only section under the article dealing with income taxes which makes provision for the compensation of collectors for collecting this type of taxes, and the only provision it makes is by way of reference to the statutes governing collectors' compensation for collecting other kinds of taxes. Therefore, the answer to your question will depend on the statutes relating to the compensation of county collectors for collecting property and other taxes.

## II

### COMPENSATION OF COLLECTOR FOR PROPERTY AND OTHER TAXES.

R. S. Missouri, 1929, Section 9935, as re-enacted in 1933 (Laws of 1933, page 454), relates to the compensation of collectors. Section 9935 is lengthy and it will not be necessary to set it out in full but it may be helpful to note that such section consists of an introductory paragraph and fifteen subdivisions, of which the first fourteen fix the different percentages allowed to collectors in different counties, the fifteenth being like the introduction - a general paragraph applicable to all counties.

The introductory paragraph of Section 9935 is as follows:

"The collector, except in counties where the collector is by law paid a salary in lieu of fees and other compensation, shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:"

Standing alone this paragraph might seem to remove from the application of Section 9935 for all purposes collectors receiving salaries in lieu of fees and other compensation. However, the proviso in Section 10133, above quoted, shows that as far as fees of collectors for income taxes are concerned, collectors on salaries are to receive fees for their income tax collections just as if they were not salaried collectors but collectors working on a fee basis, and, therefore, for the purpose of fixing the compensation to which collectors are entitled for collecting income taxes Section 9935 will govern, whether such collectors are on a salary or a fee basis.

December 4, 1934.

Another phrase in the introductory paragraph of Section 9935 which might cause and has in fact caused some difficulty is the phrase "except back taxes". Fortunately, however, this ambiguity has been removed by the decision in the case of State ex rel Shannon County v. Hawkins, 189 Mo. 615, 70 S. W. 119 (1902). The predecessor of Section 9935 which was in effect at the time the cause of action in that case arose was R. S. Missouri, 1899, Section 9260, at which time the same phrase "except back taxes" was in the introductory paragraph of such section. Likewise at that time there was in effect R. S. Missouri, 1899, Section 9309 (the predecessor of R. S. Missouri, 1929, Section 9969, as re-enacted in 1933 - Laws of 1933, page 429) which fixed the percentage on back taxes to which collectors were entitled as compensation. The question at issue was whether what is now Section 9935 meant by the phrase "except back taxes" to remove from the operation of such Section 9935 all back taxes and to allow the collector for the collection of back taxes only the percentage fixed in what is now Section 9969, or whether Section 9935 allowed the collector a percentage thereunder on all taxes collected by him, whether back or current, and in addition the percentage fixed under Section 9969 on so much of the taxes collected as were back taxes. The language of the court in analyzing this matter is set out below:

"The question is one of construction entirely. Plaintiff construes section 7640, Revised Statutes 1899, or 9260, Revised Statutes 1899, as excluding back taxes altogether from its provisions, whereas defendant gives it the much more natural construction that the commissions therein provided shall be 'full compensation' for his services in collecting the revenues 'except back taxes' for which he is allowed certain other compensation as costs which the delinquent taxpayer must pay to recompense the collector for the various extraordinary steps he is required to take to collect delinquent or back taxes.

Reading the two sections together, as we must to arrive at the intention of the Legislature, it seems to us that section 9260 deals alone with the commissions to be retained by the collector out of revenues collected. Section 9309 deals with the costs allowed him for his extra services in addition to his commissions, and these are to be paid by the delinquent, and the collector is allowed only four per cent. Otherwise we would have the result in Shannon county that the State freely allows the collector five per cent for merely receiving and paying over taxes which the taxpayer tenders, but allowing him nothing by the State or county for collecting delinquent taxes at the end of a lawsuit, and after



December 4, 1934

"making out various delinquent lists and performing other duties, in enforcing payment.

Under appellant's construction, collectors whose commissions are fixed at five per cent and over would get less for collecting back taxes, with all the extra labor imposed by the statute, than they would receive for current taxes, a result we can not believe the Legislature ever intended. The general policy of the State, from 1871, at least, to this time, has been to offer collectors extra compensation as an inducement to bring in delinquent taxes.

This is so in any event as to those collectors whose commissions, under section 9260, are less than four per cent, as they get more for back taxes even as costs than they do for current taxes.

Another reason suggested by counsel for defendant is quite persuasive, and it is this: the State and county allow the collector commissions at different rates of per cent in proportion to the amount collected, and this merely for receiving and paying over the taxes, but when we come to these costs and fees, they are at the same rate, whether the amount is one thousand dollars or one million -- which we think demonstrates that this fee is allowed for extra labor not in lieu of that commission which the State has agreed to allow her collectors out of all taxes which they collect, whether current or back taxes.

\* \* \*

We think the circuit court correctly ruled that the commissions allowed by section 9260, Revised Statutes 1899, should be full compensation for collecting all taxes, except back taxes, and as to the latter they should receive the extra fees which their extra labors and duties imposed upon them."

For the purpose of fixing commissions of collectors, "back" taxes and "delinquent" taxes are the same, and the right of the collector to additional percentage under Section 9969 for collecting back taxes begins on the day when such taxes become delinquent.

"it seems clear that the term 'back tax' means the same as 'delinquent tax,' and that the Legislature had no intention to make a distinction between the two terms, and that both terms apply to taxes remaining unpaid on January 1st of the year after which the assessment was made, and at any time thereafter." State ex rel. White v. Fendorf, 317 Mo. 579, 296 S.W. 787, 789 (1927). ✓



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Of course, it must be noted that income taxes become delinquent not on January 1st, but on June 2nd (R. S. Missouri, 1929, Section 10136), but the case just cited would govern the principle to be applied to both.

The principle that a collector is entitled to two commissions on back taxes, i. e. the percentage thereof fixed by Section 9935 and in addition the percentage fixed by Section 9969, which was established in State ex rel. Shannon v. Hawkins, supra, was reasserted in Hethcock v. Crawford County, 200 Mo. 170; 98 S. W. 532 (1906). However, a limitation on this principle was enunciated in the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614; 247 S. W. 129 (1922) where the court said that under what is now Paragraph XV of Section 9935 no collector to whom any of the first thirteen subdivisions of such section applied could be entitled to over \$9,000 in any one year as the total amount of his compensation, such proviso fixing the \$9,000 maximum being found in the 1929 revision of the statutes in the same form as it had when the cause of action under the case last cited arose. This principle established in the Fulks case was in 1933 expressly put into the statute by an amendment to Paragraph XV of Section 9935 which fixed a graduated scale of total maximum amounts to which various collectors would be entitled instead of the flat \$9,000 maximum, and which also added the following proviso:

"provided, that the limitation on the amount to be retained as herein provided shall apply to fees and commissions on current, back and delinquent taxes, but shall not apply to commissions on the collection of ditch and levee taxes,"

From the foregoing statutes and decisions the following yardstick is disclosed for measuring the compensation to which any given county collector will be entitled for his income tax collections: First, ascertain the total taxes assessed and levied in the county involved, from which can be determined which one of the first fourteen paragraphs of Section 9935 will be applicable to the case, which will show the percentage to which the collector in question is entitled under Section 9935; second, compute such percentage of the total amount collected by such collector under the income tax law whether as current or back taxes; third, ascertain the percentage under Section 9969 which is applicable to the facts involved and compute such percentage of all back income taxes collected. The collector in question will be entitled to the sum of the foregoing computations, provided however, such total is not in excess of the maximum allowed by whichever part of Paragraph XV of Section 9935 is applicable to the facts.

One qualification must be added to the foregoing. Your letter asked for an opinion on the general principles applicable to the collectors throughout this State, and the foregoing has been devoted to the general statutory provisions governing such collectors. However, as you know, there are a number of statutory provisions dealing with collectors which classify them and make different provisions for the

December 4, 1934.

compensation of collectors in counties having certain populations. Thus in counties having populations of between 50,000 and 95,000 inhabitants the foregoing principles would not be applicable because the Legislature has since 1929 passed certain acts fixing the salaries of collectors in such counties and specifically providing that such collectors cannot take any commissions or compensation from any source beyond such salaries. These enactments are as follows: Laws of 1931, page 290, applicable to counties of from 80,000 to 95,000 inhabitants; Laws of 1933, page 375, applicable to counties having from 75,000 to 90,000 population; Laws of 1933, Extra Session, page 104, applicable to counties having from 50,000 to 80,000 population. The language of these enactments is sufficiently explicit to withdraw counties having between 50,000 and 95,000 inhabitants from the principle of Section 10133, and in such counties the collectors cannot receive any fees or compensation beyond the salaries fixed in such acts, for collecting the income taxes.

Of course, there are other statutory provisions fixing salaries for collectors in other counties having certain populations, which appear in the 1929 revision of the statutes, in which the language of the statutes is not to the same effect as the language in the statutes above referred to enacted subsequent to 1929, and to such statutes in the 1929 revision the general principles enunciated in this opinion prior to the preceding paragraph would govern. Among such statutes are the following: R. S. Missouri, 1929, Section 11874, applicable to counties having between 80,000 and 150,000 inhabitants in which Circuit Court is held in two or more places in said county; R. S. Missouri, 1929, Section 11855, applicable to counties containing cities of from 75,000 to 200,000 inhabitants; R. S. Missouri, 1929, Section 10153, applicable to counties containing any cities from 200,000 to 700,000 inhabitants; R. S. Missouri, 1929, Section 11833, applicable to counties containing between 150,000 to 500,000 inhabitants, repealed and re-enacted by Laws of 1931, page 323, applicable to counties containing between 350,000 and 750,000 inhabitants, repealed and re-enacted by Laws of 1933, page 373, applicable to counties containing between 350,000 and 750,000 inhabitants. To all collectors in counties to which the statutes cited in this paragraph apply the general principles set out in this opinion prior to the preceding paragraph hereof would apply, except to the extent that the statutes cited in this paragraph apply to counties containing between 50,000 and 95,000 inhabitants, to which extent the statutes cited in this paragraph have been repealed by the statutes cited in the preceding paragraph.

In conclusion, it is our opinion that except in counties containing between 50,000 and 95,000 inhabitants, each county collector for taxes collected by him under the income tax laws of this State is entitled to the percentage of all money so collected by him (including current and back or delinquent taxes) fixed by whichever one of Paragraphs I to XIV of R. S. Missouri, 1929, Section 9935 (as re-enacted by Laws of 1933, page 454) is applicable to his county, plus the percentage on back taxes applicable to his county under R. S. Missouri, 1929,

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Section 9969 (as re-enacted by Laws of 1933, page 429), the total amount to which he is entitled for any one year, not to exceed, however, the maximum figure fixed by such provision of Paragraph XV of such Section 9935 as is applicable to his county.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McKITTICK  
Attorney-General

COUNTY CLERKS: Fees received by county clerk by virtue of Section 11679, R. S. 1929, must be accounted for.

12-14  
December 13, 1934.



Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Mr. Smith:

This is to acknowledge your letter of December 12, 1934, as follows:

"Section 11679 R. S. Missouri 1929 provides that the County Court may employ the clerk to bunch, label and index papers. Where a County Court makes an order of record directing the County Clerk to bunch, label and index certain papers in the County Clerks office, are the fees paid to the County Clerk for above services accountable fees or will that be money over and above the legal amount the County Clerk may retain as fees of his office."

The county court is a court of record. Sections 1 and 36, Article VI, Constitution of Missouri. Section 36, provides in part as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

Section 1826, R. S. Mo. 1929, provides:

"The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Chapter 77, R. S. Mo. 1929, provides for clerks of courts of record. Section 11664 of said article and chapter provides in part as follows:

"At the general election in the year eighteen hundred and eighty-two, and every four years thereafter, except as hereinafter provided, the clerks of all courts of record, except of the supreme court, the St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters of each county and of the city of St. Louis, who shall be commissioned by the governor ----- and shall hold their offices for the term of four years, and until their successors shall be duly elected and qualified, unless sooner removed from office."

From the above we conclude that a county clerk is a clerk of the court of record.

In your letter you refer us to Section 11679, R. S. Mo. 1929, and we herewith quote said section, as follows:

"Whenever, in the opinion of any court of record, or the judge or judges thereof in vacation, it shall be necessary for the papers in cases remaining on file in the office of the clerk of such court to be bunched and encased in suitable envelopes or wrappers, labeled and reindexed, such court, or the judge or judges thereof in vacation, may order the clerk of said court to perform such service. And each clerk shall keep a correct account of the work and labor performed in complying with such order, and the court shall audit said account, and shall allow the clerk an amount for such service as shall be reasonable."



A reading of that section shows that when any court of record, (which includes a county court) shall deem it necessary for papers in cases remaining on file in the office of the clerk of such court to be bunched and encased in suitable envelopes or wrappers, labeled and reindexed, such court shall order the clerk of said court to perform such services. It is thus seen that this section is primarily directed to circuit courts or clerks of the circuit court. However, it may apply to county courts and your inquiry concerns clerks of the county court and we are thus writing this opinion hypothesized on that fact. Said section provides that the court may order the clerk of said court to perform this duty, thus imposing a duty upon the clerk of the court to perform when directed by the court. When directed by the court to perform the duty provided by said section, then the clerk is entitled for his services a reasonable amount of money for compensation, same to be fixed by the court ordering the work performed.

Section 11781, R. S. Mo. 1929, provides that the clerks of the county courts shall be allowed fees for their services. The county clerk receives into his office certain fees from work performed by him or by virtue of his office and he is permitted to retain out of these fees a certain amount which is his compensation for being county clerk. However, he must earn the amount of his salary from the fees received.

Laws of Missouri, 1933, page 370, Section 11811, provides in part as follows:

"The aggregate amount of fees that any clerk of the County Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out. \* \* \* Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."



Above we have concluded that a county clerk is a clerk of a court of record and that Section 11679 imposes upon him a duty to perform, when ordered, and gives to him a reasonable compensation for performing such services. The question arises as to whether or not the county clerk, if he performs such services by virtue of Section 11679, supra, must account to the county court for the fee received, or will such money be over and above the legal amount the county clerk may retain as fees of his office? In our opinion, the fee received by virtue of said section must be accounted for. In reaching this conclusion we direct your attention to Section 11810, R. S. Mo. 1929, which in part provides as follows:

"Every clerk of a court of record in every county in this state shall make return quarterly to the county court of all fees by him received to date of return, from whom received and for what services, \* \* \* \* \*."

As stated above, it is our opinion that fees received by a county clerk by virtue of Section 11679 must be accounted for and that same will not be money over and above the legal amount the county clerk may retain as fees of his office.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

"CIRCUIT JUDGES: City of St. Louis, when terms of office begin."

12-28

December 22, 1934.



Hon. Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Sir:

You have requested a ruling on the date upon which the nine circuit judges for the City of St. Louis elected in November, 1934, for terms of six years, take office, there being some difference of opinion as to whether such judges take office on January first, 1935, or on the first Monday in January, which is January seventh, 1935.

Presumably all of such nine judges would assume office on the same date. Considerable confusion would result if some were to take office on January first and some on January seventh, both in 1935 and upon the election of their successors. Also these nine judges were elected without classification, and not to preside over any particular division of the circuit court, and if it were determined that a certain number of them should take office on one day, and the remainder on another day, there would be no possible method of distinguishing the two groups. Consequently our conclusion must be that all of these nine judges take office on the same day, if such a construction is possible under, and not forbidden by, the Constitution and statutes of this state.

At the outset of this analysis let it be remarked that the Constitution and the various statutes present certain ambiguities and inconsistencies which can only be understood by an historical resume, which will constitute the bulk of this opinion. So many provisions must be referred to that to prevent further lengthening this opinion their substance only will be indicated in frequent instances, with references to the source at which the enactment itself may be found.

a Before the Constitution of 1865 went into effect there was only one circuit judge of the County of St. Louis. That constitution (Article VI, Section XV) provided three judges for the circuit court of such county. (In the present constitutional provision (VI, 27) the designation "County of St. Louis" is likewise used, as it was enacted prior to the separation of city and county, but this factor is of no significance). The constitution of 1865, which first created a multi-cameral circuit court for St. Louis will therefore be the logical historical starting-point. In the constitution of 1865, article VI, Section XV provided that three circuit judges should be elected at the general election of 1868, that after their election and assumption of office such judges should by lot determine the duration of their several terms, which should be two, four and six years respectively, that at the general election every two years thereafter one judge of such court should be elected for the term of six years, beginning the first Monday in January next ensuing. Section XIV of such Article VI, which related to circuit judges, and was of state-wide application, contained the following:

"At the general election in the year one thousand eight hundred and sixty-eight, and at the general election every sixth year thereafter, except as hereinafter provided, all the circuit judges shall be elected, and shall enter upon their offices on the first Monday of January next ensuing."

Following a practice which is still prevalent, the General Assembly placed in the General Statutes of 1865 a section almost identical to the above quotation. (Ch. 136, Sec. I)

#### 1870 Statute

In 1870 the General Assembly provided that "from and after the first Monday of January, 1871," the circuit court of St. Louis should be composed of five judges, the additional judges (the power to increase the number of judges was given to the General Assembly by the Constitution of 1865, VI, XV) to serve for six year terms.

1875 Constitution In 1875 a new constitution went into effect, which in so far as it is relevant, is in force unchanged at the present time. Nothing is said in this constitution relating to the date when circuit judges assume office. It is, however, provided in Article VI, Sec. 25 that the terms of office of circuit judges shall be six years. In 1875 there were five circuit judges of St. Louis in office, three whose terms were to expire on the first Monday in January, 1877, one whose term was to expire on the first Monday in January 1879, and the fifth whose term was to expire on the first Monday in January, 1881. Each of these judges had been elected for a term of six years. The constitution of 1875

provided that the term of circuit judges should be six years, so apparently there was nothing new to disturb the status quo. Furthermore, the statute of 1865, (Ch. 136 Sec. I) referred to above, which was almost identical to the constitutional provision of 1865 quoted above, which provided that the terms of all circuit judges should begin on the first Monday of January, was left in force (in fact, without change until 1892, and with such 1892 changes until the present, as R.S. 1929 Sec. 1937). No further changes were made in the applicable provisions until 1892, during which time a circuit judge or judges were elected every two years, to succeed judges whose terms expired on the first Monday of January in the respective years following such elections.

1892 Statute

In 1892 the statute which has been referred to above as the statute of 1865 was amended. (Laws 1892 p. 9). The chief difference between such statute had been that instead of the phrase "except as hereinafter provided," which is in the constitutional provision of 1865 quoted above, there had been in the statute in place of the same the phrase "except as otherwise provided by law." Such section had provided for the election of all the circuit judges in the state at the general election of 1868, and every sixth year thereafter, but the constitution of 1865 had provided that there should be an election of a circuit judge for St. Louis every two years, and it must have been to this difference that the exception in the constitution and statute of 1865 referred, i.e. the time of the election of judges, and not the time at which their terms begin. The grammatical position of the exception and the substantive nature thereof both confirm the interpretation. Now in 1892 there was a proviso added to the statute of 1865 as follows:

*and the constitutional provision*

"Provided further, that nothing contained in this section shall be construed as changing the law now in force concerning the election of circuit judges in the City of St. Louis and the County of Buchanan."

With the addition of this proviso ~~to~~ the phrase "except as otherwise provided by law" was deleted, and in a form so changed this statute appears as R.S. 1929 Sec. 1937.

A major question arises because of this 1892 enactment. If it meant to refer to the law regarding the date when the terms of the St. Louis circuit judges take office, and by its very presence as an exception in the statute to refer to some law then in force making the terms of the St. Louis

circuit judges begin on a different day from the beginning of the terms of all the other circuit judges in the state, then the presumption would be that the St. Louis circuit judges do not begin their terms on the first Monday in January. However, in 1892 the law applicable to the St. Louis circuit judges made their terms begin on Mondays, and all the judges then in office were elected for terms which had begun on Mondays, and all the other circuit judges in the state had likewise begun their terms on Mondays. Therefore the law as far as it concerns the day terms commence was the same for St. Louis and the rest of the State, and the proviso added in 1892 would be meaningless and unnecessary. If, however, the proviso meant to make an exception as to the time of election of the St. Louis circuit judges, its effectiveness and desirability is immediately apparent, for here the law applicable to St. Louis (and Buchanan County, as will be discussed more fully later) did in 1892 differ from the law regarding the election of judges in other counties of this state.

The Constitution of 1865 provided that one Judge of the Circuit Court of St. Louis should be elected every two years, and the statute of 1865 provided that all Circuit Judges should be elected in 1868 and every six years thereafter, except as otherwise provided by law. When the Constitution of 1865 was superseded by the Constitution of 1875 there was no provision in the Constitution of 1875 or any statute taking the election of the St. Louis judges out of the general operation of the 1865 statute. This situation continued until 1892. To remedy this situation the General Assembly of 1892 added the proviso to the 1865 statute clearly for the purpose of making it definite and certain that the old law relating to the time of the election of the St. Louis judges was in full force and effect and that the statute relative to the election of Circuit Judges other than the City of St. Louis every six years beginning with 1868 did not apply to the election of Circuit Judges in the City of St. Louis.

Therefore, it is evident that the election of the St. Louis judges differed from all other Circuit Judges, but not in the time of beginning their terms. Such distinction from 1865 to 1875 being in the constitution, from 1875 to 1892 in the exception in the 1865 statute, and from 1892 to date in the proviso as added in that year to the 1865 statute, which is now R. S. 1929 Sec. 1937.



1895  
Statutes

In 1895 the number of judges of the St. Louis circuit court was increased for the first time since the adoption of the Constitution of 1875. In an Act effective March 26, 1895, (Laws 1895 p. 130) it was provided that "on and after the first Monday of January, 1897," the court should consist of nine judges, the five then in office and four new judges, and that five judges were to be elected in 1896, 3 for 6 year terms and two for two year terms. (The term of one judge of the court who was on the bench in 1895 was to expire the first Monday in January, 1897). The successors of all of said new judges were to be thereafter elected for six year terms. Thus after 1896 all nine judges began their terms on first Mondays, as had the five who were on the bench before this number was increased, and as had the original three judges elected in 1868.

N.B. Another Act was enacted in 1895, (Laws 1895 p. 130) with an effective date of March 12, increasing the court, as of the effective date of the Act, to 7 judges, two new judges to be appointed to serve until December 31, 1896, and two successors to be elected in 1896, one for two years and one for six years, with the successors of the new judges elected in 1896 to have terms of six years each. From the fact that the Act of March 26, 1895, covers these two additions, and that the Act of March 26, 1895, speaking as of its effective date, refers to "the five judges now constituting said court," when if the Act of March 12, 1895, was to be operative there must have been seven judges constituting the court on March 26, 1895, it seems that the Act of March 26, 1895, repealed and superseded the Act of March 12, 1895, so the latter will be considered no further and the former will hereafter be called "the Act of 1895."

There can be no doubt that the Act of 1895 fixed the terms of the judges created thereby as beginning on Mondays. This is apparent from Section 11a thereof, in which the above provisions are found, and in sections 12, 13, 14, 15 and 16 thereof, in all of which specific functions and attributes of the court are designated as beginning on the first Monday of January. This was the first comprehensive scheme of statutes enacted relating particularly to the St. Louis circuit court, and these sections were carried into the revision of 1899 as Art. XVII entitled "St. Louis Circuit Court",



of the Scheme and Charter St. Louis, as <sup>Section</sup> ~~Laws~~ 33 et seq. of such article. In the 1909 revision this article so entitled was put into the chapter on "Courts of Record" (R.S. 1909 Chapter 35, Art. 8) and in the 1929 revision it is article 7 of Chapter 9. Much of the original Act of 1895 is still in force, with the specific provisions regarding the first Monday in January, and especially noteworthy is Sec. 2112 of the 1929 statutes providing that the compensation of the St. Louis circuit judges to be received from the city shall begin on the first Monday of January, 1897. If the compensation from the city began on that date, and continued for six years, for the performance of duties during that six year period as judges, as this statute provides, it would seem to be a very strong argument against the compensation paid by the state beginning earlier and ending earlier, when such state compensation also was to be paid for six years for the performance of the duties of judge during such six year period.

Thus after the effective date of the 1895 Act it made no difference if the 1865 statute (as amended in 1895) or the 1895 statute be referred to as to the beginning of the term of circuit judges, for both provided that the terms should begin on first Mondays.

Statutes  
Since  
1900

No further applicable enactments occurred before 1900. Since 1900, the court has been increased from 9 to 18 judges, by additions of one or two judges at a time. (Laws 1903 p. 142 increasing to eleven; Laws 1905 p. 127, increasing to twelve; Laws 1915 p. 264, increasing to fourteen; Laws 1921 p. 201, increasing to 16; Laws 1929 p. 149, increasing to 18). These Acts are all in substantially an identical form. Only the first section of each one has found itself into any revision of the statutes. Each Act has used the same machinery for the increase, i.e., a declaration that from the effective date of the Act, the court shall consist of the enlarged number of judges, that the governor shall appoint the new judges to serve until December 31 of the year following the enactment, and that the successors of such appointive judges shall be elected in the year following the enactment, for terms of six years each. Nothing is said about when the terms of the first new judges elected under the current enactment shall begin their terms, unless such date can be inferred from the date on which the terms of their appointed predecessors expire. As a specimen of such acts the 1903 Act is set out below, (Sec. 5, the emergency clause, is omitted.)

"Section 1. From and after the taking effect of this act the circuit court of the city of St. Louis shall be composed of eleven judges.

"Sec. 2. Immediately on the taking effect of this act the governor shall appoint two judges of said circuit court for a term ending on the 31st day of December, 1904, and the said additional judges hereby provided for shall possess the same qualifications and shall receive the same compensation and from the same sources as the present judges of said circuit court.

"Sec. 3. At the general election held in the city of St. Louis in November, 1904, successors to said additional judges hereby created shall be elected for a term of six years and thereafter their successors shall be elected for the same term.

"Sec. 4. All acts and parts of acts inconsistent with this act are hereby repealed."

Hereafter the discussion of this 1903 act will be deemed to apply with like force to the acts subsequent to it.

It would certainly seem that the successors of the two judges appointed in 1903, with terms expiring December 31, 1904, would be intended to succeed such appointed judges without leaving a gap in the office, (i.e. a gap from December 31st, 1904, to the first Monday in January of 1905). However, at the general election in St. Louis in 1904, in addition to the two new judges to be elected under the 1903 statute, there were three other judges to be elected to succeed the three judges in office when the 1903 statute was enacted whose terms were to expire on the first Monday of January, 1905. Therefore three of the five judges elected in 1904 could not take office until the first Monday of 1905 without reducing the terms of their predecessors to less than six years. To say that the other two judges elected in 1904 should take office on January first, and their three colleagues elected at the same time should take office later, would be a curious statutory scheme. Which of these five judges elected in 1904 could claim to take office on January first? Clearly all could not, for the court under the 1903 act could only consist of eleven judges, and nine of the eleven had been elected and had taken office on the first Monday of January following their election, and the constitution fixed their terms at six years and gave them the right to stay in office that long. There is no provision for casting lots as there was in the constitution of 1865. Since these five judges elected in 1904 were elected generally to the circuit court, and were not and could not have been elected to fill any particular

division thereof, there is no possible way of fixing definitely and by law a method of segregation or classification of them.

In each of the acts increasing the court after 1903 the same problem is presented, so that nine of the present incumbents are successors (after various mesne successions) of judges whose terms, of six years each, did not expire until the first Monday in January of the seventh year after their elections, while the other nine present incumbents are successors of judges added to the court since 1900, whose earliest elective predecessors succeeded appointive interim judges whose terms expired on December 31 of the years following the acts creating their offices. Three of the judges whose terms are now about to expire are successors of the 19th century judges, while the other six are successors of judges whose offices were created after 1900. (These computations can readily be made by diagrams, for which the information already set out will be sufficient).

The natural first inference from the provision of each of the 1903 and later acts for the appointment of temporary interim judges whose terms expire December 31 of the year following their appointments, would be that the General Assembly thought that the terms of all the St. Louis circuit judges began on the first of the year. However, each of these provisions was a temporary one, (i.e. it only was effective once, on the December 31 of the year after the enactment) which never found its way into the revisions of the statutes. Also at the time of each of these acts (1903 et seq.) there were in force the general statute of 1865 as amended in 1892 to the effect that all circuit judges begin their terms on the first Mondays of January, and the act of 1895 relating particularly to the circuit court of the City of St. Louis, with the various provisions relating to the beginning of the functioning of such court on the first Monday of January, 1897. Under these latter two acts and the constitutional provision fixing six year terms, it would need reasonably clear language to work an implied repeal of such acts, especially when such a repeal would deprive some judges of parts of their six year terms for which they were elected. Thus it would seem that the three judges elected in 1904 to take the place of the three judges elected in 1898 for six year terms expiring the first Monday of January, 1905, could not take office until the first Monday of January, 1905.

The remaining question is if the two new judges elected in 1904 to take the offices created by the 1903 act take or should have taken office on January first, 1905, or along with their colleagues elected with them on the first Monday



of January, 1905. The answer to this question will likewise solve the problem of additional judges created under the later acts, for no new inferences (other than cumulative force) are offered by such later acts. As has been said, there was no way of telling which of the five judges elected in 1905 were elected to take office on January first, 1905, assuming that they were to take office at different times. As an argument against such assumption is the principle that statutes should be read together.

"A statute is not to be construed as if it stood solitary and alone, complete and perfect in itself, and isolated from all other laws. It is not to be expected that a statute which takes its place in a general system of jurisprudence shall be so perfect as to require no support from the rules and statutes of the system of which it becomes a part, or so clear in all its terms as to furnish in itself all the light needed for its construction. It is proper to look at other statutes, to the rules of the common law, to the sources from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. (Citing authorities) . . .

'Construction has ever been a potent agency in harmonizing the operation of statutes with equity and justice.' Statutes are to be so construed as to make the law one uniform system, not a collection of divers and disjointed fragments. When this principal of construction is adopted, 'an enactment of to-day has the benefit of judicial renderings extending back through centuries of past legislation' (Bishop, Written Laws, sec. 242b.) 'A statute,' says the author just referred to, 'must be construed equally by itself and by the rest of the law. The mind of the interpreter, if narrow, will stumble.' 'The completed doctrine, resulting from a bringing together of its parts, is, that all laws, written and unwritten, of whatever sorts and at whatever different dates established, are to be construed together, contracting, expanding, limiting and extending one another into one system of jurisprudence as nearly harmonious and rounded as it can be made without violating unyielding written or unwritten terms.'"

State ex inf. Major v. Amick, 247 Mo. 271, 290,  
152 S.W. 591 (1912).

If all the judges elected in any one year in St. Louis should begin their terms at the same time, in each general election some of the judges are elected to succeed judges whose terms do not expire until the first Monday of January

next, and consequently they cannot begin their terms on January first, and since an inference (from the December 31st expiration of terms of interim judges) is necessary to require the other judges to begin their terms on January first, that inference should not be drawn.

It may be said that to say that the two judges appointed in 1903 whose terms were to expire December 31, 1904, are to be succeeded by judges whose terms are not to begin until the first Monday in 1905, so that the court should consist of eleven judges from the appointments under the 1903 act until December 31st, 1904, with an hiatus from the latter date until the first Monday of 1905, during which hiatus only nine judges were on the bench, with the full bench resumed after such first Monday, is a construction reaching a result so peculiar that it should be avoided if possible. However, the alternative construction presents an absurdity which is even worse, for such alternative construction would result in a permanent evil, recurring after every general election so as to cause an hiatus at each such time, while the construction here advanced presents only a peculiarity which happens but once for each increase in the number of the judges of the court. Also the alternative construction presents a dilemma which the present law offers no solution, while the construction offers at least a clear, workable rule which, if enforced, will constitute a permanent solution.

The strongest argument for the alternative construction is that it would be ridiculous for the General Assembly to have provided, in every act increasing the court since 1900, that there should be a gap the year after each enactment from December 31st to the first Monday in January next in the office of the additional judges created by such acts, and that therefore the inference must be drawn that the General Assembly meant the new terms of such additional elected judges to begin on January first. The General Assembly, however, apparently can consciously face such gaps with equanimity, for in an act of 1889 (Laws 1889 p.74) increasing the number of circuit judges of Buchanan County from one to two, an interim judge (like those under the St. Louis acts of 1903 et seq.) was provided for, to be appointed to serve until December 31, 1890, and it was provided in the same section of the act that the successor of such interim judge should begin his term on the first Monday of January, 1891. January first, 1891, was a Thursday.

Hon. Forrest Smith (Page 11)

Three of the nine present incumbents of the Circuit Court of the City of St. Louis, whose successors were elected in 1934, are successors (after many mesne successions) of judges of that court who were elected for terms not to end until a first Monday of January. These original judges were guaranteed by the Constitution of Missouri six year terms, as were their successors, so the chain of six-year terms down to 1935 as to such three judges should not and cannot form its next link until January 7, 1935. The fact that any or all of these nine incumbents or any of their predecessors may have taken office on January first in the past of the year after they were elected could not alter the constitutional and statutory scheme which fixes the termini at first Monday in January six years apart.

In conclusion, it is our opinion that under the present law the terms of all judges of the Circuit Court of the City of St. Louis begin on the first Monday of the January next ensuing after their elections.

Edward V. Miller  
Assistant Attorney General.

Approved:

Attorney General.



CIRCUIT CLERKS - Fees in criminal cases under Section 11785  
for incorporating bill of exceptions into  
transcript.

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December 28, 1934



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We have your request of December 19,  
1934 for an opinion, which in part is as follows:

" \*\* the Circuit Clerk of Douglas  
County, Missouri, claims that he  
is entitled to 5¢ per hundred words  
for the incorporation of a copy of  
the bill of exceptions in his  
transcript to the Supreme Court  
as provided under Section 11785,  
R. S. Mo. 1929, which provides as  
follows:

' \*\*that in counties contain-  
ing less than forty-five  
thousand inhabitants, in  
cases in which the party  
applying for such transcript  
shall furnish to the clerk  
of any circuit court, court  
of common pleas, or criminal  
courts, a typewritten copy  
of any bill of exceptions, or  
any part thereof, then it shall  
be the duty of such clerk, at  
the request of the party so  
applying, to incorporate such  
copy into such transcript, and  
for the part so incorporated  
he shall receive only five  
cents per hundred words and  
figures.'

#2 - Honorable Forrest Smith

"We would be pleased to have the opinion as to what charge he is rightfully entitled to."

In an opinion dated June 23d, 1933, this department construed the term "transcript", as used in Section 11787, R. S. Mo. 1929, but that opinion did not in any way construe Section 11785, R. S. Mo. 1929 quoted in your letter.

The statute (11785) relates to the fees of clerks of circuit courts and of courts of common pleas; the first part of the statute refers to the fees in civil cases, while the latter part refers to fees in both civil and criminal cases. We do not at this time pass upon the constitutionality of this act as to whether or not it meets with the requirements of the Constitution with reference to the title of the act. However, the plain meaning of the statute is clear; it is made the duty of the clerk to incorporate any bill of exceptions into the transcript, and for such services he shall receive five cents per hundred words and figures.

It is, therefore, the opinion of this office that the circuit clerk is entitled, under this section, to five cents per hundred words for incorporating such bill of exceptions into the transcript.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

FER:FE

STATUTES: Of no force or effect prior to effective date.

February 19, 1934: 2-26-34



Hon. F. M. Stamps, Collector  
City of Pleasant Hill  
Pleasant Hill, Missouri

Dear Mr. Stamps:

We herewith acknowledge receipt of your request for an opinion of this office reading as follows:

"I understand that there was a bill passed sometime ago which cancels all penalties on unpaid taxes for the months of Jan. & Feb. tho' I understand some are still collecting penalties.

May we have your decision on this matter for which we will thank you very much?"

The bill referred to in your letter is undoubtedly House Bill #124, passed by the 57th General Assembly in extra session, reading as follows:

"That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

We direct attention to the fact that this Bill carries no emergency clause and accordingly cannot be effective until the 1st day of April, 1934.

## I.

TAXES CANNOT BE PAID UNDER HOUSE  
BILL # 124 UNTIL APRIL 12, 1934.

Our constitution provides that no bill shall be effective until ninety days after the adjournment of the Legislature enacting the law, (Section 36, Article IV). In our opinion payment of taxes under the above quoted act during January and February would annul this constitutional provision. It has been the long established rule of law in this State that an enactment of the Legislature has no force or effect for any purpose until its effective date. Such was the holding of the Supreme Court in the early case of St. Louis vs. Alexander, 23 Mo. 483, and the case of Keane vs. Cushing, 15 Mo. App. 96. In the latter case we find the following pronouncement of the law, 1. c. 99:

"\* \* \* It is a general rule that, where a constitutional provision prescribes the date at which an act of the legislature shall take effect, until the arrival of that date, it has no force or validity for any purpose whatever; not even for the purpose of imparting notice of its existence. It is said by an authoritative writer on statutory construction: 'A statute which is to become a law at a future date, is a nullity in the meantime. It does not even operate as notice to persons to be effected by it; nor does a repealing clause in it put an end to the law to be repealed.'\* \* \*

The general rule as there stated was adopted by our Supreme Court in the Alexander case supra, and referred to by the St. Louis Court of Appeals, 1. c. 100:

"\* \* \* Our Supreme Court has taken the same view of the subject. The city and county of St. Louis were authorized by a statute to make a certain subscription to the capital stock of a railroad company. The statute provided that, before the subscription should be made, the question should be submitted to a vote of the people at an election. The statute contained no clause as to the time within which it should

February 19, 1934.

take effect. This being so, under the general law then in force (Rev. Code 1845, p. 698), it did not take effect until ninety days after its passage. Nevertheless, the question was submitted to a vote of the people at an election held before the expiration of that time. It resulted in favor of making the subscription. The county court thereupon made the subscription. It was held that, because the election had been held before the statute authorizing the subscription became operative, the subscription was void.\* \* \* \*

CONCLUSION.

It is therefore the opinion of this office that no force or effect can be given to House Bill 124 until the effective date of the act, to-wit, April 12, 1934.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General.

HGW:MM

APPROPRIATIONS:—Section 12-A1 appropriates and transfers to the Grain Inspection Fund \$18,000.00 which may be paid out according to the appropriations charged to the Grain Inspection Fund under Section 14, Laws of Missouri 1933, page 38.

2-24  
February 21, 1934.



Mr. Joe Spoor, Chief Clerk,  
Grain Inspection and Weighing Department,  
317 Board of Trade Building,  
Kansas City, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Will you please give me an opinion construing Section 12-A1 of House Bill No. 127, which was passed in the extra session?"

Sometime ago, \$18,000.00 was appropriated from the Grain and Warehouse Department, and put in the General Revenue Fund. In Section 12-A1, there is appropriated \$18,000.00 for the Grain & Warehouse Inspection Fund, which is chargeable to the General Revenue Fund, and it does not specify how it is to be used. The Department is operating on the least expense possible at the present time, and we are badly in need of this money to pay for the extra help during the months of June, July and August."

Section 12-A1 of House Bill No. 127, passed by the 57th General Assembly in extra session, provides as follows:

"There is hereby appropriated to the Grain and Warehouse Inspection Fund, out of the State Treasury, chargeable to the general revenue fund, the sum of Eighteen Thousand Dollars (\$18,000.00)."

You inquire for what purposes can this fund be used and particularly can it be used for salaries for extra men whom it is necessary to employ during the months of June, July and August. We do not find any decision of our Courts construing an appropriation of this kind.

Section 19 of Article X of the Constitution of Missouri provides as follows:



"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Under the foregoing constitutional provision, it is provided that every law making a new appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied. Section 12-A1 does distinctly appropriate the sum of \$18,000.00 and distinctly appropriates and transfers it to the Grain and Warehouse Inspection Fund. We believe that the appropriation conforms to the constitutional requirement.

In 38 Cyc. 892, it is said:

"A specific appropriation is an act by which a named sum of money is set apart in the treasury and devoted to the payment of particular claims or demands. The appropriation must be specific as to the amount or fund appropriated and as to the object for which the appropriation is made, it being sufficient, however, if the amount is capable of being determined, and it is not essential that the amount be certainly ascertained prior to the appropriation, nor need the statute designate the fund out of which the money is to be drawn. The appropriation need not be made in any particular form of words, nor need it necessarily be express. It is sufficient if the legislative intent to make an appropriation clearly appears, expressly or by implication, from the terms of the statute; but such language must be used as will show the intention of the legislature to make an appropriation; and such intention will not be inferred from doubtful or ambiguous language."

The Legislature in 1933, Laws of 1933, page 98, Section 14, passed the following appropriation:

"GRAIN AND WAREHOUSE DEPARTMENT.--There is hereby appropriated out of the State Treasury, chargeable to the grain inspection and weighing fund, the sum of three hundred ninety-one thousand two hundred dollars (\$391,200.00) to pay the salaries, wages, and per diem of the officers and employees and other expenses of the grain and warehouse commissioner, as follows:

A. FOR PERSONAL SERVICE;

1 warehouse commissioner, 2 chief clerks,  
2 chief inspectors, 3 deputy chief inspectors,  
2 supervising inspectors, 25 inspectors,  
3 registrars, 12 clerks, 36 weighers, 38  
samplers, and 4 helpers and temporary help  
including clerks, weighers, samplers, in-  
spectors and helpers, - - - - - \$339,525

B. ADDITIONS:

Laboratory, scientific and testing equip-  
ment, protein laboratory at St. Louis or  
St. Joseph, - - - - - 3,750

C. FOR REPAIRS AND REPLACEMENTS:

Laboratory, scientific and testing equip-  
ment, office furniture, and equipment, trans-  
portation and conveying equipment, replace-  
ment of automobile, - - - - - 2,400

D. FOR OPERATION:

General expense: including communication,  
printing and binding, transportation of  
things, travel, other general expense (office  
rent and premium on bonds) and material and  
supplies; consisting of light, heat, power  
and water supplies, small tools, miscella-  
neous supplies and repairs, stationery and  
office supplies and special material and  
supplies, - - - - - 45,525

Total, - - - - - \$391,200"

Under Section 14 above, the Legislature appropri-  
ated out of the Treasury and chargeable to the Grain and  
Inspection Fund, \$391,200, and provided for what purposes  
the money appropriated out of the Grain Inspection and  
Weighing Fund should be used. By Section 12-A1 above, the  
Legislature, by appropriation, transferred from the general  
revenue fund in the State Treasury to the Grain and Ware-

house Inspection Fund the sum of \$18,000.00. Section 12-A1 did not appropriate this sum for any particular expenses and apparently it was the intention of the Legislature to replenish the Grain Inspection Fund by this amount. The Legislature had previously made appropriations out of the Grain Inspection Fund for various purposes and in paragraph A, for Personal Services, under Section 14, had appropriated \$339,525. Since Section 12-A1 was appropriated to replenish the Grain and Inspection Fund and not specified for any enumerated expenses, we believe that it may be used to pay the appropriations made by Section 14 above. We believe that this sum of money may be paid out for salaries under paragraph A of Section 14, so long as the total amount expended out of the Grain Inspection and Weighing Fund for salaries does not exceed the sum of \$339,525, authorized for that purpose. We conclude that Section 12-A1 did not appropriate an additional \$18,000.00, but that the intention of the Legislature was to withdraw from the general revenue fund this sum for the purpose of replenishing the Grain Inspection Fund and making available actual money not otherwise available in the Grain and Inspection Fund, out of which the appropriation under Section 14 above could be paid. Apparently there were less fees in the Grain Inspection Fund than the amount appropriated, resulting in a deficit.

In answer to your inquiry, therefore, it is our opinion that the \$18,000.00 appropriated to the Grain and Warehouse Inspection Fund under Section 12-A1 was merely a transfer of appropriation from the general revenue fund to the Grain and Inspection Fund, and that that sum of money, or portions thereof, may be used for any of the purposes set forth under the appropriations set forth in Section 14 above, so long as the amounts withdrawn for the various purposes do not exceed the amount appropriated therefor. In other words, that all or a portion of this \$18,000.00 may be used, under paragraph A of Section 14, for personal services, except that the total amount expended during the biennium for that purpose shall not exceed \$339,525.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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Attorney General.

**ELECTIONS:** An election to determine whether or not intoxicating liquor shall be sold in a city must be a special election and must not take place within 60 days of any general election; city or school election not a general election under the Constitution and Laws of Mo.

March 9, 1934. 3-9



Hon. R.B. Snow, Jr.,  
City Attorney,  
Ferguson, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"The Board of Aldermen of the City of Ferguson had presented to it a petition requesting an election to be called for the purpose of permitting the sale of liquor in excess of 5% and in accordance with the provisions of the Liquor Control Act requests that an election to vote upon said proposition be held within 40 days. I understand that you have ruled that an election for school directors is an election held under the Constitution and that under the provisions of the Liquor Control Act no special election could be held as contemplated in said Act until 60 days after such school election.

In view of the fact that there will be held in the City of Ferguson on April 3rd a municipal election for the purpose of electing aldermen and also a school election for the purpose of electing directors of the school board and fixing a rate of taxation, I would like to know what your latest ruling is on the question of what constitutes a general election and if possible would like to have a copy of your opinion so that I may advise the Board of Aldermen as to a date it may set for said election."

I.

An election to determine whether or not intoxicating liquor shall be sold in a city must be a "special election and must not take place within sixty days of any general election."

Sec. 44-a-1 of the Liquor Control Act provides in part as follows:

"Provided, that no such election held under the provisions of this section shall take place on any general election day, or within sixty (60) days of any general election held under the Constitution and laws of this state, so that such elections as are held under this section shall be special elections and shall be separate and distinct from any other election whatever.

It will be noticed that the election must be "separate and distinct" from any other election. In the case of *Dysart v. City of St. Louis*, 11 S.W. (2d), l.c. 1052, 1053, the Court said:

"Here is an indication of an intention on the part of the Constitution makers to define a special election as one especially called at a time different from the day of any election which comes regularly according to law. The definition of 'election', in section 88 of the act, shows that a general election may be local as well as state wide.

\* \* \* \* \*

The rulings in other states are conflicting upon this subject, but the weight of the authority favors the definition that a special election means one taking place at a time different from that at which an election fixed by law is held."

II.

A city election or school election not a general election under the Constitution and laws of the State.

Article VIII, Sec. 1 of the Constitution of Missouri provides:



"The general election shall be held biennially on the Tuesday next following the first Monday in November of each even year; but the General Assembly may, by law, fix a different day--two-thirds of all members of each house consenting thereto."

Sec. 655, R.S. Mo. 1929, providing for rules for construing statutes, provides in part:

"\*\*\*\*the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially. \*\*\*\*"

Fortunately, the case of *The State v. Searcy*, 39 Mo. App. 393 construes a similar provision of the local option law of 1888. The court said (l.c. 405-6):

"It is next objected that, whereas, according to the law in force at the time when this election was ordered and held, a general school election in all the counties of the state was required to be held on the first Tuesday in April, which was the second day of that month, and whereas the election ordered by the county court on the question of local option was held on the eleventh of February, which was within sixty days of the election of school directors, the election on the question of local option was void under the terms of the statute. The provision of the statute relating to elections on the question of local option outside of the corporate limits of any city or town are 'that no such election, held under the provisions of this act, shall take place on any general election day, or within sixty days of any general election held under the constitution and laws of this state, so that elections as are held under this act shall be special elections, and shall be separate and distinct from any other election whatever.' The Revised Statutes of 1879 contain this general provision: 'The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute. \*\*\*\* Sixteenth, the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November biennially'. R.S. 1879, section 3126. This shows that



March 9, 1934.

the school election required to be held in April was not a 'general election' within the meaning of the local option statute, and this disposes of this assignment of error."

CONCLUSION

In view of the foregoing, we conclude that a city or school election is not within the meaning of the Liquor Control Act providing "that no such election held under the provisions of this section shall take place on any general election day or within sixty days of any general election held under the Constitution and laws of this state." It is, however, necessary that any election called under the Liquor Control Act must be separate and distinct from any other election.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

TAXATION: No time limitation on assessment of omitted property.

April 5, 1934.



4/11

Hon. Tom G. Spratt  
Assistant Attorney  
Office of Solicitor  
U. S. Dept. of Agriculture  
Rose Cliff Hotel  
Van Buren, Missouri

My Dear Sir:

We acknowledge receipt of your letter respecting the assessment of omitted property under Section 9788 R. S. Mo. 1929, and in accordance with such communication render the following opinion. Your letter reads in part as follows:

"I have been placed temporarily in charge of title work in connection with the acquisition of lands for National Forests in the State of Missouri, and in compiling notes to govern our requirements in the purchase of these lands I ran across Section 9788 of the Revised Statutes of Missouri, and it appears from this section that if any lands were left off the assessment roll in any year it is the duty of the assessor to back tax this property in the current year or the year in which such non-assessment was discovered. In this connection see also 178 Mo. 239, 186 Mo. 205 and 177 S.W. 608. It does not appear that there is any statute of limitations governing this type of assessment, although we do find a statute limiting the collection of delinquent taxes to five years where the assessment has already been made and the land is actually delinquent.

\* \* \* \* \*

Since a great many of the old tax records in this section of the state have been destroyed, it is going to be absolutely impossible to show assessment and payment of taxes on these lands from the date of issuance of patent.\* \* \*

I.

OMITTED PROPERTY MAY BE  
ASSESSED AT ANY TIME.

Under the provisions of Sections 9788 and 9789 R. S. No. 1929, any property which has been omitted from the assessment rolls may at any time be placed thereon and the taxes levied on such assessment.

"If the assessor discovers any real property,  
\* \* \* which has not been returned to him" \* \* \*  
he shall assess such property and enter the  
same on the assessment list." \* \* \* "

"If by any means any tract of land or town  
lot shall be omitted in the assessment of any  
year or series of years, and not put upon the  
assessor's book, the same, when discovered,  
shall be assessed by the assessor for the time  
being, and placed upon his book before the  
same is returned to the court, with all arrear-  
ages of tax which ought to have been assessed  
and paid in former years charged thereon."

This is the clear intendment of these two sections and they have been so construed by our Supreme Court. In the case of State ex rel. Hammer vs. Vogelsang, 183 Mo. 17, the Court made the following remark respecting Section 9789, l. c. 23:

"This statute was enacted in 1872 and has been the law ever since; it was the law during the years the defendant's property was omitted from the assessor's books. It was in effect a proclamation to the property owner during all those years that if his property was omitted from the assessor's books then it would be assessed for the omitted period thereafter, whenever the omission should be discovered." \* \* \* "

It has also been determined that the five year statute of limitations against the institution of suits for taxes does not apply to the original assessment of taxes. Further, that such five year limitation does not commence to run until the taxes are actually assessed. The Hammer case, supra, considered the assessment made in 1896 of taxes for the years 1885 and 1890 and stated, l. c. 24:

"The suit is not barred by the statute of limitations. No right of action accrued until the taxes were assessed and had become delinquent. The assessment was made in 1896, the taxes were therefore not delinquent until January, 1897. The five years' limitation expired January 1, 1902. The suit was brought December 16, 1901." \* \* \*

This seems to be the established case law on the subject in this State and the Legislature has not enacted any time limitation upon the assessment of property. However, we believe that from a practical standpoint the lack of a statute of limitations should not concern you.

II.

ASSESSOR WILL BE PRESUMED TO HAVE INCLUDED ALL PROPERTY IN ASSESSMENT ROLLS THAT WAS SUBJECT TO TAXATION.

Under the statutes of this state the County Assessor is prescribed certain definite duties to be performed in connection with the assessment of property. A portion of these duties are found in Section 9756 R. S. No. 1929, from which we quote the following:

"The assessor or his deputy or deputies shall between the first days of June and January,\* \* proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following to-wit:\* \* \* Such lists shall contain; first, a list of all the real estate and its value, to be listed and assessed on the first of June, 1893, and every year thereafter, anything in this or any other section to the contrary;\* \* \*

By reason of the foregoing statute the County Assessor is required as a duty and obligation of his office to assess all real estate which is subject to taxation in his county. The requirements of this Section are definite and certain and although the method of obtaining the information may be considered as directory it is certainly mandatory upon the assessors to include all taxable property on his assessment roll. Being required under the statute to perform

April 5, 1934.

these specific duties, the law will presume that they have been properly and fully executed in the absence of a clear and conclusive showing to the contrary. Under the facts as related in your letter such a showing would be absolutely impossible. We find authority for the foregoing statement in the following cases.

In the case of State ex rel. Shannon County vs. Hawkins, 169 Mo. 615, 1. c. 621, we find the following statement:

" \* \* \* we agree with respondent that this ignores the ordinary presumption that every officer does his duty, and leaves out of consideration the checks and balances placed in the hands of the county courts to refuse credit on the collector's lists until they are satisfied he has exhausted his remedies against the personality of the delinquents." \* \* \*

In that case the presumption went to the question as to whether or not the County Collector had used due diligence to collect taxes before they became delinquent. As the statute placed upon the Collector the duty of making every effort to collect the taxes before becoming delinquent, the Court presumed, absent a distinct showing to the contrary, that the County Collector had exerted every effort to collect the taxes before returning them as delinquent when making his annual settlement with the County Court.

In the case of Van Pelt vs. Parry, 218 Mo. 680, we find the following statement, 1. c. 698:

" \* \* \* It matters little either to law or justice that the commissioners in 1856 may have believed, and that the county court of Barton county then may have been of the opinion, that the Parry forty was not swamp land and that the county got title through Parry's original deed in 1856. The thing done is the substance and heart of the matter, not what was believed, and the thing done in this instance was to locate a county seat upon the county's own land in 1856. To these ancient official acts the presumption is applied that officials charged with a duty performed that duty by tracking the law and doing what the law either commanded or contemplated they should do." \* \* \*

April 5, 1934.

In the more recent case of Smith v. Vickery, 235 Mo. 413, we find this rule applied in that case, l. c. 420:

\* \* \* Scott says that in 1881 and 1882 while he was sheriff and ex-officio collector of Pemiscot county, he brought and prosecuted a suit to collect the taxes on the land in dispute, and many other similar suits for taxes due on other lands; 'that he always brought suit against the land as well as the man' (the owner of the land). That at the request of the county court, he employed two competent lawyers to assist him with the suits, and in making deeds after the sales took place. From this evidence, we are warranted in supposing that the tax suit upon which defendants' title rests was brought and prosecuted to judgment against the owner of the land, to foreclose the State's lien for taxes; and that the original files and records of the circuit court, if in existence, would show that said suit and judgment were in conformity with the law. There is always a presumption in the absence of positive evidence to the contrary, that public officers perform their duty in the manner directed by law \* \* \*

For other applications of this rule, we cite you to the cases of State ex rel. Thompson vs. Harris, 208 Mo. App. 661, and Hammond vs. Gordon, 93 Mo. 223.

#### CONCLUSION.

Applying the law as established by the decisions of our Supreme Court to the facts presented in your letter, it would be our opinion that in view of the fact that the ancient assessment rolls in these counties have been lost or destroyed, the presumption that the County Assessor fulfilled his statutory duty and had assessed all taxable property, would prevail.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General

APPROVED:

ROY McKITTRICK,  
Attorney General.

HGW:MM



27 1:20 p.m.  
02  
MOTOR VEHICLES: Motor Car Salesmen ~~not~~ required to register as registered operator under motor vehicle act.

5-21  
May 15, 1934.



Hon. Al J. Stack  
Assistant Prosecuting Attorney  
St. Louis County  
Clayton, Missouri

Dear Mr. Stack:

Acknowledgment is herewith made of your request for an opinion of this office reading as follows:

"Enclosed please find letter, dated October 8th, from Mr. B. Sherman Landau, a St. Louis lawyer, in which he asks an opinion with reference to the obligation of automobile salesmen to take out a registered operator's license.

It appears to be the view of the State Highway Department and of the License Collector's office that a salesman demonstrating an automobile for a dealer must take out a registered operator's license or that he must register.

However, in view of the insistence of this attorney, who has been here on another occasion on this question, we would like to have the opinion of your office." \* \* \*

An examination of the suggestions of Mr. B. Sherman Landau, referred to in your letter indicates that the issue involved is the necessity for some thirty or more salesmen of a motor sales company of St. Louis to obtain registered operator's licenses because of their operation of the motor vehicles owned by the motor sales company. Section 7759 R. S. Mo. 1929, defines the terms as used in the Motor Vehicle Act. Under this section an "Operator" is defined as:

"Any person who operates or drives a motor vehicle."

We find "Registered Operator" to be:

"An operator, other than a chauffeur, who regularly operates a motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle."

Section 7766 R. S. Mo. 1929, refers to the registration of operators and provides in part:

"Every person desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement containing his name, age and address, and the trade name and motive power of the motor vehicle he is competent to operate, on a blank to be furnished by the commissioner for that purpose, which shall be indorsed by two citizens of this state who are registered motor vehicle owners, who shall certify to the correctness of the facts stated in such application and the good character of such applicant."

Section 7783 R. S. Mo. 1929 provides in part:

"(a)\* \* \* registered operators shall at all times carry, subject to inspection, the registration certificate furnished by the commissioner."

"(e)\* \* \* No person whose certificate of registration\* \* \* as a registered operator has been revoked shall operate any motor vehicle on the highways of this state during the period for which said revocation is effective."

"(f)\* \* \* No person operating or driving a vehicle on the highway knowing that an injury has been caused to a person or damage has been caused to property, due to the culpability of said operator or driver\* \* \* shall leave the place of said injury, damage or accident without stopping and giving his name\* \* \* and\* \* \* registered operator's number,\* \* \* to the injured party or to a police officer,\* \* \* \*"

The foregoing references are a few of the many in which registered operators are mentioned in the Motor Vehicle Act. Considering these together it is very apparent that this Act is a police measure enacted for the protection of the traveling public and others. We have no way of knowing what was in the mind of the Legislators with reference to what persons the defined words "Registered Operators" were to encompass except by the definition given and the apparent object and purpose of the legislation. A careful research fails to reveal any judicial construction of the term "Registered Operators". From a consideration of the foregoing quoted statutes and others in the motor vehicle act which have bearing upon the duties, obligations, rights and privileges of registered operators, it is apparent that this legislation was intended to throw up every safe guard possible for the protection of life and property at the hands of the operators of motor vehicles and to set up and establish a competent system for keeping a check on operators of motor vehicles in this State. Other portions of this act require registration of owners of motor vehicles and registration of chauffeurs, whose primary employment is the operation of motor vehicles. By making these various requirements an effort has been made to insure that only persons who are capable and competent are permitted to operate motor vehicles on the public highways as an incident to their employment. This being the purpose of the act, an interpretation must be placed upon it which will effect this purpose and remedy the evil which was sought to be corrected.

As Judge Lamm once said "The reason of the law is the life of the law". State ex rel. vs. Becker, 233 S. W. 641, 1. c. 649:

"There is a familiar maxim uniform in its application that the reason of the law is the life of the law.\* \* \* By reason of the law we mean of course the occasion or moving cause for its enactment. This is the touch stone of correct interpretation.\* \* \*

Applying the reason of this enactment to the instant facts it would be hard to conceive of the situation wherein the law could be more effectively applied to carry out the purpose of the enactment. While the operation of a motor vehicle is not the primary purpose of the employment of an automobile salesman, it is certainly incident thereto, and consumes a great portion of his time. Automobile salesmen are constantly called upon to operate motor vehicles upon the highways and, as stated in Mr. Landau's letter, they are

often required to operate various and numerous makes of cars. It is quite certain that there is a great necessity that they be competent to drive these cars, before operating them upon the public highways. The instant case also falls within the statutory requirement that one who operates a motor vehicle of another "regularly" and "incidental" to his employment, is required to register.

The word "incidental" or the phrase "as an incident to" as applied to services rendered in connection with employment, has received judicial construction. We refer to the case of *The Robin Goodfellow*, 20 F. (2d) 924, 1. c. 925:

"\* \* \* 'Incidental,' obviously, means depending upon or appertaining to something else as primary. 'Burrill's Law Dictionary defines 'incident' as 'belonging or appertaining to; following; depending upon another thing as more worthy.' \* \* \* A thing may be necessarily or inseparably incident to another, or usually so.' Webster defines it thus: 'Something necessarily appertaining to or depending on another, which is termed the principal.' Thomas v. Harmon, 46 Hun (N.Y) 75, 77.' 4 Words and Phrases, First Series, p. 3494.

Lord Dunedin, in *Trustee of Harbor of Dundee v. Nicol*, (1915) H.L.A.C. 550, said: 'Incidental', in my view, means incident to the main purpose of the main business.' \* \* \*

The word "regularly" as used in Section 7759 with reference to registered operators means in accordance with some consistent or periodic practice. *Green vs. Bennet*, 128 Atlantic, 20; 102 Conn. 1.

We cannot concede that Mr. Landau has placed the proper construction upon this act in contending that the act contemplates that to fall within its term a person must operate the same motor vehicle at all times. It is true that in most instances a registered operator would be operating the same vehicle over a considerable length of time. However, it could not be contended that a salesman traveling for his employer who might be called to operate two or three different makes of motor vehicles in the course of a year would not be required to register as a registered operator

Hon. Al. J. Stack.

-5-

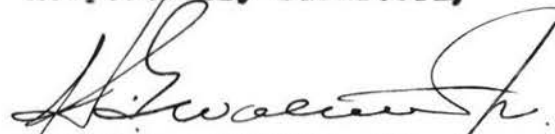
May 15, 1934.

merely because he did not operate the same vehicle during the entire license term. A distinction between that case and the instant case is simply one of degree. If in the course of employment the salesman is required to operate all makes of motor vehicles he should certainly be competent to operate before proceeding upon the public highways of the state, and in this instance his license or registration certificate should recite that he is competent to operate all makes of motor vehicles.

CONCLUSION.

It is therefore the opinion of this office that an automobile salesman operating motor vehicles owned by his employer is required to register as a registered operator under the provisions of the Motor Vehicle Act.

Respectfully submitted,



HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM

SCHOOLS: Requirement of county superintendent to have state certificate in order to hold office -- "State Certificate" discussed.

526  
May 23, 1934.



Hon. James O. Stanley  
Clerk of the Circuit Court  
Ripley County  
Doniphan, Missouri

Dear Sir:

This is to acknowledge your letter as follows:

"I'm anticipating becoming a candidate for election to the office of County Superintendent of Schools next April and I want your opinion on Sec. 11343, Art. XI of State School Law as to the qualifications, particularly the part saying they must hold a State Certificate. Does this mean any certificate issued by the State Dept. of Education?

I hold an Elementary Certificate from the State Department; have 108 hrs. credits from University of Mo.; have taught 7 years; and otherwise qualified. I'm anxious to find out these qualifications so if I lack anything, I can prepare before next spring."

The narrow question presented in your inquiry is:  
What is meant by a State Certificate?

Section 9454 R. S. Mo. 1929, provides for the qualifications of the county school superintendent, and in part provides:



"\* \* \*, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; "  
\* \* \* \* \*

In State ex inf. Chinn, ex rel. Botts v. Hollowell, 233 S. W. 405, the Supreme Court had for consideration the meaning of the words "state certificate" as used in the above statute. The opinion of the court says this:

"This action was instituted on the 16th day of May, 1920, on the information of James H. Chinn, prosecuting attorney of Schuyler county, at the relation of J. F. Botts, against appellant, to oust her from the office of county superintendent of public schools for said county.

\* \* \* \* \*

"On the date of appellant's election she held a certificate of the board of regents of the state normal school of Kirksville, Mo., which was also signed by the state superintendent of public schools of Missouri, authorizing her to teach the branches therein named in the public schools of this state for a period of two years from its date.

"The cause was submitted to the trial court upon an agreed statement of fact, from which it appears that respondent's only insistence is that appellant did not possess the statutory qualifications to hold the office because the certificate held by her did not comply with either of the three alternative qualifications prescribed in Acts of 1911, p. 404, as follows:

" 'And shall at the time of his election hold a diploma from one of the state normal schools or teacher's college of the state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate, authorizing him to teach in the county of which he is superintendent.'

"It is contended by respondent that said certificate, so issued to appellant by the board of regents of the state normal school, authenticated by the state superintendent of schools, is not a 'state certificate authorizing him to teach in the public schools of Missouri.' This contention presents the only question for decision."

And further,

"If, in the amendment of that section, the term 'state certificate' had been employed without any other or further qualifying or defining words, the legislative intent might be doubtful. But those words are immediately followed by 'authorizing him to teach in the public schools of Missouri,' which is in effect a legislative definition of the term 'state certificate.'"

And further,

"The certificate held by appellant emanated from the state by statutory authority (R. S. 11073), and authorized her to teach in the public schools of Missouri, and said certificate is therefore a state

May 23, 1934.

certificate, within the meaning of the  
qualifying statute."

See also, State ex inf. Burgess v. Hodge , 320 Mo. 877.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED;

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ROY McKITTRICK  
Attorney-General.

JLH:EG

ELECTIONS:  
PRIMARY:

Depositing a written declaration of candidacy in mails is not a filing; but declaration must have been in County Clerk's office before June 8, 1934, the last day for filing.

July 2, 1934

Mr. F. M. Stamps  
Marshal  
City of Pleasant Hill  
Pleasant Hill, Missouri



Dear Mr. Stamps:

This is to acknowledge receipt of your letter of June 14th addressed to this Department, in which you request an opinion. Your letter of request is as follows:

"We would thank you for your legal opinion on the following question.

On June 7th Mrs. Nelle Shortridge filled out her filing application for township Committeewoman for Pleasant Hill Township and to my personal knowledge this filing was mailed on June 7th, though Mr. Frank Davidson, county Court Clerk claims the paper did not reach his Office until the morning of the 11th, so says he don't think he should file same until he gets legal advice from your office.

We know this filing was made in due time, so are anxious to have an early reply from your office."

I.

Section 10254, R. S. Mo. 1929, provides as follows:

"The primary shall be held at the regular polling places in each precinct on the

Mr. F. M. Stamps

first Tuesday of August, 1910, and biennially thereafter, for the nomination of all candidates to be voted for at the next November election."

Under this section the primary this year will be held August 7th, 1934.

Section 10257, R. S. Mo. 1929, provides as follows:

"The names of no candidate shall be printed upon any official ballot at any primary election, unless at least sixty days prior to such primary a written declaration shall have been filed by the candidate, as provided in this article, stating his full name, residence, office for which he proposes as a candidate, the party upon whose ticket he is to be a candidate, that if nominated and elected to such office he will qualify, and such declaration shall be in substantially the following form: \* \* \* \* \*."

This Department has previously rendered an opinion to Honorable Paul H. Sanderson, Clerk of County Court, Pike County, Missouri, in which we stated that all written declarations of candidates, to have their names printed on the primary ballot for the August primary, should be filed with the proper officials before midnight, June 8th, 1934. It will be noted that this section provides that the "written declaration shall have been filed by the candidate." The question, therefore, would seem to depend upon what constitutes a valid legal filing.

If the deposit in the mails before the expiration of the filing date would be considered the filing of the written declaration, then, under the facts set forth in your letter that the declaration was deposited in the mails on June 7th addressed to the County Clerk of Cass County, that would be a sufficient filing. On the other hand, if a deposit was made

Mr. F. M. Stamps

in the mails before the expiration of the filing date and the written declaration was not received by the county clerk before midnight June 8th, 1934, then the filing is not sufficient to authorize the county clerk to print the name of the candidate on the official primary ballot.

## II.

The question considered in this division of the opinion at hand is as to whether a filing is complete on deposit of the written declaration in the mails.

In the case of *United States v. Lombardo*, 228 Fed. 980, 1. c. 983, District Judge Neterer had this to say as to what is meant by the word "file":

"The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered, and ordinary meaning applied. The word 'file' is derived from the Latin word 'filum', and related to the ancient practice of placing papers on a thread or wire for safe-keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office, and not send through the United States mails. *Gates v. State*, 128 N. Y. 221, 28 N. E. 373. A paper is filed when it is delivered to the proper official and by him received and filed. *Bouvier, Law Dictionary*; *Hoyt v. Stark*, 134 Cal. 178, 66 Pac. 223, 86 Am. St. Rep. 246; *Wescott v. Eccles*, 3 Utah, 258, 2 Pac. 525; *In re Von Borcke* (D. C.) 94 Fed. 352; *Mutual Life Ins. Co. v. Phinney*, 76 Fed. 618, 22 C. C. A. 425. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."



Mr. F. M. Stamps

The law is stated, on the question of what constitutes "filing", in 23 R. C. L., at page 185, as follows:

"The word 'file' is derived from the Latin 'filum' signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers on a thread or wire for safekeeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it on the thread or wire. And accordingly, under modern practice, regardless of the varying phraseology of the statutes, in contemplation of law a paper whose filing carries notice, or affects private rights is filed only when deposited with the proper officer at his office for this especial purpose, and it is not deemed to be filed when it is delivered to the officer authorized to receive it at a place other than his office and if he does so and indorses it as filed at the time of delivery his act is ineffectual."

In the case of State ex rel. O'Hearn v. Erickson, County Auditor, reported in 188 N. W. 736, a Minnesota case, which was an original proceeding against the county auditor of Hennepin County to require the placing of relator's name on the election ballot, the court said:

"The filing affidavit was in form a compliance with the statute on the subject, and was mailed to the auditor on May 10, 1922, the last day for filing, but was not received at the auditor's office until the following day, and that must be regarded as the date of filing. Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791. It is not important that it was deposited in the United States post office within the period fixed by the statute. It was not filed until it reached the office of the county auditor."

Mr. F. M. Stamps

In the celebrated case of State ex rel. Smith v. Marsh, Secretary of State (Norris, Intervenor), 232 N. W. 99, rendered by the Supreme Court of Nebraska, September 23, 1930, which involved the question as to whether George W. Norris, of Broken Bow, Nebraska, had filed his written declaration within the forty days before the primary, who was not the George W. Norris of McCook, the then and now United States Senator of identical name whose legal residence is at McCook and who had previously duly filed as a candidate at the primaries for the same office, the court said, in construing a statute similar to ours, the following (l. c. 101):

"The name of no candidate shall be printed upon an official primary ballot unless at least forty days prior to such primary, either he, or twenty-five qualified electors of the party with which such candidate affiliates, shall have filed a written application with the proper authority and in substantially the following form.' It is conceded July 3 was the last day for political filings for the general primary of August 12, 1930, and that a filing later than that would be less than 40 days prior to the primary. But the facts showed as pleaded in the answer that it had been the custom for a long time to receive filings if postmarked within the legal filing time, and the secretary of state caused to be published by newspaper men that in this instance he would receive filings for the primary if postmarked any time on July 3, 1930. The evidence shows that the nomination application of George W. Norris of Broken Bow was postmarked July 2, 1930, was sent by registered mail, addressed to the secretary of state, Lincoln, was received at the post office at Lincoln shortly after 1 o'clock P. M., July 3, and was not delivered at the office of the secretary of state until the morning of July 5, 1930. It did not arrive at the post office in time July 3 to be handled as a registered item and to be taken to the Capitol in due course of mail that afternoon and there was no delivery on the following holiday."

Mr. F. M. Stamps

And the court said further in rendering its opinion (1. c. 102):

"The affidavit was mailed the last day for filing but was not received until the next day. The court held that the statute was mandatory, that the depositing in the mails was not a substitute for filing, and that the frequent practice of receiving such filings when so mailed was not such an interpretation or construction of a plain and unambiguous statute as would be accepted as a correct interpretation of the statute. \* \* \* \* \*."

And the court ordered, in this case, the Secretary of State to omit the name of George W. Norris of Broken Bow from the list of candidates for United States Senator.

### III.

In some jurisdictions failure to file a certificate in time may be relieved against by the courts, where the delay has not been due to the fault or negligence of the convention making the nomination, or to the person with whom the filing of the certificate was entrusted. In re Darling, 189 N. Y. 570; 82 N. E. 438; Matter of Bayne, 69 Misc. Reports, 579; 127 N. Y. Supplement, 915; Earl v. Lewis, 25 Utah 116; 77 Pacific, 235.

A reading of these cases disclosed that in every instance where the court relieved against the default, it did so under a state statute giving the court jurisdiction to review the acts of an official with whom the certificate of nomination was required to be filed, and to make such order as justice might require. We have been unable to find any such statute in Missouri. Of course, if it could be shown that the written declaration was received in the office of the county clerk on June 8th, 1934, and for some reason it was not actually marked "filed" but was in the hands of the clerk or his deputies on that date, the courts would relieve against such a situation.

Mr. F. M. Stamps

It is, therefore, our opinion that a depositing in the mails before the expiration of the filing date, to-wit, June 8th, 1934, is not such a filing as is contemplated by the statute and therefore if the written declaration in question was not received in the office of the county clerk on June 8th, and was not actually received until June 11th, that said declaration was not received within the statutory time and therefore the name was not entitled to be on the printed primary ballot for the August, 1934, Primary.

Very truly yours,

OLLIVER W. NOLEN  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

CRH:EG

NATIONAL BANKRUPTCY ACT - Agricultural compensations and extensions - liability for cost of publication of notice.

September 14, 1934



Mr. Edward A. Sowers,  
Publisher, The Boonville Advertiser,  
523 Morgan Street,  
Boonville, Missouri.

Dear Sir:

Your letter of August 20, 1934, has been received, such letter being in the following terms:

"In behalf of The Boonville Advertiser I should like to ask your opinion on a matter of state-wide significance which has arisen here.

The local conciliation commissioner, who has been appointed under the new bankruptcy act, is ready to publish his first notices for a meeting of the creditors of the bankrupt or near bankrupt, working under Section 75 of the new law. But before placing these notices he wanted to know who was going to pay for them. Under the terms of the law, the bankrupt files a court fee or filing fee of \$10 and there is provision that this is all of the costs he must bear. Does the printing cost come out of the \$10 'court fee' or 'filing fee' or what provision is made for that?"

Section 75 of the National Bankruptcy Act was enacted as Public No. 420, 72nd Congress, Chapter 204 (March 3, 1933) as amended by Public No. 296, 73rd Congress (June 7, 1934). The paragraph of Section 75 relating to fees is designated (b) and is as follows:

"b. Upon the filing of any petition by a farmer under this section there shall be paid a fee of \$10 to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for

September 14, 1934

his services, including all expenses, a fee of \$25 for each case docketed and submitted to him, to be paid out of the Treasury. A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of \$5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceedings under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment, and assistance furnished him by other Federal officials, or by any State, county or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of the conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown and in the interests of justice, permit any such general order to be waived."

There is nothing in Section 75 requiring the publication of a notice of the first meeting of creditors or the publication of any other notice or proceeding. However, paragraph (n) of Section 75 provides that except as otherwise provided in Section 75 the general law relating to bankruptcies shall apply to proceedings under such Section 75 and under the general provisions of the National Bankruptcy Act it is provided that notice of the first meeting of creditors shall be published at least



3. Mr. Edward W. Sowers.

September 14, 1934

once (Code of Laws of the United States, Title 11, Chapter 6, Section 94 (b) ), so presumably since there is nothing to the contrary in Section 75 there should be a publication of this notice for proceedings under Section 75.

An analysis of paragraph (b) of Section 75 quoted above shows that in the absence of supervision over the farming operations of a farmer the only costs to be charged or taxed to either the petitioning farmer or to his creditors would be the filing fee of \$10 which goes into the Treasury. It would thus seem that all the expenses of administration, including costs of publication, would come out of the Treasury and since neither the farmer or his creditors are to be charged for anything other than the filing fee and the cost of supervision of farming operations, if such supervision is undertaken, it would seem that the Treasury must bear all other expenses. The filing fees as received could not apparently be paid by the conciliation commissioners to the publishers of the notices for the reason that the fees when paid are required to be "covered into the Treasury".

The conclusions set out above are not to be regarded as an official ruling by us for two reasons: First, that you have asked us for an opinion on the duties of an official of the Government of the United States under an Act of Congress and we do not feel that we have any authority to hand down an official opinion on a purely Federal matter, it seeming to us that the Attorney General of the United States would more properly be in a position to make a ruling on this question, and second, this office by Revised Statutes Missouri 1929, Section 11274, is authorized and required to give written opinions to various State officials on their duties but is not authorized to give official opinions to any others.

Very truly yours,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL

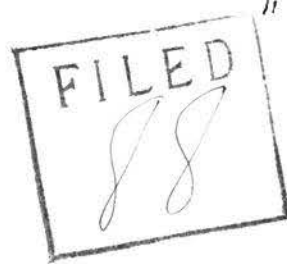
APPROVED:

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ATTORNEY GENERAL

FEES OF MESSENGER-To be fixed in amount by governor.  
EXTRADITION OF FUGITIVES-Expenses of messenger fixed by governor.

January 5, 1934



Hon. Walter C. Stillwell  
Prosecuting Attorney  
Marion County  
Hannibal, Missouri

Dear Sir:

Your request for an opinion under date of December 18, 1933, is as follows:

"I have been requested by Arch O. Leonard, Sheriff of Marion County, to obtain an opinion from your office as to what compensation per mile an officer is entitled when he goes to another State and returns a prisoner to this State, a proper requisition having been obtained from the Governor of Missouri and honored by the Governor of the other State."

In this connection, we call your attention to Sections 3567 and 3568 R. S. Mo. 1929 which are as follows:

**Section 3567:**

Whenever the governor of this state shall demand a fugitive from justice from the executive of another state or territory, and shall have received notice that such fugitive will be surrendered, he shall issue his warrant, under the seal of the state, to some messenger, commanding him to re-

§2 - Walter G. Stillwell

ceive such fugitive and convey him to the sheriff of the county in which the offense was committed, or is by law cognizable."

**Section 3588:**

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

You will note that the sheriff does not perform any of the duties of messenger in any official capacity he may hold in the State of Missouri, but performs such services in the official capacity of an appointed agent or messenger of the governor of the State of Missouri. You will note that under the provisions of Section 3588 that before any expenses can be allowed to a messenger they must meet "the satisfaction of the governor". In *State ex rel. v. Allen*, 180 Mo. 27 l. c. 31, the court, speaking of the meaning of such in Section 3588 R. S. 1929 (then Section 2744 R. S. 1899) said:

"\*the duty of determining the question of the compensation and expenses of such messenger, is vested solely in the Governor, and he is the head of a co-ordinate branch of the government, and all his acts as such are in that capacity, and hence he can not be interfered with in the discharge of his duties by the courts." The relator has per-

#3 - Walter G. Stillwell

formed a service for which he is entitled to be paid. "But this court has no power in the premises. The Governor alone has the power to determine how much shall be paid, and to order it paid. Until he does so the Auditor can not lawfully issue a warrant therefor."

Furthermore, under the provisions of Section 11405, R. S. Mo. 1929 relating to the duties of the state auditor, the expense account of a messenger of the governor in returning fugitives to the State of Missouri cannot be paid until the head of the department (the governor) shall fix the expense account at a just and reasonable figure.

It is, therefore, the opinion of this office that the authority to fix the amount of expense payable to any messenger for returning a fugitive to the State of Missouri is vested exclusively in the governor, and until such expenses account is approved by the governor, the state auditor has no authority to pay it.

Respectfully submitted,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

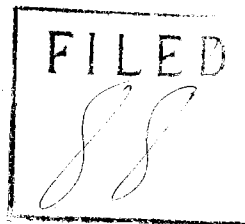
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TAXATION: Question of right to collect taxes on newly ac-  
SCHOOL DISTRICTS: quired territory by consolidated school district  
discussed; assessor's duty to indicate district  
where land is located in making out list; per-  
sonal notice need not be given to owner of newly  
acquired land; county superintendent's duty to  
file plat of district with county clerk.

January 6, 1934.

Mr. Walter G. Stillwell,  
Prosecuting Attorney of Marion County,  
Hannibal, Missouri.

Dear Sir:



*see that letter  
Feb from the state }*

We are acknowledging receipt of your letter of December  
7, 1933, in which you inquire as follows:

"The opinion of this office has been requested  
by the County Court of Marion County on a ques-  
tion growing out of the following state of facts.

Some time ago school district 59 of Marion  
County voted a consolidation and took in addi-  
tional land in their district both in Marion and  
Ralls County. In this call for the election they  
included all of Section 36, Township 57, Range 5  
which in the understanding of the leaders of the  
consolidation was in their District. Two or  
three owners of land in Section 36 were not  
notified as it was the opinion of the school  
board of District 59 that all of Section 36 was  
in District 58 and this had been their under-  
standing for years past. The assessor, however,  
in checking back his records for the past twenty-  
five years finds out that four tracts of land  
in Section 36 have always been assessed in school  
district 58. One C. W. Atkins, a property owner,  
contends that for the past 42 years he has been  
in school district 58, but the directors of the  
Tilden school, which is known as school district  
59, contend that his property is in their district  
and it has always been in their district and  
particularly so since the consolidation above  
referred to. Several citizens representing the  
Tilden school board appeared before the County  
Court and sought to have this property changed  
from district 58 to district 59.

1. Whose duty is it to set out opposite the  
different tracts of land what school district  
they are in?

2. If at the time district 59 became consolidated and increased the size of the district, whose duty if anyone's was it to notify Mr. Atkins of the fact that his property was in a new district?

3. Whose duty is it to make up a complete statement of the property comprising each individual school district in the County? Is this the County Superintendent of Schools duty, the Clerk of the County Court or the County Assessor's?"

We are also in receipt of your letter of December 28, 1933, in which you inquire as follows:

"On December 7th I wrote your office requesting an opinion concerning school district number 59 of Marion and Ralls County, Missouri. I have been requested to advise your office of the following additional facts that present themselves and which appear to be vital to your ultimate decision.

At the time district number 59 voted a consolidation and took in additional land in both Marion and Ralls County E. C. Bohon, County Superintendent of Schools, of Marion County, and Mr. Northcut, Superintendent of Schools in Ralls County advised with the directors of School District 59 about additional lands that were to be taken in and it was agreed by Mr. Bohon that the lands in question which were in section 58, township 57, range 5 and located in school district number 58 would not be disturbed.

An old map which is now in the County Collector's office at Palmyra shows the land in question to be in school district number 58. Submitting these facts with the facts mentioned in my letter of December 7th, we would appreciate your opinion on the questions asked in my former letter.

The County Court has also requested that I obtain your opinion on the following additional question growing out of the same subject matter.

4. The election touching the consolidation of district number 59, now known as Marion-Ralls Consolidated District number one, was held on June 5th, 1931. Because of the fact that all assessments are made as of June 1st of each year we would like to know when the school taxes of the newly acquired territory should rightly go



to Marion-Ralls Consolidated district number one? Were they entitled to it in 1931 or 1932, or 1933, as suggested by County officials?

I realize that this request is a difficult one, but the two schools in question have each retained counsel and are having serious difficulties concerning where the school taxes to the landin question should go. I would appreciate your opinion at your earliest possible convenience."

I.

Section 9261, R. S. Mo. 1929, among other things, provides as follows:

✓ \* \* \* "And it shall be the duty of the county assessor in listing property to take the number of the school district in which said taxpayer resides at the time of making his list, to be by him marked on said list, and also on the personal assessment book, in columns provided for that purpose."

X In answer to your first inquiry it is the duty of the County Assessor to set opposite the different tracts of land what school district they are in.

II.

In answer to your second inquiry we find no provision in the statute that requires any personal notice to be given Mr. Atkins of the fact that his property is included in the new district. Section 9353, R. S. Mo. 1929, provides how the plats and notices shall be posted, and when that provision of the statute is complied with it is not necessary that any personal notice be given to any resident of the proposed district.

III.

Section 9353, R. S. Mo. 1929, among other things, provides:

\* \* \* "The county superintendent shall file a copy of the petition and of the plat with the county clerk and shall send or take one plat to the special meeting. \* \* \* The county superintendent shall proceed as above set forth and in addition shall file a copy of the petition and of the plat with the county clerk of each county from which territory is proposed to be taken. \* \* \*"

Under the foregoing section therefore, it is the duty of the county superintendent to file with the county clerk the plat which sets forth the limits and boundaries of the

district and the land contained therein. The foregoing section applied to consolidated schools. Section 9315, R. S. Mo. 1929, applies to common schools and is as follows:

"The district clerk shall record a copy of all reports made by him to the county superintendent. He shall also record in the record book of the district a correct plat of the district, changing the same as often as alteration is made in the boundary lines by the proper authority, and shall furnish the county clerk and county superintendent with copies of the same, and shall officially notify them of any change whenever made."

Under the foregoing sections therefore, if the district is a common school district, it is the duty of the clerk to file the plat with the County Clerk, and if the district is a consolidated district, it is the duty of the county superintendent to file the plat with the County Clerk.

#### IV.

In your fourth inquiry you inquire when the school taxes of the newly acquired territories should go into the Marion-Ralls Consolidated School District. It appears from your letter that this district was organized on June 5th, 1931.

Taxes are assessed to the owner as of June 1st of each year and that valuation is the valuation upon which taxes are collected during the next year. The assessment, as made by the County Assessor, however, is not, in contemplation of law, the complete assessment. The Assessor merely lists the property of each taxpayer and places a valuation thereon. The assessment is not completed therefore when the assessor makes his valuation. After the assessor lists the property and places a valuation thereon, there must be a levy by the taxing authority and the extension of the levy upon the valuation as made by the assessor. The answer to your inquiry, we believe, depends not so much upon the time of making the valuation as it does whether there was an actual levy made and by whom the levy of taxes was made.

As the Marion-Ralls District was not organized until June 5th there was no land in the district on June 1st. However, when this consolidated district was organized on June 5th it withdrew from certain other districts land which had previously been therein. It is evident that the land which was in the various districts on June 1st, 1931 was not in those districts at the time the actual levy was made. The newly acquired territory having been withdrawn from the old districts prior to the time the levy was made, the County Clerk should have made the levy in favor of the consolidated school district in extending his tax books, because the land was in the consolidated district at the time of making the levy.

In State ex rel. v. Buford, 82 N. A. 343, 348, it is said:

"It is quite difficult to understand after the subtraction of these sections from said districts, how the respondent could assess the estimates of the latter against the real and personal property in the former. The clerk is required by the provisions of section 8067 Revised Statutes 1889, to assess the amount of the estimates returned to him by the districts on all taxable property, real and personal, therein. He is without power to assess the property of one district with the amount of the estimate of another."

In State v. Consolidated School District, 238 S. W. 819, the question arose as to whether the consolidated school district could function as such until June 30th after its organization. The Court at page 821 says:

"Suppose it be, as relators urge, that the consolidated district could not function until June 30th after its organization. The old districts were absorbed into the consolidated district on October 22, 1930, and thereafter had no power to do anything except to finish the business then under way, and at the end of the school year, June 30th, make the turn over as required by section 11262. There would be no annual meeting of the old districts, because they would have no powers left except to continue as provided in section 11262. If the consolidated district could not function till June 30th, there are many things that it might not do then, because certain things are required to be done at the annual meeting, and the statute fixes the annual meeting on the first Tuesday in April."

The consolidated school district, therefore, became an active organized district as of June 5th, 1931. We assume that they took proper steps and did make a levy upon the property within the district. If they made a valid levy and the clerk extended the taxes on the basis of that levy, then we believe that the district is entitled to the taxes on the newly acquired land which were payable in 1932. It would therefore be entitled to the taxes on the newly acquired land for the year 1933 also.

However, whether or not the consolidated school district would be entitled to taxes levied for the consolidated school district depends upon whether there was an actual levy made.

In State ex rel. v. Young, 38 S. W. (2d) 1021, an action was brought to collect school taxes. District No. 2 of Camden

and Laclede Counties was formed by an election held on June 19, 1925, at which time its board of directors ordered an election to be held on July 10, 1925, for the purpose of voting a 65¢ levy on the \$100.00 valuation for school purposes and for a nine months term for said consolidated district. The suit was to enforce a lien for taxes for the year 1925. The court held that the district could not collect the taxes because there was not a sufficient levy, saying:

"It is apparent from the foregoing review of the evidence that the levy and extension of school taxes against defendants' land on the county tax book for 1925 was void for the reason that no estimate or certification of school taxes by or for consolidation school district No. 2 of Camden and Laclede counties, which were the taxes sued for, was filed with the county clerk, as required by sections 11183 and 11151, R. S. 1919, and the trial court properly in effect so found. It also appears that the only estimate or certification of school taxes for the year 1925 that might have become a lien on defendants' land was the estimate of common school district No. 82, and the county clerk did not use this estimate in levying and extending school taxes on the tax books. The trial court erred in treating this as having been done."

In view of the foregoing decision, it is apparent that the statutes regarding the levy and estimates must be complied with, otherwise the levy is not legal. There could be no levy by the consolidated district on taxes that were due in 1931 because the district was not in existence at the time the levy should have been made. Any levy which was made upon the newly acquired land for taxes due in 1931 was made upon the estimate submitted by the various districts in which this newly acquired land was then found. We believe, therefore, that the taxes payable in 1931 on the land recently taken into the consolidated district should go for the benefit of the districts from which the land was taken. If, however, the consolidated district took proper steps to submit their estimates and have their levy made and the taxes extended on the newly acquired property, they would be entitled to the taxes thereon which were payable in 1932 and subsequent years.

It is therefore our opinion that the question as to whether the tax money should go to the consolidated district or not depends on whether or not, after the organization, they took the necessary steps in submitting their estimates and having taxes levied and extended on the newly acquired property. If the consolidated district did take the necessary

steps, then it is our opinion that they would be entitled to collect the taxes on the newly acquired territory which were payable in 1932 and 1933. The consolidated school district would not be entitled to the taxes due in 1931 which were based upon the estimate and levy of the old districts wherein the land was found and which were made prior to the time that the consolidated school district came into existence. If, by chance, the consolidated school district did not take proper steps to have the levy made in its favor and the taxes extended for 1932 and the taxes on the newly acquired land for 1932 were based upon the estimate furnished by the old districts, then we believe that the old districts would be entitled to the taxes for 1932.

Your inquiry did not give us sufficient information as to the levying of these taxes by the old and new districts, and we hope, by using the various assumptions, we have been able to answer your inquiry.

Very truly yours,



Assistant Attorney General.

FWH:8

APPROVED:

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Attorney General.

**MOTOR VEHICLES :**

License registration fee, amounts to be charged under recent act discussed.

1/12  
January 11, 1934.



Hon. V. H. Steward  
Commissioner of Motor Vehicles  
Office of Secretary of State  
Jefferson City, Missouri

Dear Mr. Steward:

This office acknowledges receipt of your letter dated January 10, 1934, as follows:

"Please refer to a recent act of the General Assembly which repeals Sections 7761, 7762 and 7769 revised statutes 1929, and enacted in lieu thereof two new sections, namely, 7761 and 7769, which sections relate to registration of motor vehicles, chauffeurs, registered operators, etc. Your opinion is requested as to the amount of fees to be charged the following:

1. Motor Vehicles and Trailers.
2. Manufacturers and Dealers.
3. Chauffeurs.
4. Operators."

As stated in your letter, the present Legislature (57th, Extra Session) passed an act which repealed Sections 7761, 7762 and 7769 R. S. Mo., 1929, and enacted in lieu thereof two new sections known as Sections 7761 and 7769, relating to same subject, which act was approved by the Governor January 6th, 1934. An emergency clause was provided, thus making the act effective immediately upon approval. The repealed 1929 statutes, supra,



pertained to the following; (1) Section 7761 to the registration of owners of motor vehicles and trailers; (2) Section 7762 to the increasing of registration fees; and municipal licenses; (3) Section 7769 to the date of registration for motor vehicles, trailers, chauffeurs, registered operators and dealers and further providing for the prorating of fees relative to the registration of a motor vehicle by an owner.

### I.

In interpreting statutes it is well to keep in mind the language of the Supreme Court of Missouri in the case of *Meyering v. Miller*, 51 S. W. (2d) 65, wherein it was said, l. c. 68:

"The primary rule of construction of statutes or ordinances is to ascertain and give effect to the lawmakers' intent. 2 Lewis' Sutherland on Stat. Const. (2d Ed.) Section 363. The rule of strict construction 'has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object.' Endlich on Interpretation of Statutes, Section 329; Maxwell on Statutes (5th Ed.) 425."

And further,

"Likewise, it has been said that strict construction 'is not a precise but a relative term. It is not the exact converse of liberal construction, for it does not consist in giving words the narrowest meaning of which they are susceptible.'"

Thus, we look to the four corners of the act to gather the intent of the Legislature. A reading of same shows that the Legislature primarily intended to do two things: First, to reduce

the fees on automobile registration; second, to change the renewal and expiration date on automobile registration, and registration of manufacturers and dealers, chauffeurs, and operators.

## II.

### MOTOR VEHICLES AND TRAILERS.

We look to the act to ascertain the fees charged for the registration of motor vehicles and trailers. Note these provisions, to-wit:

"Section 1. That sections 7761, 7762, and 7769, of the Revised Statutes of Missouri for 1929 be and the same are hereby repealed and two new sections enacted in lieu thereof to be known as sections 7761 and 7769 and to read as follows:

Section 7761. (a) \* \* \* \* \*

(c) Registration fees made payable to the State Treasurer shall be remitted to the Commissioner with the application for registration for that part of the calendar year of 1934, beginning with February 1, 1934, and ending December 31, 1934, at 11/12 of the schedule amounts hereinafter shown, and for the full calendar year of 1935 and each full calendar year thereafter in accordance with the following schedules:

For motor vehicles other than commercial	
motor vehicles and motorcycles and motortricycles.	
Less than 12 horsepower .....	\$5.00
12 horsepower and less than 24 horsepower..	8.50
24 horsepower and less than 36 horsepower..	11.00
36 horsepower and less than 48 horsepower..	20.00
48 horsepower and less than 60 horsepower..	25.00
60 horsepower and less than 72 horsepower..	31.50
72 horsepower and more .....	37.50
Motorcycles .....	6.00
Motortricycles.....	7.50

For commercial motor vehicles having a capacity of:

Less than 2 tons .....	\$10.50
2 tons and less than 5 tons .....	18.00
5 tons and less than 6 tons .....	27.00
6 tons and less than 7 tons .....	30.00
7 tons and less than 8 tons .....	36.00
and for every ton or major fraction thereof in excess of 8 tons, \$15.00 per ton.	

For each trailer there shall be paid a fee equal to one-half ( $\frac{1}{2}$ ) of that provided for commercial motor vehicles and for each semi-trailer there shall be paid a fee equal to one-quarter ( $\frac{1}{4}$ ) of that provided for commercial motor vehicles, according to the live load capacity of such trailer or semi-trailer.

\*\*\*\*\*  
Section 7769. (a) \*\*\*\*\*

(b) If application for the registration of a motor vehicle by an owner is made during the period between the 1st day of July and ending the last day of September, only one-half of the full annual fee shall be paid; if application for such registration is made during the period beginning the 1st day of October and ending the last day of December, one-fourth of the full annual fee shall be paid."

We call attention to the fact that the horsepower of the motor vehicle determines the license fee. Such was also the manner in which the license fees were arrived at under the 1929 Statutes. For illustration, take the first fee provided for motor vehicles other than commercial vehicles, motorcycles and motortricycles of less than 12 horsepower, which under the present act is \$5.00, and under the 1929 Statutes was \$7.50. However, for the year 1934 the registration fee to be charged on motor vehicles is  $11/12$  of the amount provided in the above schedule. That is to say, for example, if an owner of motor vehicles of less than 12 horsepower registers

his motor vehicle between February 1st, and June 30th, 1934, he will pay 11/12 of \$5.00, or \$4.59; if between the first day of July and the 30th day of September, 1934, he will pay one-half of \$5.00, or \$2.50; if between the first day of October and the last day of December, 1934, he will pay one-fourth of \$5.00, or \$1.25. In other words, the registration fee for the year 1934 is 11/12 of the schedule hereinbefore set out up to June 30th, and after that one-half or one-fourth of the schedule as provided therein. We call your attention to the fact that the registration of motor vehicles for the calendar year of 1934 begins February 1st, 1934, and ends December 31st, 1934; the fee for trailers being:

"For each trailer there shall be paid a fee equal to one-half ( $\frac{1}{2}$ ) of that provided for commercial motor vehicles and for each semi-trailer there shall be paid a fee equal to one-quarter ( $\frac{1}{4}$ ) of that provided for commercial motor vehicles, according to the live load capacity of such trailer or semi-trailer."

### III.

#### MANUFACTURES AND DEALERS.

Section 7769 (a) of the recent act provides as follows:

"Registration of motor vehicles, trailers, chauffeurs, registered operators and dealers shall be renewed annually, upon the payment of fees provided herein, to take effect on February 1st for the remainder of the year 1934, and thereafter on the 1st day of January in each year, and all certificates of registration and number plates issued hereunder shall expire on the succeeding 31st day of December."

Section 7769 R. S. No. 1929, which was repealed, provided that the registration of manufacturers and dealers should be renewed annually on the first day of February in each year. The new statute merely changes the date of registration.

Section 7764 R. S. Mo., 1929, provides in part the following:

"(a) All manufacturers and dealers shall, instead of registering each motor vehicle manufactured or dealt in, make application upon a blank to be furnished by the commissioner for a distinctive number for all the motor vehicles owned or controlled by such manufacturer or dealer, said application to contain: (1) a brief description of each type of motor vehicle manufactured or dealt in, including character of the motive power, amount thereof, stated in figures of horsepower, and (2) the name and business address of such manufacturer or dealer; (3) the weight and rated live load capacity of commercial motor vehicles.

(b) Fees and plates for manufacturers and dealers: On the payment of a registration fee of \$21.00 there shall be assigned to such manufacturer or dealer a certificate of registration in such form as the commissioner shall prescribe, and two sets of number plates bearing such number. As many duplicate sets of number plates as may be desired may be obtained upon the payment of a fee of \$10.50 for each duplicate set."

A reading of above shows that manufacturers and dealers do not register each motor vehicle dealt in but pay in lieu thereof a registration fee and a further fee if additional plates are required. All motor vehicles operated on the highways of this State must have license plates and a dealer merely transfers them from one car to another, using his plates. Thus, the car on which a dealer's plates are used is not registered in the sense of a privately owned motor vehicle but in lieu thereof the dealer pays the fee provided in Section 7764, supra. And no provision is made in that section for a reduction of the fee in the event the dealer applies at the first of the year, the last of the year, or the middle of the year. In other words, a dealer seeking to be registered as such pays the same fee if he becomes registered at the first of the year or any other time thereafter.

It is, therefore, our opinion that the registration fee of a manufacturer or dealer will be that as provided in Section 7764, R. S. Mo., 1929.

IV.

CHAUFFEURS.

Section 7765 R. S. Mo., 1929, pertains to "chauffeurs" and in part reads:

"(a) Every person desiring to operate a motor vehicle as a chauffeur shall file in the office of the commissioner a statement containing his name, age, address and the trade name, style and motive power of the motor vehicles he is competent to operate, on a blank to be furnished for that purpose by the commissioner. Etc.

(b) Upon the filing of such statement and photographs, if the commissioner is satisfied as to the competency and good character of such applicant, he shall assign to him a number and upon the payment of a fee of \$3.00 he shall issue and deliver to such applicant a certificate of registration which shall contain etc."

It is our opinion that the fee of registered chauffeurs shall be that as provided for in Section 7765, supra.

V.

OPERATORS.

Section 7766 R. S. Mo., 1929, provides in part as follows:

"(a) Every person desiring to operate a motor vehicle as a registered operator shall file in the office of the commissioner a statement etc.



(b) Upon the filing of such statement and the payment of a fee of \$3.00, the commissioner shall issue and deliver to the applicant a certificate of registration, which shall contain etc."

It is our opinion that a registered operator shall pay the fee as provided for in Section 7766, supra.

The Legislature clearly provided that owners of motor vehicles should pay certain fees. Likewise, ~~they~~ provided that manufacturers and dealers, chauffeurs, and operators should pay certain fees. The Legislature changed the fees to be charged the owners of motor vehicles and trailers but did not vary or change the law pertaining to manufacturers and dealers, chauffeurs, or operators, other than to change the date such were to be registered.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

**MOTOR VEHICLES:**

Commissioner of Motor Vehicles does not have to amend certificate of ownership to show liens or encumbrances; neither is he compelled to file notices of releases or filing of mortgages.

January 27, 1934.



Hon. V. H. Steward  
Commissioner of Motor Vehicles  
Jefferson City, Missouri

Dear Mr. Steward:

This office acknowledges receipt of your letter dated January 19, 1934, as follows:

"Please give an opinion of law on the following questions:

First: Where the applicant for a Title Deed to a motor vehicle failed to set out, on his original application, the fact that his automobile was owned subject to a chattel mortgage, and a Title Deed was issued pursuant to said applicant whereon no lien was shown, after discovering that the Title Deed fails to show existing liens, then is there any law requiring the Motor Vehicle Department to amend the original application and change the Title Deed to read, showing such lien or mortgage when brought to their attention by the title holder?

Second: Where the applicant for a Title Deed to a motor vehicle receives his Title Deed subject to all mortgages, if any, has shown upon his original application for such title, then is there any law requiring the Motor Vehicle Department to file notices, notations, or letters from the mortgagors advising this Department as to subsequent liens upon the motor vehicle described in the original application?"

At the outset we direct your attention to the distinction between the "Certificate of Registration" and the "Certificate of Ownership", to the end that you will distinguish between such and keep in mind the purposes of each and the dependency of one to the other, and that you will have a general idea of the office each fills.

I.

CERTIFICATE OF REGISTRATION.

The 57th General Assembly, Extra Session, passed an act with an emergency clause, which was approved by the Governor January 6, 1934, relating, among other things, to the registration of motor vehicles. Note these provisions therein found:

"Section 7761. (a) Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the name, residence and business address of the owner of such motor vehicle; etc."

"Section 7769. (a) Registration of motor vehicles \* \* \* shall be renewed annually, etc."

II.

CERTIFICATE OF OWNERSHIP.

Section 7774 R. S. Mo. 1929, provides in part the following:

" (a) Upon the transfer of ownership of any motor vehicle or trailer its certificate of registration and the right to use the

number plates shall expire, etc."

Paragraph "(c)" of said section is captioned "Certificate of ownership", and we divide said section to emphasize the various provisions therein found:

"No certificate of registration of any motor vehicle or trailer, \* \* \*, shall be issued by the commissioner unless the applicant therefor shall make application for and be granted a certificate of ownership of such motor vehicle etc.

"Application shall be made upon a blank form furnished by the commissioner and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer.

"The commissioner shall \* \* \*, if satisfied that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, \* \* \* The certificate shall contain a description, manufacturer's or other identifying number, and other evidences of identification of the motor vehicle or trailer, \* \* \* together with a statement of any liens or encumbrances which the application may show to be thereon.etc.

"The certificate shall be good for the life of the motor vehicle or trailer, so long as the same is owned or held by the original holder of the certificate, and shall not have to be renewed annually. Etc.

"After the expiration of said four months it shall be unlawful for any person to operate in this state a motor vehicle or trailer registered under the provisions of the law unless a certificate of ownership shall have been issued as herein provided.

"In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, \* \* \* with a statement of all liens or encumbrances on said motor vehicle or trailer, and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer. Etc."

### III.

We epitomize the provisions of the above statutes as follows:

- (1) Certificate of ownership must be obtained before motor vehicle shall be registered.
- (2) No motor vehicle shall be operated on the highways unless it be registered.
- (3) Registration shall be annually.
- (4) Certificate of ownership shall be good for the life of the motor vehicle, so long as the same is owned or held by the original holder of the certificate, and shall not have to be renewed annually.
- (5) Certificate of ownership provides for the following:
  - (a) Manufacturer's number or other identifying number so as to particularly identify the motor vehicle.
  - (b) Statement of liens or encumbrances.
  - (c) Name of owner, etc.

(6) Certificate of registration only provides for:

- (a) Name of owner, and residence.
- (b) Brief description of motor vehicle (motor number and amount of horsepower). Such does not contain a statement of liens or encumbrances.

(7) Upon transfer or sale of a motor vehicle, the certificate of ownership must be assigned with warranty of title with a statement of all liens or encumbrances on said motor vehicle or trailer and delivered to the buyer at the time of delivery to him of said motor vehicle.

Section 7771 R. S. No. 1929, provides:

"In the event of the loss, mutilation or destruction of any certificate of registration, certificate of ownership \* \* \* issued by the commissioner, the lawful holder thereof may, upon filing with the commissioner an affidavit showing such fact, and on the payment of a fee of \$1.00 obtain a duplicate of such \* certificate \* \*."

One of the purposes of requiring owners of motor vehicles to have certificates of ownership was to suppress the theft of same.

Section 7774 (c), supra, has this provision:

"The commissioner shall co-operate with the commissioners or the officials of other states and countries having supervision of the registration of motor vehicles and shall exchange information with them relative to the registration, ownership, sale and theft of motor vehicles, for the purpose of suppressing the stealing and unauthorized use of motor vehicles."

The courts of this State have held that the provisions of the statute relative to the sale or transfer of motor vehicles is mandatory and unless complied with the sale thereof is void.



In Weaver et al v. Lake et al, 4 S. W. (2) 834, the Springfield Court of Appeals said:

"Their claim of possession is founded on an alleged sale of an automobile to which no certificate of title was assigned or delivered. Under our statute there can be no question that a sale of an automobile without an assignment or transfer of a certificate of title is absolutely void."

Also, in Platner v. Bourne, 275 S. W. 590, the court (Springfield Court of Appeals) said:

"The motor vehicle statute is a police regulation and provides (Acts 1921, p. 90) how motorcars may be transferred from one person to another, and also provides that, unless its provisions are complied with, the sale shall be fraudulent and void. The Supreme Court has held that a transfer of a motorcar cannot be made in any other way. State ex rel. Conn. Fire Ins. Co. of Hartford, Conn., v. Cox et al., Judges (Mo. Sup.) 268 S. W. 87, 37 A. L. R. 1456."

#### IV.

The provision of the statute requiring the showing of liens and encumbrances on the certificate of ownership neither adds to nor detracts from the validity of the certificate. The Legislature required such, in our opinion, to be shown as an added safeguard to the public. In other words, the fact that a certificate of ownership does not show a lien or mortgage does not mean that there is none on the motor vehicle, and vice versa, because a mortgage could be placed thereon after the certificate was issued and if a lien appears on the certificate such could be satisfied before transfer or sale of the motor vehicle. However, upon transfer or sale of the motor vehicle the transferor must make an affidavit as to liens or encumbrances,

and if he falsifies same he would be guilty of making a false affidavit with respect to that matter, but the title to the motor vehicle would pass, subject, however, to any liens whether shown on the certificate or not.

Section 3097 R. S. Mo. 1929, requires chattel mortgages to be filed and/or recorded at the place of residence of the mortgagor. Said section provides in part as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, \* \* \* \* \* or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, etc."

V.

In answer to your first question it is our opinion that there is no statute requiring the Motor Vehicle Department to amend the original application to show liens or encumbrances omitted (intentionally or otherwise) therefrom.

Section 7771, supra, uses these words:

"In the event of the loss, mutilation or destruction of any \* \* certificate of ownership \* \* the lawful holder thereof may, upon filing with the commissioner an affidavit showing such fact, etc."

Section 7774 (c), supra, provides this:

"The certificate shall be good for the life of the motor vehicle \* \* so long as the same is owned or held by the original holder of the certificate, and shall not have to be renewed annually. Etc."

If the Legislature intended the Motor Vehicle Department to amend certificates of ownership when the status of liens and encumbrances changed, it would have so provided in the statute.

## VI.

In answer to your second question, it is our opinion that the filing of notices, notations, etc., concerning liens placed (or satisfied) on motor vehicles, subsequent to the issuance of the certificate of ownership, is discretionary with the commissioner. The statute does not compel (in fact silent) him to file them.

Section 7772 R. S. No. 1929, provides in part:

"(c) The commissioner may keep such other classifications and records as he may deem necessary."

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

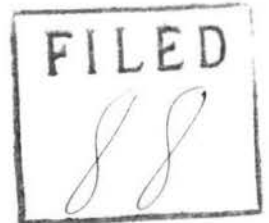
JLH:EG

SHERIFF:

County is not liable for supplies purchased by sheriff to be used in courthouse unless the jail is in such courthouse and such supplies are for use in said jail and deemed necessary by said sheriff for the proper administration of said jail.

1-31  
January 30, 1934.

Mr. Walter G. Stillwell,  
Attorney-at-law,  
Hannibal, Missouri.



Dear Mr. Stillwell:-

We have your letter of October 21, 1933, in which was contained a request for an opinion as follows:

"I have been requested by the County Court of Marion County, Missouri, to obtain an opinion of your office on the following question:

'Some time ago the Sheriff of Marion County purchased from the Germo Manufacturing Company of St. Louis, certain supplies which were and are being utilized and used in the courthouse in the Hannibal Court of Common Pleas at Hannibal. The Germo Manufacturing Company has presented their bill to the County Court and they desire your opinion as to whether or not the Sheriff can purchase supplies to be used in County Buildings and the liability of the County therefore'."

The sole question which presents itself here is whether or not the sheriff had the power in this instance to purchase at the county expense supplies to be used in the courthouse.

Section 2078, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 2078. SHALL CONTROL COUNTY PROPERTY.-  
The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

January 30, 1934.

Section 1870, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 1870. DUTIES OF SHERIFFS.- The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

The former section places the control of the courthouse in the hands of the county court and the latter section gives the sheriff the power to purchase supplies only when ordered by the court to do so. Since the letter above quoted does not mention any such order, we must presume that there was none and therefore the sheriff was not properly authorized to purchase such supplies.

If the supplies in question were for use in the jail, which might well be in the courthouse, the law is to the effect that if the sheriff deemed the supplies necessary for the proper administration of the jail he had the power without authorization to purchase same at the county expense. (See *Kansas City Sanitary Co. vs. Laclede County*, 269 S. W. 395, 1.c. 398; *Harkreader vs. Vernon County*, 216 Mo. 696). Since such facts do not, however, appear in the above quoted letter we need not pursue this angle.

The Supreme Court of Missouri in the case of *Kansas City Disinfecting and Mfg. Co. vs. Bates County*, 273 Mo. 300, passed squarely on our present question as it appears here. In that case Judge Faris who wrote the opinion stated at page 305-6 as follows:

"It is not doubted that the statutes (Sees. 1571 and 1573, R. S. 1909) and the construction thereof by this court in a case to an extent analogous (*Harkreader v. Vernon County*, 216 Mo. 696) furnish authority to a sheriff of a county to purchase such articles and supplies as are requisite and necessary to keep and maintain the county jail 'in good and sufficient condition and repair.' But such authority, absent an order of the county court, which might pro hac vice make him its agent, would not extend to purchases made for the poor house or the poor farm, the custody and control of which are vested by statute in the county court, and not in the sheriff. (Sec. 1343, R. S. 1909). Likewise, the county court is by statute vested with the control of the

Walter G. Stillwell--#3

January 30, 1934.

court house (Sec. 4081, R. S. 1909), and while it is made the duty of the sheriff 'to furnish fuel, stationery and other things more necessary for the use of the court' (Sec. 3887, R. S. 1909), this duty is delimited by the appended provision directing performance thereof 'whenever ordered by the court.' (Sec. 3887, supra.)

This latter conditional duty is disassociated from control of the premises and is a general one which the sheriff owes to the circuit court, to the probate court, and even to the county court itself, though the latter court is the general statutory contracting, auditing and fiscal agency of the county. Clearly, such an order should either be express, or plainly implied from the necessities of the situation."

Sections 4081 and 3887, Revised Statutes of Missouri, 1909, referred to in the above quotation are substantially sections 2078 and 1870, Revised Statutes of Missouri, 1929, respectively, which sections are quoted earlier in this opinion. This case has never been overruled and is the law in this state today.

In view of the above, therefore, we are of the opinion that the county is not liable for the purchase by the sheriff of the supplies in question.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMHjr-MB

APPROVED:

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Attorney-General



PROSECUTING ATTORNEY:

Where chattel mortgage is filed in one county and unauthorized sale of the chattel is made in another county, the latter county is the proper county in which to bring the prosecution.

March 8, 1934. 3-13



Mr. William E. Stewart,  
Prosecuting Attorney,  
Edina, Missouri.

Dear Mr. Stewart:-

We have your letter of December 16, 1933, in which was contained a request for an opinion as follows:

"I have the following question that I would like to ask you. The Guaranty Finance Corporation of Edina has a chattel mortgage on an automobile owned by one Fred Johnson. The chattel mortgage was filed in the office of the Recorder of Deeds of Knox County, Missouri. The said Fred Johnson sold the automobile described in the chattel to Martin Brothers of Kahoka, Missouri, the sale was made in Kahoka, Clark County, Missouri. Where is the proper county to bring the prosecution? I am of the opinion that the crime was committed in Clark County. I would like to have a reply as early as possible."

Section 3377, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 3377. Offenses, where punished.--Offenses committed against the laws of this state shall be punished in the county in which the offense is committed except as may be otherwise provided by law. (R.S. 1919, Sec. 3722)."

The offense referred to in the letter above quoted is made an offense against laws of this state by Sec. 4100, Revised Statutes of Missouri, 1929. The sole matter for decision, therefore, is as to which county is the county in which the offense was committed.

A search of the laws and decisions of this state has failed to yield any case where this matter has been expressly passed on, but a very slight digression in the field of analogy will solve our problem.

In this connection we advert to the often cited case of State vs. Shaeffer, 89 Mo. 271. This was a case of obtaining money under false representations and the Supreme Court at page 280 stated as follows:

Mr. William E. Stewart

-2-

March 8, 1934.

"We entertain no doubt that the place where the money or goods are obtained, without regard to where the representations were made, is the place where the party should be prosecuted."

In addition, see 9 Ruling Case Law 1293, where it is stated:

"As a general rule the accused must be tried in the county where the act of appropriation or conversion took place."

Also, to the same effect the case of Ex Parte Hammond 59 F. (2d) 683, at page 685.

In our present case the prospective defendant did nothing unlawful in Knox County; he merely placed a mortgage on his automobile. It was in Clark County that he perpetrated his unlawful acts, therefore there should he be prosecuted. For instance, the Court in the Shaeffer case above cited said that there was nothing unlawful per se in the false representations made in another place, but that it was the obtaining money as a result of those false representations wherein the crime lay. The Shaeffer case is a stronger case than the one at hand, but it clearly illustrates the attitude of our courts.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, Jr.  
Assistant Attorney General.

Approved:

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Attorney General.

NEWSPAPERS. Independent newspaper cannot qualify for publications  
under Sec. 10249, R.S. 1929.

4-20  
April 18, 1934.



Hon. William E. Stewart,  
Prosecuting Attorney,  
Knox County,  
Edina, Missouri.

Dear Sir:

This department is in receipt of your letter of  
some time ago, requesting an opinion as to the following facts:

"The County Clerk of this county has requested me to submit a question to you. Section 10249 requires the clerk to publish in two newspapers representing each of the two major political parties, at least seven days before an election, the nominations to office certified to the clerk by the secretary of State and those filed in the clerk's office. In Knox County one paper is listed in the Blue Book as Democrat, one of larger circulation, as Independent, and another, of very small circulation, as Republican. The one listed as Republican is printed in Brashear, Adair County, Missouri. The clerk wishes to know if it would be legal to publish in the Democrat paper and the one listed as an Independent."

Sec. 10249, R.S. Mo. 1929, relating to the printing of nominations to office certified to the county clerk by the Secretary of State, provides as follows:

"At least seven days before an election to fill any public office, the clerk of the county court of each county shall cause to be published in two newspapers representing each of the two major political parties, if such there be, and if not, then in two newspapers, or if there be only one newspaper published within the county then in such newspaper, the nominations to office certified to him

by the secretary of state, and also those filed in his office. He shall make two such publications in each of such newspapers before the election, one of which publications in each newspaper shall be upon the last day upon which such newspaper is issued before the election. Provided, that no higher rates shall be paid per inch, than is provided by section 13773, chapter 114, R.S. 1929, as amended."

There appears to be no question as to the propriety of printing the notice in the Democratic paper. We take it for granted that the two major political parties are the Republican Party and the Democratic Party.

The decision in the case of *Reefy v. Elyria*, 30 O.C.A., l.c. 274 is to a certain extent enlightening on this subject, and provides in part as follows:

"It is not pretended that 'politics', as used in the statute under which the contracts attempted to be awarded are allowed, is the word in its broad sense of comprehending the whole scope and office of government. It is used, all will agree, in its restricted sense of partisanship. Thus considered, the word signifies party preference and connection. It lives and exercises its force and brings its power to bear through party organization and discipline and finds expression in party platforms and declarations of principles and in utterances of candidates and leaders."

It is our opinion that the Legislature meant that the two newspapers should represent not only the two major political parties, but two opposite parties in politics. In the case of *Reefy v. Elyria*, supra, the Court further said:

"The word 'opposite', when employed as the statute in question employs it, means antagonistic, having a different tendency, quality or character. Contrary is, perhaps, the most expressive as well as the most correct verbal equivalent by which the underlying concept of opposition can be voiced; it is, at least, sufficient for the purpose in this case. It does not permit a twilight zone in which, or under the shadow of which, neighbor Garford, or townsman Sharp may be supported by a paper masquerading as a political enemy to their

party. It is not allowable, under this definition of the vital word, to make merchandise of journalistic agencies by selling space to the minor candidates of one side while posing as the party exponent of the other side, in good and regular standing. What the statute clearly means is--'He that is not for me is against me; he that gathereth not with me scattereth abroad.'"

There are no decisions directly in point on this question in Missouri; however, the Supreme Court of Ohio, in discussing the status of an independent newspaper, in the case of *The Ohio State Journal Co. v. Brown*, 19 Ohio, 1.c. 326, said:

"It is admitted that the Press Post is a newspaper of the Democratic Party, and the contention on the part of counsel for the plaintiff is that the Columbus Dispatch is an independent newspaper of no political party, while counsel for the Columbus Dispatch contends, notwithstanding that newspaper holds itself out to the public as an independent newspaper, and has been such; that the evidence shows its support of the measures and candidates of one of the political parties has been such that it is a newspaper of a political party within the meaning of the statute.

"The only matter necessary to be determined is whether the Columbus Dispatch is a newspaper of a political party; and if so, whether of a party different from that of the Press-Post.

\* \* \* \* \*

"A newspaper to be of a political party, within the meaning of the statute, must profess to be so or be so known. It is not sufficient that it has, while professing to be an independent newspaper, supported a political party.

"A newspaper professing to be of a political party, or one so known, may be independent in the sense that it does not advocate all of the measures of its party, and yet be of the party, for its conduct may be owing to its judgment, or the want of it, and not to its want of faith; and an independent newspaper may advocate all of the measures of a party and support all of its candidates, and yet be not of the party, for its support of the party is to be attributed to its discretion, and not to its allegiance.



"The evidence shows that the Columbus Dispatch holds itself out to the public as 'an independent newspaper', and its proprietor testifies that it is not a Democratic, not a Republican, nor a Prohibition, nor a Populist newspaper; that he is a Republican, and that his newspaper has generally supported that party, but that it is independent in all things and at all times free to choose which side it will take.

"Such newspaper is not of a political party within the meaning of the statute, and in view of its disclaimer, the court ought not to be asked to hold otherwise."

In the case of Columbus v. Barr, 27 Ohio, l.c. 268, the Court said:

"The kind of newspaper is predetermined by an established party allegiance, which denotes its politics and which the council is not at liberty to ignore.

"An independent paper, which refuses to be bound by the ties of party allegiance, is not within the classification, for the reason that, compared with any other paper, it may be of opposite politics on one question, and of the same politics on another, at one and the same time; of opposite politics today and of the same politics tomorrow, evading the provision of the statute at will.

"The purpose of the legislature was to provide for the widest publicity of the public acts of the municipal council, under a general law. It is common knowledge that this purpose would be best subserved as a general rule, by publication in the newspapers of opposite party politics, for the reason that when applied to all municipalities, they are the local papers that generally reach the most people. The independent newspaper, as a rule, is confined to the larger cities. It may best subserve the purpose of the statute in a few cities, but it is the exception that must fail under a general law.

"The legislature did not undertake to cheapen the publication by competition. The competitive bidding resorted to in this case, is the policy



April 18, 1934.

of the city, and, as is expressed in the ordinance providing for the same, is not to be used to annul the statute. It may be that this interpretation opens the door to political aggrandizement, but it still remains that extended publicity is the governing purpose of the statute, and must be kept to the fore when seeking to discover the legislative intent. No useful public purpose could be subserved by holding that this language should receive a more liberal construction, unless it be that it would provide competition, but that must yield if it would narrow publicity."

#### CONCLUSION

In view of the foregoing decisions, it is the opinion of this department that an independent newspaper cannot qualify for publications under Sec. 10249, R.S. Mo. 1929.

Since your request has been on file in this department, we are in receipt of an unsigned letter which we assume was written by some member of your County Court or the Clerk, Hon. Ralph W. Haselwood, in which there is enclosed a form of affidavit made by the Editor of the Edina Sentinel stating that the Edina Sentinel is a Republican newspaper. This raises the question of fact and not being in possession of the facts, this department is not in a position to pass upon the same.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

TAXATION:- Section 1, Laws of Missouri 1931, page 349,  
SCHOOL DISTRICTS:- is not unconstitutional as being in conflict  
with Section 6 of Article X, which exempts  
school property from general taxes.

June 16, 1934.

Mr. Walter G. Stillwell,  
Prosecuting Attorney,  
Hannibal, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in  
which you inquire as follows:

"I have been consulted by the president of the Hannibal School Board relative to the constitutionality of Section 1 of an act relating to the erection, construction and maintenance of sewers — assessment of cost, etc., which said statute is found on page 350 of the Laws of Missouri, 1931.

"The City of Hannibal by virtue of an ordinance has taxed the Hannibal School District their pro-ratio amount for the installation of sewers and the school board has been advised by competent counsel that the above mentioned section is unconstitutional in that it attempts to levy a tax or assessment on school property.

"Your usual prompt attention would be appreciated in this matter because there is a possibility that the holders of these tax or assessment bonds will institute legal proceedings for their collection."

Section 1, Laws of Missouri 1931, page 350,  
is as follows:

"All real estate owned by any school district of this state, shall be subject to the provisions of all ordinances of any city, town or village of this state, which relate to the erection, construction and maintenance of sewers and sewer systems, and of sidewalks, guttering, curbing and paving of the streets and alleys adjoining and abutting the real estate of said school districts and to the assessment of the costs thereof,

FILED  
88

to the same extent as that of private citizens of this state."

You state that the City of Hannibal, pursuant to the authority contained in the foregoing section, has sought to subject school property to assessments for the purpose of maintaining sewers. You inquire whether or not Section 1 of the Statute is constitutional. We assume that you have in mind in making this inquiry, Section 6 of Article X of the Constitution, which is as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

The Courts in construing Section 6 of Article X have generally held that it only applies to general taxes which are used for the support of the city, county and state governments and that the exemption in the Constitution was not intended and does not include special assessments or benefits.

In *Mullins v. Cemetery Association*, 239 Mo. 681, it was contended that a cemetery association was exempt from taxation by reason of the provisions of Section 6 of Article X. A suit in that case was brought upon sewer bills and the court said at page 687:

"It is provided by section 6, article 10, of the Constitution of this State that: 'The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation.' The law is too well established by require the citation of authorities that the exemption from taxation in the foregoing

section of the Constitution has reference to general taxes, levied and collected for the support and maintenance of the State, and not to special taxes assessed to pay the cost of local improvements. The correctness of this proposition is not contested by respondent. It rests its claim, that its property is exempt from liability for the taxes sued for, upon a statute hereinafter discussed."

Again in *Houck v. Drainage District*, 248 Mo. 373, in discussing the right of a drainage district to collect an assessment, the court, in discussing the above constitutional provision, says at page 383:

"That the special taxes they are authorized to levy and collect upon and for the benefit of the lands included in their districts do not come within the provisions of article 10 of the State Constitution invoked by the appellants, has long been settled, and has passed from the realm of legitimate discussion."

In *Corrigan v. Kansas City*, 211 Mo. 608, it was held that Section 6 of Article X did not apply to special assessments. The court says at page 627:

"Section 3, article 10, of the State Constitution requiring taxes to be uniform, and sections 6 and 7 of the same article, the one exempting properties of certain kinds and the other forbidding any other exemptions, refer only to general taxes; those sections neither exempt nor forbid the exemption of properties from special assessments for local improvement. If the legislative department of the State government or that of the city government should make an arbitrary selection of property to be taxed for the benefit of the whole district, omitting other property of like kind and used for like purposes, there are other clauses of both State and Federal constitutions that could be applied to prevent such inequality, but this is not such a case; here all properties of the same class are omitted from the assessment. The classification here shown is not beyond the legislative discretion of the Common Council."

In view of the foregoing decisions we believe that

the Legislature had a right to authorize cities to levy special assessments against the properties of schools. Section 6 of Article X, quoted above, has been construed to apply only to general taxes and has been construed to apply not to special taxes or special assessments. Such being true, that section is not violated when the Legislature authorized cities to collect special assessments from school districts. It is also apparent, in view of the Corrigan case above, that so long as the Legislature authorized the levying of a special assessment against all of a particular class that the Act is not unconstitutional because it exempts other classes.

It is therefore the opinion of this Department that Section 1, Laws of Missouri 1931, page 349, is not unconstitutional as being in conflict with Section 6 of Article X of the Constitution, which exempts school property from general taxes.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

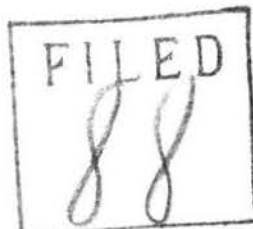
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ROY McKITTRICK,  
Attorney General.

FWH:MS

**TAXATION:** Procedure established by Senate Bill 94 applicable in cities of the third class.

9-12  
September 5, 1934.



Hon. Robert T. Stephens  
City Attorney  
Excelsior Springs, Missouri

Dear Mr. Stephens:

Your communication of July 10, 1934, has been relayed to this office by the Honorable James S. Rooney, Prosecuting Attorney of Clay County. Your request reads as follows:

"You may have already obtained an opinion from the attorney general concerning the sale of delinquent property for taxes as provided by the laws of Missouri for 1933 on pages 425 to 449 inclusive. I have heard so many different things concerning this that I would like to have an opinion from the Attorney General as to whether or not this law is applicable to cities of the third class. Also when that law went into effect. Whether on April 7, 1933 or 90 days thereafter. I doubt seriously whether this Act had an emergency clause in it.

Also what becomes of suits filed in the circuit court under the old law after the effective date of this Act.

I would appreciate it very much if you would give me the opinion of the attorney general in reference to the above questions."

We shall deal with your questions in the order asked.



I.

**DELINQUENT CITY TAXES OF THIRD  
CLASS CITY COLLECTED UNDER PRO-  
CEDURE ESTABLISHED BY SENATE BILL  
94.**

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The provisions for the collection of delinquent city taxes are found in the Chapter entitled "Municipal Corporations" and numbered 38 of the Revised Statutes of Missouri, 1929. Article IV sets forth specifically how delinquent city taxes of third class cities are to be collected. Senate Bill 94 did not alter, repeal or amend any Section in this Chapter but is confined to the repealing of certain sections of Chapter 59 and the reenactment of other sections in lieu thereof. However, we find that Section 6781 prescribes the duties of the city collector in the collection of delinquent taxes in cities of the third class and provides in part:

"The city council shall cause the land and lot delinquent list and the personal delinquent list and be returned to the city collector, who shall be charged therewith, and who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes:" \* \* \*

By this provision the Legislature has adopted the same procedure for the collection of delinquent city taxes in cities of the third class as are now or may be established for the collection of delinquent State and County taxes.

There is no provision in Chapter 38 and particularly Article IV thereof for the transferring of these duties from the city collector in cities of the third class to county officials. Although the 57th General Assembly in Extra Session reenacted Section 9970 of the Laws of 1929, with a slight modification (page 451 Laws of Missouri, 1933), it has heretofore been held by this office that that Section does not apply to cities of the third class (opinion to State Tax Commission, August 8, 1933).

We therefore are of the opinion that your City Collector should proceed with the collection of delinquent city real estate

taxes this year, in the same manner as is prescribed by law for the collection of delinquent State and County taxes, to-wit, as provided for in Senate Bill 94, page 425 et seq. Laws of Missouri, 1933.

## II.

SENATE BILL 94 PAGE 425 ET SEQ.  
LAWS OF MISSOURI, 1933, NOT  
EFFECTIVE UNTIL JULY 24, 1933.

An examination of the Senate Journal of the 57th General Assembly in Regular Session, page 669, reveals that although Senate Bill 94 was passed by a vote of nineteen to eleven, the Emergency Clause to Senate Bill 94 failed to adoption by a vote of eighteen to twelve. Also, referring to page 449, Laws of Missouri, 1933, it is apparent that Section 3 of the act which constituted the Emergency Clause was not adopted, as said Section 3 does not appear therein. No Emergency Clause being attached to the Act it became operative in accordance with the provisions of the Constitution, to-wit, ninety days after the adjournment of the General Assembly.

## III.

SUITS FILED BEFORE JULY 24, 1933,  
MAY BE DISMISSED AND ENFORCED UNDER  
SENATE BILL 94, OR MAY BE PROSECUTED  
TO FINAL JUDGMENT UNDER PRIOR LAW.

We direct your attention to Section 9962b of Senate Bill 94, found at page 444, Laws of Missouri, 1933, a portion of which Section reads as follows:

" \* \* provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage

of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions and that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

By virtue of this Section the option is given to the County Collector to proceed with the suit which had been instituted prior to the effective date of Senate Bill 94 and collect the taxes after judgment and execution, or to dismiss the suit and advertise the property for sale in accordance with Senate Bill 94. Although this Section saves the costs which have accrued on these taxes, we direct your attention to a subsequent enactment of the 57th General Assembly in Extra Session. This enactment is known as House Bill 124, and found at page 166, Laws of Missouri, Extra Session, 1933-34. This Section reads as follows:

"Section 1. PENALTIES AND INTEREST--HOW COMPUTED.--That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

This is a relief measure enacted for the benefit of the taxpayer by remitting part of the penalties which accrued on personal and real estate taxes for the year 1932 and prior years.

This enactment is a subsequent expression of the legislative will and therefore must be considered by you when making settlement of your back tax suits.

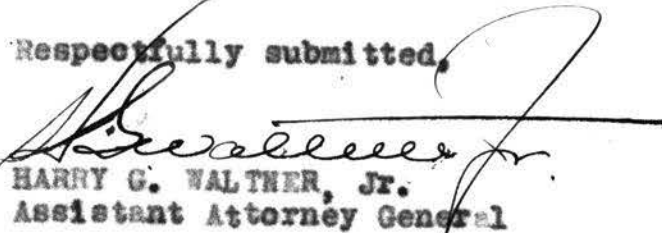
Hon. Robert T. Stephens.

-5-

September 5, 1934.

It is therefore the opinion of this office that as to suits filed for the enforcement of delinquent real estate taxes prior to July 24, 1933, the Collector has the option of proceeding with the collection of such taxes under the law as existed at that time, or under the provisions of Senate Bill 94 of the Regular Session, all subject to House Bill 124, page 186, Laws of Missouri, Extra Session, 1933-34.

Respectfully submitted,

  
HARRY G. WALTHER, Jr.  
Assistant Attorney General

APPROVED:

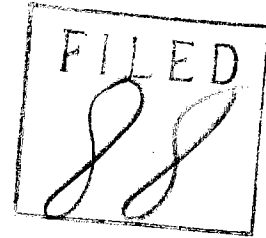
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ROY McKITTRICK,  
Attorney General

HGW:MM

TAXATION:—Under Section 9868, R. S. Mo. 1929, upon petition by County Court, Circuit Judge may issue order directing increased levy and may, under same section, revoke its prior order.

September 11, 1934.



Mr. R. P. Stone,  
Prosecuting Attorney,  
Eldon, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I herewith hand you a number of Exhibits which are orders of the County Court of Miller County, Missouri, and orders of the Circuit Court of Miller County in vacation, together with my petition to the Circuit Judge as Prosecuting Attorney of Miller County, Missouri, based on the order of the County Court, (all of which are presumed to be based on Section 9868, R. S. 1929, and ask your opinion on the same:

"FIRST: Did the County Court have authority to make the order and request in Exhibit 'A' herewith filed?

"SECOND: If the County Court had the authority to make the order and request in Exhibit 'A' did I, as prosecuting attorney have any choice as to filing the petition to the Circuit Judge, said petition being marked Exhibit 'B' and filed herewith?

"THIRD: Did the Circuit Judge in vacation have authority to make the order marked Exhibit 'C' and filed herewith, upon the petition filed by me as Prosecuting Attorney of Miller County?

"FOURTH: If the county court had the authority to make the order and request in Exhibit 'A' dated February 8th, 1934, and the Circuit Judge in vacation had authority to make the order in Exhibit 'C', did the county court, after receiving the order from the Circuit Judge, and after making the levy of six cents

on the One Hundred Dollars valuation (the same being within the Constitutional limits) and after the Six Cents had been extended on the Tax Books by the County Clerk, have authority to ask the Circuit Judge to rescind the order, as shown in Exhibit 'D', and did the Circuit Judge in vacation have the authority to make the order, dated August 20th, 1934, and marked Exhibit 'E' setting aside the levy made by the county court, and if the Circuit Judge had authority to set aside the levy so made by the county court, after the levy was made and extended on the Tax Books, and delivered to the Collector, then whose duty would it be to deduct the Six Cents from the Tax Rolls, or Book, and how would the County Collector account for the same, after it had been charged to him?"

Section 9868, R. S. Mo. 1929, provides as follows:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes shall be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes,



and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

It appears from your inquiry that the County Court requested the authority to levy an additional tax under the foregoing section. You, as prosecuting attorney, prepared the request and filed it with the circuit judge and the circuit judge, under the foregoing section, found that there was a necessity for the tax and made the order authorizing the additional levy. Thereafter, for various reasons, the county court requested that the order be rescinded and upon application made by you the circuit judge entered his order revoking the original order. In the meantime, however, the assessments had been made and they now appear on the tax books.

In answer to your first inquiry we are of the opinion that the county court had the authority, under the foregoing section, to make the request which it did.

In answer to your second inquiry, under the foregoing section, it was your duty, upon a request being made by the county court, to file the petition which you did with the circuit court.

In answer to your third inquiry we are of the opinion that the circuit judge in vacation had authority to make the order giving to the county court the right to make the additional levy. The above section specifically provides that the court may make the order in vacation.

In answer to your fourth inquiry, we believe that the court had a right to modify or set aside its original order. The foregoing section specifically provides

that the court may modify or set aside the order whenever it appears to the court or the judge thereof that the taxes which were assessed were not authorized by the Constitution or laws of the State, or that the necessity no longer existed. The order of the Circuit Court found that the taxes were not authorized by the Constitution or laws of the State and the judgment of that court, standing unappealed from, became final and is not subject to collateral attack. So far as the county is concerned, the situation is the same as if the county had not made the original request to increase the levy, because the court, in revoking its prior order, destroyed the power previously given to the county court to make the levy.

Since the Circuit Judge has revoked the order levying the assessment, which he had a right to do, then the assessment cannot be enforced. Since the levy is not legal the County Collector cannot be held responsible for his failure to collect those taxes. Since he is charged with them on his books, the county court would have a right to give him credit for that portion of the taxes when he makes his usual settlement. As a matter of fact, the order of the county court and of the circuit court already provides that the county collector shall take credit for this levy which is now found upon his books.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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(Acting)  
Attorney General.

FWH:MS

SCHOOLS - COUNTY SCHOOL FUND: Right of county court to reduce or waive interest or principal of loans from county school fund secured by farm real estate mortgages.

November 15, 1934.

11-20

Hon. Walter C. Stillwell,  
Prosecuting Attorney of Marion County,  
Hannibal, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of October 31, 1934, such request being in the following terms:

"The opinion of this office has been requested on the following state of facts:

Approximately One Hundred Thousand dollars of money belonging to the school fund of Marion County has been heretofore loaned by the County Court on school fund mortgages, the security being farm property. In this community many holders of farm loans have sealed the principal down and many have waived interest payments. Is it possible for the County Court

First: To waive delinquent interest, and

Second: Where deemed wise, expedient and necessary for the welfare of the County to decrease the principal to prevent foreclosure or the acceptance of a Deed of Conveyance from the record owners.

The County Court is very anxious for this information and I would appreciate hearing from you at your earliest convenience."

This Department has heretofore ruled on the questions raised in your letter. In an opinion signed by the Attorney-General and by Charles M. Howell, Jr., Assistant Attorney-General, dated August 20, 1934, and addressed to O. P. Allen, District Appraiser, Home Owners' Loan Corporation, Moberly, Missouri, it was ruled that a county court could not make a compromise settlement of loans made out of a county school fund, and that neither principal nor interest could be reduced by the county court, from which it follows, of course, that interest could not be waived. This opinion

2. Hon. Walter C. Stillwell.

November 15, 1934.

of August 20, 1934, confirmed and supported another ruling by this Department dated October 25, 1933, addressed to Hon. Joseph C. Crain, Prosecuting Attorney, Ozark, Missouri, which was signed by the same officials. We are enclosing a copy of each of these opinions.

In conclusion, it is our opinion that where a county court has invested money constituting a part or all of the county school fund in notes secured by mortgages on farm real estate, that such county court has no authority to waive delinquent interest on such obligations or to decrease the principal or interest thereof.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY McFITTICK  
Attorney-General

Counties: Refunds from State, taking over bridge to which county contributed, may be put in general revenue fund of county by county court. On transfer or paying back to other counties their contribution no commission allowable under 12316, R. S. 1929.

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December 7, 1934.

12-10



Honorable Louis B. Stigall  
Chief Counsel  
Highway Department  
Jefferson City, Missouri

In Re: State Eleemosynary Institutions v.  
Buchanan County

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Dear Sir:

On January 19, 1934 we obtained a judgment against Buchanan County in favor of State Hospital No. 2 for \$43,144.65, and a judgment on March 9, 1934 against Buchanan County in favor of the State Sanatorium for \$1,839.34.

We understood that monthly refunds were being made to Buchanan County by the State Highway Department, and that these refunds were set aside in May, 1932.

The judgment in behalf of the State Sanatorium was obtained for warrants issued during the year 1932 to that institution, but which warrants were not paid. The judgment in favor of State Hospital No. 2 against Buchanan County was for the care of insane patients for the year 1932 in the principal sum of \$39,401.51, which, including interest, made the total amount of the judgment \$43,144.65.

I am enclosing herewith a copy of an opinion previously written by this office relative to the use of the money to be refunded, which opinion, I understand, is based upon a similar set of facts involved in this case. Under this opinion, the refund set up in 1932 could be used for the payment of these judgments against Buchanan County for bills incurred by that county to the eleemosynary board for the year 1932.

#2 - Honorable Louis B. Stigall

It is the opinion of this office that under the attached previously prepared opinion, the refund of \$37,000 now available for Buchanan County may be paid and applied on the judgments held by the eleemosynary board against that county.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

PER:FE  
Enc.



MOTOR VEHICLE LICENSE FEES: License fee for trailers and semi-trailers should be based on live load capacity of such trailer or semi-trailer.

12-27  
December 19, 1934.



Mr. V. H. Steward,  
Commissioner of Motor Vehicles,  
Secretary of State's Office,  
Jefferson City, Missouri.

Dear Sir:

This department is in receipt of your letter of December 4 requesting an opinion as to the following state of facts:

"Some question has arisen as to the proper method of computing license fees, and the amount of license fee that should be paid and collected for trailers and semi-trailers, provided for under Section 7761, page 98, Laws of Missouri, Extra Session 1933-1934."

Section 7761, Laws of Mo. Extra Session 1933-34, at page 100, provides in part as follows:

"For each trailer there shall be paid a fee equal to one-half ( $\frac{1}{2}$ ) of that provided for commercial motor vehicles and for each semi-trailer there shall be paid a fee equal to one-quarter ( $\frac{1}{4}$ ) of that provided for commercial motor vehicles, according to the live load capacity of such trailer or semi-trailer."

In order to determine the question here before us, it is necessary to define the phrase "live load capacity". In 38 Corpus Juris, p. 70 the phrase "live load capacity" is defined as follows:

"Of a chassis or truck, the amount of freight it will carry, exclusive of the weight of the chassis and body."

In the case of Oldfield v. International Motor Company, 113 A. 632, the Court had before it a question involving a warranty of "live load capacity". The Court said:

\*\*\*As it is conceded that the 'live load capacity' of a chassis or truck means the amount of freight it will carry, exclusive of the weight of the chassis and body, and as the contract expressly guaranteed that the chassis would have a live load capacity of 10,000 pounds, it is equally apparent that if the chassis or truck in question did not have the capacity so specified and guaranteed it was not a compliance with the terms of the contract.\*\*\*"

#### CONCLUSION

In view of the foregoing, it is the opinion of this department that by reason of Section 7761, Laws of Mo. Extra Session 1933-34, page 99-100, the license fee that should be paid and collected for trailers and semi-trailers should be based according to the live load capacity of such trailer or semi-trailer, the "live load capacity" being the amount of freight the trailer or semi-trailer could carry exclusive of the weight of the chassis and body.

Respectfully submitted,

JWH:AH

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

COUNTY WARRANTS: Warrants reduced to judgment do not lose their priority nor does the judgment extinguish priority.

2-24  
February 21, 1934.



Hon. Edward D. Summers,  
Prosecuting Attorney,  
Crawford County,  
Steelville, Missouri.

Dear Sir:

This department acknowledges receipt of your letter requesting an opinion, as follows:

"I wish to request an opinion from your office as to whether or not a judgment based on numerous county warrants merges the warrants into itself so that the warrants lose their original priority of payment. In other words, should the Treasurer pay a warrant, regularly protested, as of the date of the original protest, or as of the date of the judgment rendered upon it?

The statute provides that warrants shall be paid in the order in which they are protested and the question I have in mind is what effect, with reference to the priority of payment does a judgment have in extinguishing or continuing such priority?"

I.

WARRANTS REDUCED TO A JUDGMENT DO NOT  
LOSE PRIORITY, NOR DOES THE JUDGMENT  
EXTINGUISH PRIORITY.

Section 12139, R.S. Mo. 1929 provides the manner in which the county treasurer shall keep his warrant book and is as follows:

"He shall procure and keep a well-bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: Provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual, and for all expenses necessary to maintain the county organization for any one year, shall have been fully paid and liquidated."

Section 12140, R.S. Mo. 1929 relates to the manner of payment of warrants, and is as follows:

"No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants previously presented for the ordinary current expenses of the county as mentioned in the preceding section, and in the order presented, so that no such warrant of subsequent presentation shall remain unpaid by reason of the holder of such warrants of prior presentation failing to present the same for payment after funds shall have accrued in the treasury for their payment: Providing, however, that nothing

herein contained shall prevent the treasurer from receiving from the collector all scrips and warrants lawfully received by him in the payment of county tax: Provided further, before the treasurer shall receive such scrips and warrants, the collector shall make out a list of such scrips and warrants, under oath, specifying the number and amount thereof, the date when received, and from whom received; and said list shall be filed and preserved by the treasurer."

The Court in determining this question in the case of State ex rel. v. Hortsman, 149 Mo. 290 said (l.c. 295-6):

"For certain purposes a judgment creditor is in a more advantageous position to enforce payment of his debt than a simple contract creditor. For example, as is argued by the learned counsel for the relators, a judgment creditor may, under certain circumstances invoke the writ of mandamus in his aid, while a simple contract creditor under the same circumstances, would have no such remedy. That is because, if the respondent should deny the validity of the debt, that issue could not be tried in such a suit. It may be doubted if the prosecuting attorney of the county could be compelled by mandamus to petition the circuit court to order the assessment provided for in section 7654, Revised Statutes 1889, since the law requires of him the exercise of his judgment as to its necessity; but if it be conceded that relators, by virtue of being judgment creditors could have compelled the county officers to put that machinery in motion, that is all they could have done. Their judgment gave them no lien on the property or revenue of the county, and they could not have compelled the county court to levy a tax to pay their debt in preference to other debts of equal merit. In this case the county court of its own motion instituted the procedure required by the statute, and it recognizes the validity of the debts evidenced by warrant. The fund now in the hands of the county treasurer is not the

Feb. 21, 1934.

product of any action taken by the  
relators. The law gives them no lien  
on it and there is no reason why they  
should have it applied to their debt  
in preference to others."

CONCLUSION

From the foregoing we are of the opinion that when  
warrants are reduced to a judgment they do not lose their orig-  
inal identity nor their original priority of payment.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

OWN:AH



COUNTIES: No priority with respect to interest payments.

531

May 29, 1934.



Hon. Edward D. Summers,  
Prosecuting Attorney,  
Crawford County,  
Steelville, Missouri.

Dear Sir:

This department is in receipt of your letter of March 15, 1934 requesting the opinion of this department as to the following state of facts:

"Can a county apply money collected during the year 1933 to the payment of the interest and principal payment on a bond issue payment due at the end of the year 1932? This county defaulted in its payment on its bond issue for the year 1932 because of the failure of the bank, and it now has money on hand for the payment of the interest and principal payment of one year, and we desire to know whether to pay the payment for 1933 or 1932."

Section 2895, R.S. Mo. 1929 provides:

"Any county, city, village, town, township, parts of townships or school district, issuing its bonds for the purpose aforesaid, shall, at the time of issuing the same, provide in express manner provided by law for the levy and collection of an annual tax sufficient to pay the annual interest on such funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due."

It will be noticed that there is nothing said in the law about any one year's taxes being segregated and set apart for the service of a particular year's maturity and interest, and this law has never thus been interpreted by the courts of this state.

The general rule with respect to disbursement of county funds is stated in 15 Corpus Juris, page 586:

"In the absence of statutory provision on the subject, it would seem to be no doubt that county boards as the fiscal agents of their counties, may direct the disbursement of county revenues."

In the case of Aetna Casualty & Surety Co. v. Board of Supervisors, (Supreme Court of Appeals of Virginia), 168 S.E. 617, the court said (l.c. 634):

"If a treasurer, whether he has succeeded himself or not, has in his hands money belonging to a particular fund, it is his duty to pay a warrant drawn upon that fund when it is presented to him, though it may have been drawn prior to the beginning of that term of office. This is true, though the money in his hands belonging to that fund may have come from revenue accrued during his current term."

Judge Ragland, in the recent case of State v. Grand River Drainage District, decided by the Supreme Court of Missouri, in Banc in 1932, 49 S.W. (2d) 121, had before him a case involving drainage district bonds. The Court said:

"It is also within the contemplation of the statute (article 1, Chap. 64, Rev. St. 1929) as shown by various and sundry of its provisions, that taxes levied by a drainage district may become delinquent and that because of such delinquency bonds issued by it may not be paid at their maturity. Yet the statute is wholly silent as to preferences or priorities as between the holders of matured bonds, when the funds at a given time are not sufficient to pay all. Nor does it contain a requirement, or even an intimation, that none of such bondholders shall be paid until funds are available to pay all. On the contrary, by the clearest implications it places upon the board of supervisors the imperative duty to pay matured and maturing bonds and interest installments as long and

May 29, 1934.

as often as funds are available for that purpose."

CONCLUSION

By reason of Sec. 2895, R.S. Mo. 1929 requiring the county court to levy a tax annually "sufficient" to pay the bonds and the interest thereon, the court must be presumed to have included in its levy for the year 1933 a sufficient sum to take care of the unpaid interest for the year 1932. The statute is silent as to priorities, and in view of Judge Ragland's decision in the case of State v. Grand River Drainage District, we conclude that interest installments for the years 1932 and 1933 must be paid as long and as often as funds are available for that purpose.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

JWH:AH

RECORDER OF DEEDS - Fees to be charged for recording Deeds  
of Trust.

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June 12th, 1934.

6-15



Honorable W. B. Sydnor, Sec-Treas.  
Lafayette County Nat'l Farm Loan Ass'n.  
Dover, Missouri

Dear Sir:

We have your request of May 25th, 1934  
for an opinion as to the proper amount a Recorder of  
Deeds is entitled to charge for recording Federal  
Land Bank and Land Bank Commissioner Deeds of Trust.

In answer to your inquiry, we quote you  
Section 11804, Revised Statutes of Missouri, 1929,  
which provides:

"Recorders shall be allowed fees for  
their services as follows:

For recording every deed of  
instrument, for every hundred  
words.....\$ .10

In addition to the above fee  
for recording deeds, they  
shall be allowed for re-  
cording every such instru-  
ment relating to real estate,  
a fee of ten cents, as a  
compensation for making and  
preserving direct and inverted  
indexes to every book contain-  
ing deeds affecting real es-  
tate.

For every certificate and seal.. .50

For recording a plat of survey,  
if not more than six courses.... .40

#2 - Honorable W. B. Sydnor

For every course above six  
of the same..... .02

For copies of plats, if not  
more than six courses..... .40

For every course above six..... .02 "

You will note from the above statute that a Recorder is entitled to a fee of ten cents (10¢) per hundred words. The charge for recording various deeds and Deeds of Trust will therefore vary according to the number of words contained in each, and in order to get uniformity of charges, the Deeds of Trust must contain the same number of words. The charges set out in this statute are the lawful charges the Recorder is entitled to make for recording Deeds of Trust mentioned in your letter.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

F  
I. RELATING TO CONSTRUCTION OF SECTION 9044 AS AMENDED <sup>by</sup>  
LAWS OF 1933.

II. RELATING TO AUTHORITY OF CITIES TO PASS ORDINANCE EXCEEDING  
THE CHARTER RIGHTS IN CONFLICT WITH STATE LAWS.

9-12  
September 7th, 1934



Hon. S. Ray Sweeney  
109 E. Market  
Warrensburg, Missouri

Dear Sir:

We acknowledge receipt of your letter of August 17th  
in which you state and inquire as follows:

"I am writing you for an interpretation of  
Senate Bill #123 amending Section #9044 article  
2 chapter 52 Statutes of Missouri passed at  
the 1933 General Assembly and signed by the  
Governor about April 9, 1933.

This amendment was suggested and passed be-  
cause of the request of Funeral Directors to  
avoid what had become a hard-ship not only on  
Funeral Directors but the families they serve.

For instance warrensburg is in a certain reg-  
istration district and not five miles away there  
begins another registration district. This is  
an actual case, a man died of Typhoid Fever,  
house of three rooms five others ill in the  
same house of the same trouble. The Doctor  
attending is out on a call, the registrar  
some where else. They want the body removed  
to our Funeral Home at once. It would delay  
several hours to find first the family to get  
the family history, then to get the Doctor  
located then to find the registrar and get the  
removal permit. This law was passed as I  
have said to take care of just such cases as  
this so that we would not violate the law.

Another example, we are in 50 miles of Kansas  
City. A family who we have served has a member  
who dies in a Kansas City Hospital, they want  
us to handle the case from here and not a K. C.  
Funeral Director who they do not know. It is  
in the middle of the night when we get to the  
Hospital in K.C. the Doctor is in some other  
part of the city, to comply with the law we  
must find the Doctor then go to the City Hall  
in the north part of the city, and we have seen



times when a clerk was not on duty there. The body must lay at the hospital until this is all done before it can be removed. That is under the old law and some say this amendment does not change it. We have been taking or removing bodies from E. C. Hospitals and leaving a blank permit at the place of death and have a friend of ours get the necessary permit the following day and mail to us, which is always before burial. I take the stand it is better to do this than to leave a body to decompose while these papers are being prepared.

Does a City have a law that overrides this state law? Thanking you in advance for your opinion I am, "

I.

Dead body may be removed from or into any registration district for the purpose of preparing such body for burial without removal permit, but no such body may be interred, deposited in vault, tomb, or cremated or otherwise disposed of until permit so to do has been issued by registrar of district in which death occurred.

Section 9044 Laws 1933, page 270 provides in part as follows:

"The body of any person whose death occurs in the state shall not be interred, deposited in a vault or tomb, cremated or otherwise disposed of, or removed from or into any registration district until a permit for burial, removal or other deposition shall have been properly issued by the local registrar of the registration district in which the death occurs. Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the registration district in which the death occurs."

It will be observed that the amendment of said section by the Legislature of 1933, was as follows:

"By inserting between the words "occurs" and the word "and" in line ten the following words: "Provided, no such removal permit shall be required when a dead body is removed for the purpose of preparing such body for burial, but no such body shall be interred, deposited in a vault, or tomb, cremated or otherwise disposed of until a permit so to do has been properly issued by the local registrar of the district in which the death occurs."

It is the opinion of this department that by the terms of said amendment, Funeral Directors may remove dead bodies from or into any registration district without permit, for the purpose of preparing such body for burial only; that such a body so removed must not be interred, placed in a vault or tomb, cremated or otherwise disposed of until a permit so to do shall have been properly issued by the registrar of registration district in which the death occurred.

## II.

Municipal regulations must not directly or indirectly contravene to general law nor can such regulations be repugnant to the policy of the state as declared in general legislation.

Section 7 Article IX of the Constitution provides as follows:

"The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

No city ordinance may be declared valid, that cannot find support in the charter provisions.

In *St. Louis v King*, 226 Mo. l.c. 350, Judge Gantt, in ruling this principal of law said:

September 7th, 1934

"We think this ordinance cannot find support in the charter provision in regard to the regulation of doctors nor in the general welfare clause of the charter of St. Louis.

Applying the well known doctrine in this state, we are constrained to the opinion that this ordinance must fail, because the power to enact it is not conferred in the charter and is not necessarily incident to any power that is expressly granted in the charter, and that the ordinance itself is not in harmony with the statutory law of this state on the subject, but has endeavored to enlarge the powers of the city further than necessary to carry into effect the specific grants of power."

In Kansas City v Hallett 59 Mo. App. 1. c. 163, Gill Judge said:

"It is not necessary to invoke the terms of the constitution to announce that the by laws of a municipal corporation in order to be of any validity, must be consistent with its charter and the general statutes of the commonwealth creating it. This is a well understood principal of common law. Such ordinances or by laws must not be repugnant to the legislative policy of the State, as manifested by its general enactments."

In St. Louis v De Lassus, 206 Mo. 1. c. 583, Judge Gantt in that case proceeded to measure the ordinance under review by the State Statute on the same subject in order to determine whether or not there were inconsistencies or conflicts.

Therefore in view of the constitutional and statutory limitations, and the authorities of our courts, this department rules that the doctrine that "the creature is not greater than the creator", applies in this matter that is a city ordinance, in conflict with a state statute, or one which exceeds its charter authority is void and of no legal effect.

Respectfully submitted,

W. W. Barnes

Assistant Attorney General

APPROVAL:

Roy McKittrick  
Attorney General

SPECIAL ROAD DISTRICTS

Where Special Road District  
in grading a road damages  
culvert driveway in front of  
farm home, said district  
is not liable for said damage.

22  
January 2nd,  
1934



Mr. J. Olin Taylor,  
County Clerk,  
Hermitage, Missouri.

Dear Mr. Taylor:

We have your letter of October 11, 1933 in which was contained a request for an opinion as follows:

"In view of the fact that a County road has been established, and a culvert sufficient for reasonable traffic placed in front of a Farm Home and that a special road district while grading said road removes said culvert, and that said culvert after the road is graded is not sufficient for driveway at this place. Who's duty is it to furnish material for new culvert, Road District or individual who uses it as entrance to home."

Nowhere in our statutes is there any provision covering the above situation. In addition the courts of this state have never passed on the respective rights of parties under these given facts. In view of the foregoing, therefore, in order to render a sound opinion we must first enter the field of construction and analogy. In short, we feel our opinion should be based on an application of the principles of negligence under the circumstances. We assume that the grading by the Special Road District in such a way as to destroy or render useless the culvert in question was the result of unintentional negligence on the part of such Special Road District. It is then only necessary to decide whether the Special Road District is to be held responsible for such unintentional negligence.

Special Road Districts in Hickory County are governed by Chapter 42, Article 9, Revised Statutes of Missouri 1929.

Section 8033, Chapter 42, Article 9 Revised Statutes of Missouri provides as follows:

"Sec. 8033. Board's powers and duties. Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, and shall remove all obstructions from such highways, and for the discharge of these duties shall have all the power, rights

January 2, 1934

and authority conferred by general statutes upon road overseers, and said board shall at all times keep the public roads under its charge in as good repair as the means at its command will permit, and for this purpose may employ hands at fixed compensations, rent, lease or buy teams, implements, tools and machinery, all kinds of motor power, and all things needful to carry on such road work: Provided, that the board may have such road work or any part of such work done by contract, under such regulations as the board may prescribe."

It will be seen that the above section, among other things, confers on the Board of Commissioners the same power, rights and authority as is conferred by general statutes on road overseers. In other words, said board stands in the same relation in this respect to the public as does the road overseer, and a case deciding the rights and liabilities of road overseers as to their acts is applicable to the rights and liabilities of the board under similar circumstances.

In view of the foregoing, therefore, the case of Cook vs. Hecht, 64 Mo. A 273 is most applicable to the situation at hand. Briefly the facts in that often cited case are in essence the same as here. Plaintiff owned a farm abutting on the road with ready and easy access to said road. The road overseer in improving the road, cut a drainage ditch between plaintiff's property and the road, thereby as in our case materially damaging plaintiff's access to said road. The court at page 279 stated the rule, which subsequent decisions have approved, as follows:

"These road overseers are statutory officers, clothed with certain discretionary powers. It is made their duty to exercise proper diligence in keeping the roads in good repair (Revised Statutes, 1889, section 7808), and as to how this shall be done is necessarily left to their judgment. They come, then, within the scope of the rule, well established, that public officers, vested with discretionary powers in the performance of certain duties, cannot be held individually liable for their acts, unless willfully, maliciously and oppressively exercised. Reed v. Conway, 20 Mo. 22; Edwards v. Ferguson, 73 Mo. 686. They can not be individually held for mere mistakes in judgment. They are not liable so long as they honestly and in good faith perform the work intrusted to them. The injury must be maliciously and willfully committed; and by willful, says Judge Ryland in Reed v. Conway, supra, is meant 'contrary to a man's own conviction.'

It may be, now, that this defendant did not pursue the best mode of improving the road at the point in question; it may have been better to have carried the water across the road by a culvert, rather than to lead it down in front



January 2, 1934

of plaintiff's premises, though numerous witnesses seem to have approved his conduct as the part of wisdom. But, however, this may be, he is not responsible for such mistaken judgment. He was there on the highway in question, representing the public, which had acquired the right of way, 'with the powers and privileges incident to that right, such as digging the soil, using the timber and other materials found within the limits of the road, in a reasonable manner, for the purposes of making the road,' etc. Wash. on Eas. & Serv. (3 Ed) p. 228; Pemberton v. Dooley, 43 Mo. App. 176.

We discover no evidence in this record that can justify the charge that defendant acted in a malicious and willfully oppressive manner in repairing the road in question. We think there is no merit in the plaintiff's case and the judgment, which was for the defendant, will be affirmed. All concur."

And again in the case of Sharp vs. Kurth, 245 S. W. 636, the court at page 638 stated as follows:

"Absent legislation making special road districts liable for its negligent acts, it is established by a wealth of authority in Missouri that such districts are public corporations and are quasi political subdivisions of the county and the state and are not liable for negligence in the building and construction of public works, such as roads and bridges. Lamar v. Bolivar Special Road District (Mo. Supp) 201 S.W. 890, and cases therein cited. A like ruling was recently made by this court in reference to the liability of a drainage district under our law. D'Arcourt et al v. Little River Drainage District (No. 17,395) 245 S.W. 394, and Hausgen v. Elsberry Drainage District (No. 17365) 245 S.W. 401, not yet (officially) reported.

(2) It is likewise clear that the individual defendants, being special commissioners of the road district, are not liable for their mistakes of judgment or their acts of negligence in doing work."

Further authority along the same line may be found in 29 Corpus Juris, Section 302, page 576 and 52 L.R.A. (N.S.) 145 (note.)

This being so and there being no statutory authority on which to base a responsibility on the part of the road district, under the circumstances, we are constrained to hold that the individual in question must furnish material for the new culvert.

Very truly yours,

APPROVED: \_\_\_\_\_  
Attorney-General

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General



BANKS AND BANKING:

Township Boards not permitted under  
the law to purchase Capital "B"  
Notes.

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3-21

March 19, 1934.



Honorable John D. Taylor  
Keytesville  
Missouri

Dear Mr. Taylor:

We are in receipt of your letter of recent date, with request for an opinion, which letter of request is as follows:

"As special counsel for the Township Board of Triplett, Township, I am submitting to you the following proposition for your opinion:

"The Triplett Bank, of Triplett, Missouri, is now operating under restrictions made by the State Finance Department. The assets of this bank total \$96,000.00. Among other deposits in the bank, there are county funds to the amount of \$3,000.00, school funds to the amount of \$3,000.00, and township funds to the amount of \$38,000.00, a total of \$44,000.00. This bank is not a legal depository for any of the above funds. Consequently, under existing court rulings, this amount would be treated as preferred claims in the event of liquidation.

"Recently, an application was made to the Federal Deposit Insurance Corporation for insurance on deposits, and an application made to sell Capital Notes

'A' and 'B' in order that the bank might operate without restrictions with interest on deposits. Application was made to the R. F. C. to buy capital notes, and it has been suggested that the R. F. C. buy capital notes to the amount of \$8,000.00, provided that Capital Notes 'B' to the amount of \$15,000.00 can be sold.

"This bank has solicited subscribers to the Capital 'B' notes and has procured the sale of \$10,000.00 of such notes. The only way that the remaining \$5,000.00 can be sold will be for Triplett Township to be a purchaser of Capital 'B' Notes to the amount of \$5,000.00.

"Past experience has shown, in the liquidation of banks in this county that have been liquidated, that the assets rarely produced in excess of forty per cent. of their face value.

"In the present instance, upon these figures, we could not hope to realize more than \$37,600.00, which would be \$6,400.00 less than the preferred claims would amount to. As a matter of good business, it would seem advisable for the Township Board of Triplett Township to accept Capital 'B' Notes to the amount of \$5,000.00 in order that this bank might operate without restrictions, which would be beneficial, not only to the township, but to all of the people of the community who have deposits therein. Under the Insurance Deposit Law, the township would not forfeit its preferential claim for the balance of the debt, yet this action would insure to the depositors, in amounts of \$2,500.00 and less, a full payment of their deposits in the event that liquidation would become necessary in the future.

"I am submitting to you this full statement of facts for your opinion on the following question:

"Can the Township Board, for the purpose of protecting and rendering available the balance of its deposits, become a purchaser of Capital 'B' Notes of this bank to the amount of \$5,000.00, using as the purchase price \$5,000.00 of its present restricted deposits?"

We note fully what you say in your statement of facts relative to the condition of the bank in question and the kind and character of the deposits therein, that is, that \$44,000.00 of this bank's deposits are public funds and in the depositing of these funds the School Districts, the County Court and the Township Board, and the bank, according to your statement have not complied with the law relative to the selection of public depositories, and that the bank therefore is not a legal depository under the existing rulings and in the event of liquidation, these deposits would be treated as preferred claims.

At the special session of the Fifty-Seventh General Assembly, 1933, Sections 5312, 13, 14 and 15 of Article I of Chapter 34, R. S. 1929 were repealed, and four new sections were enacted in lieu thereof to be known as Sections 5312, 13, 14 and 15. These new sections authorize banks and trust companies, whose capital have been impaired, to issue capital notes; that is, creating new liabilities against the capital of the bank. As a practical business proposition said notes have been divided into two classes, Capital "A" Notes and Capital "B" Notes. The Capital "A" Notes being superior to the Capital "B" Notes.

Your question is, can the township board purchase \$5,000.00 of Capital "B" Notes, using as the purchase price thereof \$5,000.00 being a part of its present restricted deposits in said bank. As we view it this question resolves itself into a strictly legal proposition, that is, may the township board of directors, as officers of the township, purchase these notes under the conditions set forth in your letter.

Section 12256, R. S. 1929, sets forth the powers of

townships, which section is as follows:

"Each township, as a body corporate, shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of this state; second, to purchase and hold real estate within its own limits for the use of its inhabitants, subject to the power of the general assembly; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative powers; fourth, to make such orders for the disposition, regulation or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township, or the inhabitants thereof, in their corporate capacity, and to dispose of the same."

And Section 12257, R. S. 1929, places restrictions upon the corporate powers of the township board, and is as follows:

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."

Members of the Township Board are officers of limited powers and their powers are similar to the county court as being the agents of the township in the transaction of the township's business, as the county court is agent for the county in the transaction of the county's business.

In 15. Corpus Juris, at page 540, it says:

"A county is not bound by a contract beyond the scope of its powers or foreign to its purposes, or which is outside the authority of the officers making it. In this connection it is the rule that the authority of a county board to make contracts is strictly limited to that conferred, either expressly or impliedly, by statute, regardless of benefit to the county or of value received; and the same is true as to other county officers attempting to contract in behalf of the county.  
\* \* \* \*

As bearing on this question, we quote from the following Missouri cases:

"\* \* \* \* As County Courts are only the agents of the county, with no powers except what are granted, defined and limited by law, like all other agents they must pursue their authority and act within the scope of their powers.  
\* \* \* \* (Steines et al. v. Franklin County et al., 48 Mo. l.c. 177.)

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void. Saline County v. Wilson, 61 Mo. 237; Welcott v. Lawrence County, 36 Mo. 275; Steines v. Franklin County, 48 Mo. 167. Persons dealing with such agents are bound to take notice of their powers and authority.  
\* \* \* \* (Sturgeon V. Hampton, 88 Mo. l.c. 213, 214.)

"This court, in numerous cases, has repeatedly held, that the county courts of the respective counties of the State are not the general agents of the counties of the State. They are courts of limited jurisdiction, with powers well defined and limited by the laws of the State; and as has been well said, the statutes of the State constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void.

"Consequently, this court has also repeatedly held, that all persons while dealing with said courts or agents are bound to take notice of their powers and authority." (Bayless v. Gibbs, 251 Mo. 506.)

From the statement in your letter, \$44,000.00 of the deposits in this bank are public funds respectively - \$3,000.00 county funds, \$3,000.00 school funds and \$38,000.00 township funds - all of said funds being deposited in said bank without compliance with the statutory method in the selection of public depositaries, and the bank is not the legal depository of the respective political subdivisions; and, in the event of liquidation would be treated as preferred claims against the bank.

The immediate effect of the purchasing of Capital "B" Notes of the Township would be the changing of the position of the township as to the \$5,000.00, in the event of liquidation, from a preferred claim to a lower classification. The liability of the bank to its creditors would be in the following order:

- First, - Preferred Claims;
- Second, - Common Depositors;
- Third, - Capital "A" Notes;
- Fourth, - Capital "B" Notes;
- Fifth, - Capital Stock Liabilities .



3/19/34

If Triplett Township can legally purchase \$5,000.00 of Capital "B" Notes, it can purchase an amount of said notes equal to its deposit in said bank, that is, the entire \$38,000.00 of township deposits, if said deposit belong to Triplett Township, and the school district could use its \$3,000.00 or any amount thereof for said purposes, and the county funds could also be used for said purpose. We do not think that public officers as agents of their respective political subdivisions can legally, under the circumstances as outlined in your letter, invest their funds in such securities.

It is therefore our opinion that the Township Board of Triplett Township can not legally purchase \$5,000.00 of Capital "B" Notes of the Triplett Bank of Triplett, Missouri, using as the purchase price \$5,000.00 of its present restricted deposits in said bank.

Respectfully submitted,

GOVELL R. HEWITT  
Assistant Attorney-General,

APPROVED:

ROY McKITTRICK,  
Attorney-General.

GRH:afj

**ELECTIONS: PRIMARY:** Only one Party Ballot can be handed to each  
Elector.

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July 3, 1934.

Mr. H. C. Tate , Sanitary Inspector,  
Board of Health  
201 Polk Street  
Chillicothe, Missouri



Dear Mr. Tate:

Your letter of June 25th addressed to  
General McKittrick and containing the following request  
for an opinion has been handed to me for answer:

"Does the Ballot Judge hand the  
voter one of each tickets or doss  
the voter call for the Ballot he  
wants to vote - i.e. Dem. or Rep.-  
I am asking this so that we may  
know, if a Bunch of Republicans  
here should decide to nominate cer-  
tain Dem. (or supposed to be) can-  
didates. If a voter is entitled to  
one of each party ballots there is  
no way to keep Reps. from nominat-  
ing a weak Dem."

Section 10267, R. S. 1929, is applicable to the  
matter of voting in your county and is herewith quoted:

"At all primaries there shall be  
as many separate tickets as there  
are parties entitled to participate  
in said primary election. There  
shall also be a non-partisan ticket,  
upon which, under appropriate title  
of each office, shall be printed the  
names of all persons by whom declara-  
tion papers shall have been filed, as  
required by this article, who do not  
announce by such declaration papers

as candidates for any political party, as defined by this article. The names of all candidates shall be arranged under the appropriate title of the respective offices, and under the proper party designation upon the party ticket, and upon the nonpartisan ticket, as the case may be; and the names of the candidates for each office shall be so alternated on the ballots used in the several election districts or precincts, that each name shall appear thereon substantially an equal number of times at the top, at the bottom, and in each intermediate place, if any, of the lists or group of names in which such candidate's name belongs, and all officers charged with the preparation and distribution of such ballots shall cause the printer's forms to be so transposed and the ballots so made up as to carry out the intent of this provision. If any elector write upon his ticket the name of any person who is a candidate for the same office upon some other ticket than that upon which his name is so written, this ballot shall not be counted for such person. On any day of nomination of public officers in any primary election precinct, each qualified elector shall be entitled to receive from the judges of the election one ballot of the political party participating in such election for which he desires to vote. It shall be the duty of such judges of election to deliver such ballot to the electors. Before delivering any ballot to the elector, the two judges of election having charge of the ballot shall write their names or initials upon the back of the ballot with indelible pencil, and no other writing shall be on the back of the ballot except the number of the ballot voted."

The statute is plain in its wording to the effect,

"\*\*\*\* each qualified elector shall be entitled to receive from the judges

Mr. H. C. Tate

-3-

7/3/34

of the election one ballot of the  
political party participating in  
such election for which he desires  
to vote. \*\*\*\*\*

It is therefore the opinion that only one party  
ballot can be handed to each elector.

Yours very truly,

OLIVER W. NOLEN  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

OWN/afj

NEPOTISM:

Member of Board of Aldermen may not pass upon the appointment of his brother as City Attorney without violating Section 13, Article XIV. of Missouri Constitution.

Member of Board of Aldermen who also holds the office of City Clerk does not forfeit both offices by passing upon the appointment of brother in his capacity as Member of Board of Aldermen.

----- October 26, 1934.  
Both appointor and appointee forfeit office under the Nepotism law.

-----  
The Nepotism Law of Const. of Mo. applies to Cities of Fourth Class.

Honorable John W. Terrill  
State Representative  
Maries County  
Odd Fellow Building  
Belle, Missouri.

Dear Sir:



This department is in receipt of your letter of recent date wherein you state in part as follows:

"In the City of Belle, Missouri, which is a city of the fourth class, there is a certain person who is a member of the Board of Aldermen and city clerk. His brother was appointed city attorney by the Mayor and this appointment was passed upon by the Board.

"I would like to have a ruling from you in regard to this as to wheather or not the Anti nepotism laws of the State prohibit both men to serve in their respective positions. And as to wheather this law applies to cities of the fourth class."

Your request is divisible into the following questions:

- (1) May a member of the Board of Aldermen pass upon the appointment of his brother as City Attorney without violating Section 13 of Article XIV of Missouri Constitution?

- (2) If a member of the Board of Aldermen also holds the office of City Clerk, does he forfeit both offices by passing upon the appointment of his brother in his capacity as a member of the Board of Aldermen?
- (3) Does only the member of the Board of Aldermen, as appointor, lose his office or does it also include the office of the appointee?
- (4) Does Section 13, of Article XIV. of the Constitution of Missouri apply to Cities of the Fourth Class?

- 1. - - -

May a Member of the Board of Aldermen  
pass upon the appointment of his brother  
as City Attorney without violating Section  
13 of Article XIV of Missouri Constitution?

Section 13 of Article XIV of the Constitution of Missouri, provides as follows:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."



Under the foregoing constitutional provision, a member of the Board of Aldermen, who exercises his right to name or appoint his brother as City Attorney, would forfeit his office as a Member of the Board of Aldermen. You do not state whether or not the member of the Board of Aldermen participated in the election of his brother as City Attorney. If he did not vote for the City Attorney and the latter was elected by the votes of other members of the Board, then the member of the Board of Aldermen has not violated the above constitutional provision. However, if he did exercise his right to vote in favor of his brother as City Attorney, then he has violated the provision of the Constitution.

In State ex inf. McKittrick v. Whittle, 63 S. W. (2d) 100, the Supreme Court passed upon Section 13, of Article XIV. of the Constitution of Missouri, the Court says at page 101:

\*\*\*\*\* The amendment is directed against officials who shall have (at the time of the selection) 'the right to appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. \*\*\*\*\*

In State v. Ellis, 28 S. W. (2d) 363, 325 Mo. 154, provides:

"Section 13 provides that any official violating its provision ' \*\*\*\* shall thereby forfeit his \*\*\*\* office employment'.

"He forfeits by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477."

A brother is related within the fourth degree, and

therefore, we are of the opinion that if a member of the Board of Aldermen exercised his right to name his brother as City Attorney, he has forfeited his office. We are further of the opinion that he would also forfeit his office if he was silent and refused to vote for it would be deemed to be with the majority. If, however, the board member did not vote for his brother and as a matter of fact voted against him, then, absent fraud and collusion, he would not forfeit his office. To hold otherwise would make it possible for the other members of the Board to name the relative of an unfavored member of the Board and thereby cause him, over his objection and protest to forfeit his office, and we do not believe that this was the intention of the constitutional provision.

## II.

If a member of the Board of Aldermen  
also holds the office of City Clerk,  
does he forfeit both offices by passing  
upon the appointment of his brother in  
his capacity as a member of the Board  
of Aldermen?

Section 13 of Article XIV. of the Constitution of Missouri, supra, provides that "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, \*\*\*\*."

The above constitutional provision makes the office forfeited when "by virtue of his office or employment", a public officer or employee of this State or of any political subdivision thereof has a right to name or appoint a person within the prohibited degree. By virtue of his office, as City Clerk, the Board Member would have no right to name, appoint, or cast a deciding vote in favor of his brother as City Clerk, and we are therefore of the opinion that the board member would not come within the constitutional provision as to forfeiture of his office as City Clerk.

## III.

Does only the member of the Board  
of Aldermen, as appointer, lose  
his office or does it also include  
the office of the appointee?

As to the rules of construction to be applied to constitutional provisions, the Supreme Court of this State in State ex rel. Carthage v. Hackmann, 287 Mo. 184, 190, 191 said:

"There are certain well-understood rules laid down by the courts for the construction of constitutional provisions, and they are the same as those governing legislative enactments."

It was said in State ex rel. v. McGowan, 138 Mo., 1. c. 192, in discussing the regular rules of construction of constitutional provisions that, "The organic law is subject to the same general rules of construction as other laws, due regard being had to the broader objects and scope of the former, as a charter of popular government. The intent of such an instrument is the prime object to be attained in construing it."

In 12 Corpus Juris, at page 700, it is said:

"\*\*\*\* The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied. \*\*\*\*"

We are of the opinion that considering the mischiefs intended to be eliminated and the evils sought to be eradicated not only was it the intention of the people in adopting the constitutional provisions that the appointor (Board Member) forfeit his office but also that the appointee (City Attorney)

be without title to the office for which he was appointed. To reason otherwise would nullify the Constitution and allow an office holder to name his relative to office merely upon a forfeiture of his own office. Such was clearly not the intention of the people.

IV.

Does Section 13, of Article XIV. of  
the Constitution of Missouri apply  
to Cities of the Fourth Class?

In answer to the above question, we enclose a copy of an opinion written by the Honorable Gilbert Lamb, Assistant Attorney-General, wherein he held that Section 13 of Article XIV. of the Constitution of Missouri applies to officers and employees of Cities of all classes in the State of Missouri.

Respectfully submitted,

WM. ORR SAWYERS  
Assistant Attorney-General.

APPROVED:

ROY MCKITTRICK  
Attorney-General.

MW/OWS:afj

LOCATION: Federal Emergency Relief Administration exempt from gasoline tax.

GASOLINE TAX;

December 20, 1934. 12-21



Mr. H. H. Talbot,  
Missouri Relief & Reconstruction  
Commission,  
Jefferson City, Missouri

Dear Sir:

I am in receipt of a communication from your office reading as follows:

"We have, as a part of the Commission, a department called the Relief Commodities Division. This department distributes the relief commodities throughout the state, and to facilitate the handling of these commodities, we recently purchased ten trucks. You understand that the commodities which this department distributes are food and clothing, given to families on the relief rolls. The commodities are sent in to us by the Federal Government at Washington, or are purchased from monies sent in by the Federal Government.

The following is an extract from a letter received from Washington, dated November 17, signed by Wm. L. Nunn, Director of Commodity Distribution:

"Now, with regard to exemption from payment of State and local taxes, this is a matter which must be determined in accordance with the laws of the particular State, and the Attorney General or Head of the Taxing Bureau should be consulted. Every effort should be made to avoid the payment of such taxes on the ground that the Relief Administrations are engaged in the exercise of a Governmental function in order that relief funds may be used for the administering of relief and be not diverted to other purposes."

Will you kindly give me in writing your decision as to whether this department is exempt the State tax. You of course understand that these trucks move only relief commodities and nothing else."

From subsequent conversations it is my understanding that these trucks were purchased by monies supplied wholly by the Federal Government, and that the funds to meet the operating expenses thereof, including the purchase of gasoline, are likewise wholly Federal funds. It is apparent from the foregoing that the commodities transported and distributed are 100% relief commodities and are likewise supplied by the Federal Government.

Your entire program is based upon the Federal Emergency Relief Act of 1933. This is found at 15 U.S.C.A. 721 et seq. The opening section of this act is as follows:

"The Congress hereby declares that the present economic depression has created a serious emergency, due to widespread unemployment and increasing inadequacy of State and local relief funds, resulting in the existing or threatened deprivation of a considerable number of families and individuals of the necessities of life, and making it imperative that the Federal Government cooperate more effectively with the several States and Territories and the District of Columbia in furnishing relief to their needy and distressed people."

Other provisions of this act allocate \$500,000,000 to the Federal Emergency Relief Administration, provide for the appointment of an administrator who in turn is authorized to appoint and employ such other officers and employees necessary. By Section 723, Subdivision B, it is provided:

"The Administrator may, under rules and regulations prescribed by the President, assume control of the administration in any State or States where, in his judgment, more effective and efficient cooperation between the State and Federal authorities may thereby be secured in carrying out the purposes of this chapter."

Other sections provide for grants for the relief of hardship and suffering caused by unemployment, in the form of money, service, materials and commodities; the conditions under which the grants are to be made or application thereof; the contents of the application



and provisions for reports and investigations. A careful reading of this act shows conclusively that while the term "grant" is used in reference to payments made to the States, that at all times the Federal Government retains control, supervision, regulation and direction of the entire program. By the provisions of the declaration of the emergency, it is clear that the Government entered into this program under its general governmental powers and is proceeding to conduct the same as a part and parcel of the general responsibility that the Government owes to its people to safeguard the health and welfare of the citizenry. That being the case we must consider the Emergency Relief Administration as a part and parcel of the government itself, and grant to it the same privileges and immunities which are extended to the other branches of our Federal Government.

This specific instance has not been passed on in this State by any Court, and a review of the decisions have indicated that in only one State has this problem reached a court of last resort. In the case of Wiseman vs. Dyess, Administrator of Emergency Relief Administration, 72 S. W. (2d) 517, the Supreme Court of Arkansas passed upon the application of the Relief Administration to enjoin the State Commissioner of Revenues from collecting automobile license tax and gasoline tax on automobiles and gasoline used and consumed in conducting the affairs of the administration. These automobiles and the gasoline therefore were purchased from funds made available to the State of Arkansas from the Federal Government. The lower court granted the injunction and on appeal the decree was affirmed. The Court in passing upon this stated, 1. c. 518:

"It is our opinion that these funds and the automobiles for which a portion of the funds had been expended were and are federal property, and as such are not subject to taxation by the state. It is true the act of Congress refers to the apportionment of these funds to the states 'as grants to the several States,' but it does not appear that such a donation thereof was made as to pass the title and control thereof from the federal government. They are, and continue to be, federal funds, subject to the supervision of the federal government in their disbursement. The state has no control over the expenditure of these funds. It does appear that for the convenience of the Federal Administrator, and to expedite the distribution of the federal government's bounty, application for the funds is made by the Governor of the state, who signs the receipt therefor and indorses the check used in remitting the funds, but when he has

done so he delivers the indorsed check to the plaintiff State Administrator for distribution. The clerical acts mentioned comprise the full extent of the authority and duty of the Governor.

\* \* \* \* \*

No reports of expenditures are made to the Governor; but such reports are made to the National Administrator, who appointed the State Administrator, and the National Administrator makes report to the President of the United States and to the Congress of the manner in which and the purposes for which the money was expended. The act of Congress under which the apportionments are granted require this, and negatives the idea that an absolute grant or gift had been made to the state. If, by any possibility, any of the funds thus apportioned were not required, the unexpended balance would revert, not to the state, but to the federal government.

The title to the automobiles is in the United States, and not in this state. It is stipulated that the purchase and use of these automobiles was and is in aid and in furtherance of the congressional program for the amelioration of the emergency which induced the passage of the legislation. As to what would be done with the automobiles when the use of them for the purpose for which they are now employed has ceased is a question not presented by the record before us. They are now used for a federal purpose, and, if so, they are not subject to taxation; nor is the gasoline required to run them subject to taxation."

Of course the foregoing case is not binding upon us. It is strongly persuasive of the proper prospective from which to view this Federal legislation. We have no reason to believe that the Supreme Court of our State would reach a different conclusion were the matter placed before it. As in the Arkansas case, the funds are handled separate and distinct from state funds. The relief funds received from the federal government are not treated as are funds which may be considered to be "state funds". They are not deposited in the State Treasury nor are they disbursed by reason of any legislative appropriation or paid by warrants drawn by the designated state officials. As stated in the Arkansas case, it is clear that

December 20, 1934.

the Federal Government at all times retains title and control of the funds and power and authority to supervise and direct and disburse.

Aside from the foregoing it seems peculiarly inappropriate that the State of Missouri should require and demand any exaction whatsoever upon the privilege of disbursing relief commodities in this State. It is unconscionable that any portion of the funds appropriated for the relief of suffering and hardship should be required to be paid before these commodities are permitted to reach those destitute and in need.

It is the opinion of this office that the Relief Commodities Division of the Emergency Relief Administration should be entitled to the same privileges and immunities respecting the Missouri Motor Vehicle Fuel tax as is accorded to any other agency or instrumentality of the United States Government.

Respectfully submitted,

  
HARRY C. WALTNER, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

HGW:MM

AN OPINION RELATING TO THE PAYMENT OF DELINQUENT COUNTY WARRANTS.

February 15, 1934

2-17-34

FILED

Mrs. Jessie Key Thomas  
County Treasurer  
North County  
Grant City, Missouri

Dear Madam:

We acknowledge receipt of your letter in which you state an inquiry as follows:

"What in your opinion is the best way to pay the outstanding warrant against this county.

Whether to pay the oldest ones or the newer ones. The Prosecuting Attorney of this county is undecided, and I would like your opinion on it. Please answer as soon as possible."

I.

County Courts have the right to anticipate the revenue collected and to be collected for any given year and contract debts for ordinary expenses which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.

Section 12, Article 10 of the Constitution of Missouri provides in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the state shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, \*\*\*\*\*"

In *Book v. Earl*, 87 Mo., l.c. 251, the Court said in part as follows:

"The evident purpose of the framers of the Constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish a cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section, a county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

It appears very clearly from the foregoing opinion of our Supreme Court that current revenue cannot be used to pay ob-

ligations of a different year unless there remains an excess after all obligations of the current year have been paid. For example, taxes levied for the year 1933 are to be used to pay obligations incurred by the County Court for ordinary current expenses for the year following. It matters not when the taxes are collected, they remain a part of the revenue anticipated for the year for which they were levied, and they shall first apply when collected to the obligations incurred for that period.

County Courts have a right to anticipate the revenue for each fund for which a tax was levied for a given year and to contract obligations for the ordinary county expenses for that year which are binding on the county to the extent of the contemplated revenue provided for that year for the purpose for which it is expended, but not in excess of it.

Section 5, Laws 1933, p. 344, provides in part as follows:

"Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. PROVIDED, HOWEVER, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class



-4-

six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

CONCLUSION

Therefore, this department rules that warrants issued for obligations incurred during previous years outstanding and unpaid should first be paid out of the revenue provided for that purpose for that year when such revenue is collected, or the County Court may, under the provisions of Class 6 of Section 5, Laws 1933 (supra), after all prior claims have been provided for and there is an actual cash balance in the county treasury to pay all prior classes for the current year and also all warrants previously issued in Class 6, pay such warrants out of funds in said Class 6, provided said outstanding and unpaid warrant or warrants were not in excess of the revenue contemplated for the year in which issued, and, if in excess of the contemplated revenue, are void and the county is not liable for such warrant or warrants.

Very truly yours,

W. W. BARNES,  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK,  
Attorney General

WVB:FE

CITIES OF THE ) Relating to the Extension of its City  
THIRD CLASS ) Limits.

3-26

March 22, 1934.



Mr. H. W. Thomas, Jr.  
City Engineer  
Moberly, Missouri

Dear Sir:

This department is in receipt of your letter dated November 15th, wherein you state the following:

"The City of Moberly (a City of the Third Class) desires to extend the Corporate limits, and we are anxious to know if there are any limitations that we must exercise in this undertaking?

It is our understanding that a majority vote only, is required; that is, of the legal voters within the present Corporate Limits.

Is there any other procedure or permission from any State Administration necessary before this extension can be made? \* \* \*

Section 6720 R. S. Mo. 1929, provides for the extension of city limits of cities of the third class and reads in part as follows:

"\* \* \* \*The mayor and council of such city, with the consent of a majority of the legal voters of such city voting at an election thereof, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city."

The only limitation upon the power of the city to extend its limits is that this power be exercised reasonably. Such was the holding in the case of Copeland vs. The City of St. Joseph, 126 Mo. 417. In this case our Supreme Court quoted with approval the following excerpt from a decision of the Supreme Court of Texas:

"\* \* \* \* 'Under the decisions of our Supreme Court, we understand the correct rule to be that the incorporation will be held valid, although a reasonable amount of land not in actual occupation be included; but if the excess be such as, in effect, to evidence an attempted fraud upon the law, and territory be embraced that can not fairly be termed a part of the town, it will be annulled.'\* \* \*"

In the case of State ex inf. Lashley vs. City of Maplewood, 193 S. W. 989, we find a very comprehensive decision respecting powers of cities of the third class to extend their corporate limits. The Court made the following statement as to the reasonableness of the ordinance in that case, l. c. 991:

"We further held in Parker vs. Zeisler, supra, that an ordinance extending the corporate limits of the city to take in contiguous territory suitable for city purposes and densely populated, and already receiving many of the advantages of the city, is neither unreasonable nor inequitable. While it is true that in the case at bar the territory taken in is not densely populated, a large part of it is subdivided into lots and blocks, and the evidence very clearly establishes that the people residing in this adjacent territory had for sometime prior to the extension received many of the advantages of the city, as for instance in the supply of water, to some extent as to sewerage and drainage, and protection against fire.\* \* \* In short, our conclusion on reading the testimony is in harmony with that arrived at by the learned trial judge, that it was a reasonable exercise of power on the part of the city authorities of Maplewood in extending the limits of that city so as to take in this district."

Hon. H. W. Thomas, Jr.

-3-

March 22, 1934.

From your inquiry we take it that your City is one operating under the general statutes of cities of the third class and is not organized or operating under any special charter.

**CONCLUSION.**

It is therefore the opinion of this office that Section 6720 R. S. No. 1929, controls the extension of city limits of cities of the third class, and that so long as the powers there given are exercised in a reasonable manner the Courts will not interfere with the actions taken in accordance therewith.

Respectfully submitted,

HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK  
Attorney General.

HGW:MM

**PETITION: Form in action for deficiency in public school fund loan.**

4-20  
April 18, 1934.



Hon. J. W. Thurman  
Prosecuting Attorney  
Reynolds County  
Centerville, Missouri

My Dear Mr. Thurman:

Your request of April 10, 1934, reading as follows has been referred to the writer:

"I have several suits on School Fund Mortgages to bring in the May term of the Circuit Court for deficiency judgments against the bondsmen where the land has been sold and did not bring the amount that was against it; Will you please send me forthwith, a form to be governed by in drawing the petitions?"

In accordance with the foregoing request I herewith enclose to you proposed form for petition. I have assumed that what you desire to do is to proceed against the makers of the note for a deficiency judgment. If your action is one upon a bond, a separate undertaking guaranteeing performance by the principal debtors, this petition of course will not be of any assistance to you. If your action is upon an independent bond I suggest that you forward a copy of one of the bonds to this office with a request for a proposed draft for a petition on a bond. If it is township school funds which were loaned, it will be necessary for you to make certain changes in the form of the petition particularly as to the plaintiff, both in the style and in the body of the petition. Also, in paragraph two the proper school fund should be identified.

We trust that this petition may be of assistance to you.

Respectfully submitted,

APPROVED:

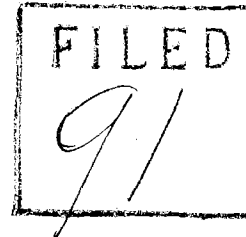
HARRY G. WALTNER, JR.  
Assistant Attorney General

ROY MCKITTRICK,  
Attorney General.

HGW:MM  
Enc.

SCHOOL DISTRICTS: Discussion as to who are elected school directors where 6 run for three offices without announcing for which terms they are, and where some receive the same number of votes.

4-28  
April 27, 1934.



Mr. Vane C. Thurlo,  
Prosecuting Attorney,  
Linneus, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I desire the opinion of your department on the following:

The school district of Saint Catherine in this county is a town school with a board of six directors, and governed, we believe, by Article 4, Chapter 57, Revised Statutes for 1929.

On April 3rd last, the annual school meeting and election was held, pursuant to the required notices. Due to a vacancy having occurred on the board of directors last year, which was filled by appointment, there were two directors to be elected for a three year term, and one director to be elected for a one year term. At the election the votes for directors were as follows:

S, 50 votes; R. 42 votes; H, 42 votes; I. H. 23 votes; G. S. 22 votes; G. R. 29 votes.

The persons designated as H, I. H., and G. S. were members of the board prior to the election. A ticket which had been printed by the clerk without the knowledge or authority of the board was used by the voters, additional names being written in on the blank lines on the ballot or ticket. The ticket was substantially as follows:

'School ticket.  
Saint Catherine District,  
For directors 3 years,  
Two for 3 years, One for 1 year,  
R. \_\_\_\_\_  
H. \_\_\_\_\_  
S. \_\_\_\_\_



April 27, 1934.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
For nine months school YES  
For nine months school NO  
25 cents in excess of 20 cents YES  
25 cents in excess of 20 cents NO

On the evening of April 4, following the election, the Board of Directors met as a result of the president's call, the four persons receiving the highest number of votes at the election also having been asked to attend the meeting. Four of the directors of the old board met, and when S was asked to take the oath and qualify, he refused and left the meeting. The Board then declared his office vacant and N. R. was appointed to fill his vacancy until the next annual election. This appointment was made by the unanimous vote of the board.

The Board took the position that apparently as R and H received the same number of votes neither was elected and could not qualify, and the old members would hold over to the next election.

The Board also took the position that the two persons receiving the highest number of votes was elected for the three year terms, and the one next high was elected for the one year term, that is, to fill out the unexpired term.

The Board now takes the position, I understand, that the Board of Directors consists of the three members whose terms had not expired, H, I H and G S.

In the opinion of your Department, is the Board right, and if not, who constitutes the Board of Directors, and what is the effect of the tie vote?"

We must confess at the outset that this inquiry contains some very interesting and intricate problems, and we have been unable to find any decision which would help us in solving your problem. The whole difficulty seems to have arisen by reason of the fact that the persons seeking to be elected did not announce for which terms they were running. Had they so announced or had the ballot been so prepared as to indicate which directors sought the three year term and which sought

the one year term, then we could have solved your difficulty. However, it appears that these six directors were running at random. Since these directors were not running for any particular term, and since we find no judicial decision which would determine to which term any director should be elected, we assume in our discussion that the logical solution would be that the two receiving the highest number of votes should be elected to the three year term and the one receiving the third highest number of votes should be elected to the one year term.

We shall dispose of Mr. S first. Mr. S received 50 votes, which was the highest number of votes cast for any director, and we assume, therefore, that he was elected to one of the three year terms. However, after being elected he refused to qualify and we conclude that by reason of such fact the Board of Directors would have a right to fill the vacancy. His refusal to qualify, we believe, is of the same effect as if he had qualified and had immediately resigned. The Board then elected a member to fill the vacancy caused by the failure of Mr. S to qualify for the office. This leaves one three-year term and one one-year term to be disposed of.

It appears that Mr. R and Mr. H each received 42 votes. Had Mr. R and Mr. H both been running for the same term, then on account of the tie neither would have been entitled to the office because it could not be said that either was elected thereto. However, it appears that Mr. R and Mr. H were not running for the same office but that there were six people running for three offices and none of the candidates were running for any particular office. Mr. R and Mr. H both received more votes than Mr. I H, Mr. G S and Mr. G R. If you throw out Mr. R and Mr. H because they received the same number of votes and declare that neither were elected to any office, then it appears to us that Mr. G R, who received 29 votes, and Mr. I H, who received 23 votes, would be the persons elected as directors. However, since Mr. R and Mr. H each received 42 votes, which was more than each of the other three directors received, and since they were not running for the same term, if you eliminate Mr. R and Mr. H then it appears to us that the will of the people is not being followed. It is apparent that Mr. R and Mr. H and Mr. S were the choice of the voters of the district for the three positions to be filled. It appears to us that the solution of your difficulty would be to have either Mr. R or Mr. H qualify for the three-year term and the other qualify for the one-year term. They both, of course, cannot qualify for the same term and if it happens that both should demand to qualify for the same term, then by such action they have taken the position that both were aspiring for that particular term; then, because of the tie vote, it could be said that neither

April 27, 1934.

were elected for that particular term. In such an event the three-year term and the one-year term should go to the persons receiving the next highest number of votes; that is, Mr. G R, having received 29 votes, should be qualified for the three-year term, and Mr. I H, having received 23 votes, should be qualified for the one-year term.

If, however, either Mr. R or Mr. H should qualify and accept the three-year term and the other should accept the one-year term, then we believe that they are entitled to membership on the board because they received more votes than any other director except Mr. S.

It is therefore the opinion of this Department that since Mr. S was elected director and did not qualify, that it was proper for the board to appoint a member for a three-year term to fill the vacancy caused by his failure to accept the office. We further believe that if either Mr. R or Mr. H qualifies for the three-year term and the other qualifies for the one-year term, both are entitled to membership upon the board. We believe that if they refuse to qualify for separate terms and insist on qualifying for the same term, by such action they are in the same position as if they had previously announced that they were both running for the term which they seek to qualify for and since they received the same number of votes neither would be elected. In such an event, then we believe that the two directors receiving the next highest number of votes, to-wit, Mr. G R, who received 29 votes, and Mr. I H, who received 23 votes, would be entitled to membership of the board.

The same formality is not required in school elections as is required in other elections which are strictly governed by Statute. We believe, however, that the candidates should announce the term for which they aspire and that the ballots should be so prepared so that the voters would be advised. Since there seems to be no precedent that would aid us in the solution of your difficulty, we have tried to work it out on the theory that the will of the people who voted to elect the directors should be carried out in so far as possible. We, of course, do not know any of the parties involved and have no personal interest whatever, in reaching the conclusion which we have reached. If these suggestions to not solve your difficulty to the satisfaction of all concerned, then, of course, any one or more may resort to the courts to test out their right to become a member of this board.

Very truly yours,

APPROVED:

FRANK W. HAYES,  
Assistant Attorney General.

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Attorney General.

**SHERIFF: TRUSTEE - WHEN SHERIFF IS APPOINTED BY THE COURT AS TRUSTEE TO FORECLOSE A DEED OF TRUST, DEPUTY SHERIFF CAN MAKE A LEGAL AND BINDING SALE.**

6.5

May 31, 1934.



Honorable Otto Theisen  
Sheriff, Buchanan County  
St. Joseph, Missouri.

Dear Sir:

This department is in receipt of your letter of May 1st, wherein you state in part as follows:

"For the past several weeks I have been able to be out, and accepted advertisements for Trustee's Sales, which are conducted by this office, as I have to make them personally. However, I caught some cold, and the doctor has forbade that I go outside until the sun is very warm again.

"On Thursday, May 3rd of this week, I have two Trustee's Sales to make, and due to the fact that I will be unable to get out, I am wondering if it will be Legal to have Mr. Cox, one of my deputy's, read the sale at the east front door of the Court House as is required, then bring them on over to the residence, which is East of the Front Door of the Court House, and have me announce the property sold to the purchaser. Mr. Cox would receive the bids at the East front door of the Court House.

"Also, I am told that by law, the Judges of the Circuit Court of Buchanan County could meet in banc, and authorize Mr. Cox to conduct those sales, while I am ill."

Section 11513, R. S. Mo. 1929, provides that,

"Any sheriff may appoint one or more deputies with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 11514, R. S. Mo. 1929, provides the power and duties of deputies and reads as follows:

"Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

Section 3137, R. S. Mo. 1929, provides when the court is to appoint a sheriff or other suitable person, as trustee and describes his powers and duties. It reads in part as follows:

"If such court shall be satisfied that the facts stated in such affidavit are true, it shall, in the case of a deed of trust given to secure the payment of a debt or other liability, make an order appointing the sheriff, or some other suitable person of the county, trustee to execute such deed of trust, in the place of the original trustees; and thereupon such sheriff, or other suitable person appointed by said court, shall be possessed of all the rights, powers and authority possessed by the original trustee, under the deed of trust, and such sheriff or other person shall proceed to sell and convey the property and to pay off the debts and liabilities according to the directions of the deed of trust, \*\*\*\*\*"

Section 3138, R. S. Mo. 1929, provides when a trustee is to give bond and reads as follows:

"Every trustee appointed or who may

be appointed, by any last will, deed or other instrument of writing, to hold, manage or dispose of any property or estate, real, personal or mixed, for the use or benefit of any other person, may be required by the circuit court of the county in which any such will shall be proved and recorded, or in which such deed or instrument of writing shall be recorded, to give bond, in such sum and with such securities as the court shall direct, conditioned for the faithful execution of the trust, unless the will, deed or other instrument of writing, creating such trust, shall, in express terms, dispense with security."

Section 1198, R. S. Mo. 1929, provides as to how the sheriff shall proceed in selling real estate, that notice be given and where the sales are to be made and reads in part as follows:

"When real estate shall be taken in execution by an officer, it shall be his duty to expose the same to sale at the courthouse door, on some day during the term of the circuit court of the county where the same is situated, having previously given twenty days' notice of the time and place of sale, and what real estate is to be sold and where situated, by advertisement in some newspaper printed in the county \*\*\*\*."

In the case of Tatum et al., v. Halliday, Adm'r., 59 Mo. 422, 1.e. 427, the Court said:

"This brings us to another branch of the inquiry, viz: Was the sale invalid because made by a deputy sheriff? If the sheriff acted in his official character as sheriff, then the sale was good, and could be legally performed by his deputy. But if he was simply a trustee, without regard to his capacity as sheriff, the sale would be void, because a trustee cannot delegate his trust.

"Where a trustee in any deed of trust



to secure the payment of a debt or other liability, dies, resigns or becomes disabled, the statute provides that the court shall make an order appointing the sheriff of the county trustee to execute the deed of trust, in place of the original trustee, and thereupon such sheriff shall be possessed of all the rights, powers and authority possessed by the original trustee under the deed of trust; and such sheriff shall proceed to sell and convey the property and pay off all the debts and liabilities, according to the terms and directions of the deed of trust, and with the same force and effect; and in case of a deed of trust given for the benefit and use of any person other than a deed of trust to secure payment of a debt or other liability, such court shall make an order appointing some suitable person as trustee in such deed of trust, in place of the original trustee, to hold the property or estate conveyed by such deed to the same uses and trusts, etc., (Wagn. Stat., 1347-8, Secs. 1, 2.)

"It will be perceived that provision is here made for the appointment of two classes of trustees. The first is where the sheriff is appointed to sell under a deed to pay a debt or other liability, and the second is where a suitable person, other than the sheriff, is appointed to hold property for uses and trusts.

"From the phraseology employed in the first, there might be some doubt as to the real character in which the sheriff acted, but we think the 4th section of the same law furnishes a solution and explains the legislative intent. It is there declared, that any person having a beneficial interest, present or future, absolute or contingent, in the trust property, may apply to the court for security to be given by the trustee. This applies to the appointment made under the second clause of the second section, and shows plainly

enough that it was deemed unnecessary to require any security of the sheriff when he was acting as trustee, and the only reason that can be assigned is, that it was supposed that his security as sheriff was sufficient. The sheriff, when making a sale under a deed of trust, must therefore be considered as acting officially, and what he can perform by himself, he can perform by his deputy."

Again in the case of State, ex rel. v. Griffith, 63 Mo. 545, 1.c.549, the Court said:

\*\*\*\*\* It has been decided by this court that when a sheriff has been appointed in place of a trustee to execute the trust deed in selling the property, he is acting officially, and that in so acting, a sale, though made by his deputy, is valid and binding. \*\*\*\*\*

In the case of State ex rel. v. Bus, 36, Mo. 636, 1.c. 637, our Supreme Court held that deputy sheriffs were public officers and expressed itself in the following manner:

\*\*\*\*\* Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' Rev. St. 1889, Sections 8181, 8182. The right, authority, and duty are thus created by statute. He is invested with some portions of the sovereign functions of the government, to be exercised for the benefit of the public, and is, consequently, a 'public officer' within any definition given by the courts or text writers. It can make no difference that the appointment is made by the sheriff, or

that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state; the authority is derived from the law; and the duties are exercised for the benefit of the public. \*\*\*\*\* The statute requires a deputy sheriff to take 'the oath of office,' and his powers and duties are made equal to those of the sheriff, himself. The deputy sheriff is certainly a 'public officer,' under the laws of this state, and his power and authority are co-extensive with that of sheriff. State v. Dierberger, 90 Mo. 369, 2 S.W. 286."

In this opinion, we are not passing on the legality of the judges of the Circuit Court of the county to authorize a deputy sheriff to conduct trustee's sales. We have limited our opinion as to whether a sheriff, who has been appointed by the court as trustee to foreclose a deed of trust may have his deputy make the sale, and further whether same would be legal and binding.

#### CONCLUSION.

In light of these foregoing cases and sections, we are of the opinion that when the sheriff is appointed by the court as trustee to foreclose a deed of trust, the sheriff may have his deputy, who is a "public officer" (State v. Bus, supra,) make the sale and such sale will be valid and binding.

As stated in Section 11514, supra, "Every deputy shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

In the case of Tatum v. Halliday, supra, the court had before its consideration the identical problem that is now before us, namely "\*\*\*\*\* was the sale invalid because made by a deputy sheriff? \*\*\*\*\*" The court held that "\*\*\*\*\* The sheriff, when making a sale under a deed of trust, must therefore be considered as acting officially, and what

he can perform by himself, he can perform by his deputy."

Again in the case of State ex rel. v. Griffith, supra, the court had before it the same question, and in its opinion said: "\*\*\*\* It has been decided by this Court that when a sheriff has been appointed in the place of a trustee to execute the trust deed in selling the property, he is acting officially, and that in so acting, a sale, though made by his deputy, is valid and binding."

Respectfully submitted,

WM. ORR SAWYERS,  
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK  
Attorney-General.

MW:WOS/afj

CRIMINAL USURY: One violates the criminal code of Missouri who charges in excess of 2% per month as interest for a loan.

7-19

July 17, 1934.



Honorable Vane C. Thurlo  
Prosecuting Attorney  
Linn County  
Linneus, Missouri

Dear Sir:

Your request for an opinion dated June 29th is as follows:

"The letter of your department dated June 20, 1934, addressed to Mr. R. C. Sherrod of Marceline, Missouri, and written by Hon. Wm. Orr Sawyers on behalf of your department has been presented to me, and wherein the writer states as his 'unofficial' opinion that the loan mentioned was usurious; and inasmuch as this letter has caused some debate I respectfully request the 'official' opinion of your department.

"The facts involved are as follows:

"On May 16, 1934, Mr. Sherrod went to the office of Mr. W. B. Erwin in Brookfield and asked that a loan be made him for sufficient money to pay off a \$200.00 loan on his car, and an additional \$50.00, to be paid direct to Mr. Sherrod. Mr. Erwin was, and is, an insurance agent and loan agent maintaining an office in Brookfield. Mr. Sherrod asked Mr. Erwin if the interest would be 2½ per centum per month and Mr. Erwin replied that his company did not figure it that way but that is what it would be, or words to that effect.

"Mr. Erwin wrote out a written application for a loan, which he handed to Mr. Sherrod, and which Mr. Sherrod signed. A copy of this application is herewith enclosed, the underlined portions being the parts filled in by Erwin before being signed by Sherrod.

July 17, 1934.

"There is also enclosed a copy of the figures prepared by Mr. Erwin and given to Mr. Sherrod some time after the loan was made. Mr. Sherrod agrees that these figures are correct, and states that the note, chattel mortgage, and other papers were made in favor of Erwin, and later transferred to The Lewis Investment Company of Kansas City, Missouri, and that this company paid the lien of U. C. C. in the amount of \$200.00, and paid him the sum of \$55.10 in money, and paid for insurance in the amount of \$8.40 on the automobile covered by the chattel mortgage he signed.

"Mr. Sherrod stated to me to-day that his letter of June 13, 1934, to your department was inaccurate wherein it stated that the loan granted by The Lewis Investment Company was in the amount of \$263.50, but that the loan was granted in the amount of \$350.00 payable in eleven monthly installments of \$20.00 each, and one installment (the last) of \$130.00.

"Mr. Sherrod does not state that The Lewis Investment Company received the \$52.50 referred to as "commission" but indicated that this was paid by that company to Mr. Erwin.

"Mr. Sherrod became dissatisfied with the loan after he was sent a copy of the agreement by The Lewis Investment Company, and tried to pay it off. After some correspondence the Investment Company agreed to accept the sum of \$315.17 as full payment, which he paid.

"At the time he signed the written application Mr. Sherrod did not read it, but signed it without reading it.

"In the opinion of your department, is the above transaction a usurious transaction, and can Erwin be prosecuted in this County, and if so, for what?



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"All acts performed by The Lewis Investment Company were done in their office in Kansas City, Missouri, and we assume that the officers of that Company could not be prosecuted in this County.

"If I correctly read the case of Frischmann vs. Schultz, 55 S. W. (2), 313, 1. c. 318, and cases therein cited, the commission paid to a broker for negotiating a loan is not considered in determining whether the loan is usurious."

In your request you refer to the letter of Mr. R. C. Sherrod of Marceline, Missouri, dated June 13, 1934, which is as follows:

"On the 16th day of May, 1934 I applied in person to Mr. W. B. Erwin, Brookfield, Missouri, in regard to obtaining a loan on my car. I asked Mr. Erwin if the interest rate was  $2\frac{1}{2}\%$  per month. He stated his company did not figure it that way but it amounted to the same thing. On this information I assumed I was getting the loan under the Small Loan Act, which is  $2\frac{1}{2}\%$  per month on the unpaid balance. Mr. Erwin made out a number of papers which included a chattel mortgage, note, information sheet in regard to the description of the car, etc., and was handed these to sign, but due to the fact that there was so much reading matter and the interest rate had been explained I never read these papers.

"The papers were sent in to the Lewis Investment Company of Kansas City, Missouri, 1301 Oak Street, and the loan granted in the amount of \$263.50. The following charges were made by the company:  $2\%$  filing fee \$6.00, straight interest  $8\%$  \$28.00, and broker's fee \$52.50 to Mr. Erwin, making a total loan of \$350.00. I was unaware of these charges until after I had accepted the check and received a copy of the contract from the Lewis Investment Company at a later date. After questioning Mr. Erwin I found that the above named company was not operating under the Small Loan Act, but was operating under the

July 17, 1934.

Investment Act, and that Mr. Erwin was acting only as a broker of the above named investment company. The intentions of the Small Loan Act are being violated by this unscrupulous method of evading the law."

Our answer to Mr. Sherrod's letter was as follows:

"Under the law it is not possible for the Attorney General's office to render official opinions to private persons in private matters. On the other hand it is my unofficial opinion, from the facts stated in your letter, that the loan which you speak of is usurious and the matter should be taken up with your Prosecuting Attorney or your Grand Jury for their consideration."

There are several statutes in Missouri affording remedies where persons exact in excess of the legal rate of interest from a borrower. All of Chapter 14, R. S. Mo. 1929, dealing with "interest" touches expressly or indirectly on usury. In said chapter the Legislature has laid down 6% as a legal rate when not expressed, and up to 8% when the parties agree in writing. Persons are prohibited from taking more than the legal rate, and subjected to a civil suit when they take more than allowable by law. By virtue of said chapter defendants are allowed to plead usury as a defense in civil courts even against money brokers and where the person loaning has exacted usurious interest his lien is declared invalid. No place in said chapter is there a criminal remedy afforded. The great bulk of cases in Missouri have been determined by applying the provisions of this chapter in civil suits, and the civil remedies of Chapter 14 have been generally applied. On the other hand one who has exacted interest in excess of the law may be prosecuted in an action by the State according to provisions not found in this chapter, but found in the criminal code, and it is the purpose of this opinion to consider your submitted facts from the point of view of a prosecutor about to prosecute for the crime of exacting illegal interest contrary to the criminal code. We are making no pretense of applying the civil code on usury or Chapter 14 R. S. Mo., 1929, and the civil remedies therein set out.

Section 4420 R. S. Mo. 1929, makes it a crime to dispose of a note knowing it to be usurious, and states the law thus:

July 17, 1934.

"Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall sell, assign, transfer or in any manner dispose of any bond, bill of exchange, note or contract whatsoever, knowing the same to be usurious, without first giving the purchaser or assignee thereof notice of its usurious character, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days."

Section 4421, R. S. Mo. 1929, defines the crime of receiving greater interest than 2% per month thus:

"Every person or persons, company, corporation or firm, and every agent of any person, persons, company, corporation or firm, who shall take or receive, directly or indirectly, by means of commissions or brokerage charges, or otherwise, for the forbearance or use of money or other commodities, any interest at a rate greater than two per cent per month, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail for a period of not less than thirty days nor more than ninety days. Nothing herein contained shall be construed as authorizing a higher rate of interest than is now provided by law."

Under one set of facts as submitted, viz: That the note was for \$350.00 while the borrower actually received \$263.50 consideration for the note, leaving \$87.00 as the percentage charged, we find that by computation this would figure out a rate of interest of 24 6/7% annually. Taking the other set of facts set out in your letter, viz: That the note was for \$350.00 and the borrower actually received \$255.10 consideration for the note, leaving \$94.80 as the percentage charged, we find by the compu-

July 17, 1934.

tation that this would figure out a rate of interest of  $27 \frac{3}{35}\%$  annually. This would be more than  $2\%$  per month under either mode of computation.

Under the above sections the facts as submitted by you would justify a statutory charge against The Lewis Investment Company and Mr. Erwin their agent, for making said loan, and would also justify a charge against the agent of the loan company, Mr. Erwin, who undoubtedly transferred and assigned the loan to The Lewis Investment Company.

#### CONCLUSION.

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Under the provisions of the above sections the crime against The Lewis Investment Company and their agent can be prosecuted in the jurisdiction (county) where The Lewis Investment Company through their authorized agent, entered into an agreement to exact the excessive interest or the Investment Company can be prosecuted in the jurisdiction (county) where it actually exacted the excessive interest. Under the provisions of Section 4421 supra, the agreeing to receive excessive interest could be a crime in one jurisdiction, while the receiving excessive interest could be a crime in another jurisdiction, all growing out of one transaction.

The crime of assigning a note, knowing it to be usurious, should be prosecuted only in the county where the agent made the assignment. The facts do not state that there was an assignment, or where it was made.

Not having sufficient facts it is not possible for us to tell you positively that your county has jurisdiction to punish the Investment Company or Mr. Erwin for the crime. The above rules and law would determine that, when you apply the facts to the rules and law, and this can be done as well by you as by us.

In the case of State v. Haney, 108 S. W. 1080; 130 Mo. App. 95, 1. c. 101, the Appellate Court passed on the sufficiency of an information charging an offense under the above statute, and the court said:

"Our statute, regardless of the motive or intent of the defendant, makes it an offense to take, or agree to take, for the use of

July 17, 1934.

money any interest at a rate greater than two per cent per month. The criminality of the act does not depend upon the intent with which the usurious interest is received but upon the fact that it is received, hence defendant's intent in charging and receiving the usurious interest constituted no part of the offense and is not an element of the offense."

The case of *Fischman v. Schultz* 55 S. W. (2d) 313, 1. c. 318, cited by you in your letter was a civil suit and the Appellate Court there was determining the civil rights of a defendant in a civil suit who did not plead usury as a defense in said suit as the Legislature had so provided for him in civil actions by virtue of Section 2843 R. S. Mo. 1929. The Court there held that defendant did not plead usury, hence he was not entitled to a directed verdict in said civil action even if there was evidence of usury. True, the Court by way of dictum made the broad statement, "The charge of a commission by the agent of the borrower, or by an independent broker, is not usurious". They based their statement on civil cases where civil rights were involved, and were interpreting at the time statutes offering only a civil remedy. In none of these cases did the Court have under consideration the provisions of Sections 4420 or 4421 supra, where a defendant was being charged with a crime. It is the opinion of this office that the above case is no authority to support a contention that Sections 4420 or 4421 have not been violated under the facts submitted in your letter. By the very terms of these sections a broker and his agents are made expressly liable for their criminal acts, and since in the instant case the rate of interest computes at more than 2% per month, it is our opinion that both the Investment Company and their agent are criminally liable.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H



VOTING: Members of Veterans Administration department of Federal Government are entitled to vote in Missouri.

8-1

August 1, 1934.



Mr. Allen M. Thompson  
Secretary to the Governor  
Executive Office  
Jefferson City, Missouri

Dear Mr. Thompson:

Your letter of July 26, 1934, requesting an opinion of this office is as follows:

"I wish you would give me an opinion on the enclosed letter at your earliest convenience.

Thanking you in advance for your information, I am,"

The letter attached to your request from L. M. Wilson is as follows:

"In the case of me and my wife we are both native Missourians, and have maintained legal residence in the state all our lives, and lived in the City of Excelsior Springs, Mo., from January 1, 1931 to April 30, 1931, before moving on the reservation, and would like to be advised by the Attorney General if this does not give us right and entitle us to vote in this county. My former residence was Braymer, Missouri and my wifes Poplar Bluff, Missouri.

Also in regards to the other employees who have lived on the reservation for twelve months are they not also entitled to a vote, I understand that there has been a decision rendered in another state in which the opinion was that employees living on reservation were not entitled to vote other than and absentee ballot, but in this state when the legislature ceded this property to the government, it reserved certain rights, and inasmuch as it did, and inasmuch as all employees here purchase



Missouri Automobile licenses, and have been advised that they must purchase automobile licenses in the state, does that qualify them as residents of the state. \* \* \* \*

Section 2 of Article VIII of the Missouri Constitution is as follows:

"All citizens of the United States, including occupants of soldiers' and sailor's homes, over the age of twenty-one years who have resided in this state one year, and in the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor-house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from the right of voting."

Section 10178 R. S. Mo. 1929, provides as follows:

"Every male citizen of the United States and every male person of foreign birth who may have declared his intention to become a citizen of the United States according to law, not less than one year nor more than five years before he offers to vote, who is over the age of twenty-one years, possessing the following qualifications, shall be entitled to vote at all elections by the people: First, he shall have resided in the state one year immediately preceding the election at which he offers to vote; second, he shall have resided in the county, city or town where he shall offer to vote at least sixty days immediately preceding the election; and each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides: Provided, however, that no officer, soldier or marine in the regular army or navy of the United States, shall be entitled

to vote at any election in this state; and provided further, that no person while kept at any poorhouse or other asylum at public expense, except the soldiers' home at St. James and the confederate home at Higginsville, nor while confined in any public prison, shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

There is nothing specifically contained in the Missouri Constitution or statutes prohibiting members of the Veterans Administration of the Federal Government, who happen to be located in Missouri from voting and hence when they can qualify under the above general provision of law, they are electors in this state, with the privilege of franchise in the coming primary and general elections.

The only question which bothers the prospective voter, in your query, is his question as to necessary residence in Missouri under the Constitution and statutes above set out.

Residence is a necessary prerequisite before voting in this State. The duties of one attached to the Veterans Administration located in Missouri, does not disfranchise one as a voting citizen in this state. Where an elector so employed has resided in this state for one year and in the county, city or town 60 days immediately preceding the election to which he offers to vote, he should be considered and qualified as an elector when presenting himself to the polls for the purpose of voting.

This question may present itself: Is the personnel of the Veterans Administration, made up only of temporary residents of this State, at all events not entitled to vote in Missouri, because of non-permanency of their occupation and quarters?

The fact that Administrative quarters may be moved at pleasure does not mean that the residence of the personnel is determined by the location of personnel quarters. The personnel does not suffer the loss of any civil rights simply because they happen to work for a department of the Federal Government known as the Veterans Administration.

Section 650 R. S. Mo. 1929 provides in part as follows and defines residence in Missouri, when the word is used in the Constitution or statutes, thus:

" \* \* \* ;seventeenth, the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively;" \* \* \*

In the case of Green v. Beckwith, 38 Mo. 384, 1. c. 387, our Supreme Court said:

"A man's residence, like his domicile, or usual place of abode, means his home, to and from which he goes and returns, daily, weekly, or habitually, from his ordinary avocations and business, wherever carried on."

In the case of State ex rel. v. Smith, 64 App. 313, 1. c. 319, the Court said:

"The term 'residence' has no fixed meaning applicable alike to all cases, it must be understood differently, according to a number of varied conditions. In some instances it is regarded as synonymous with 'domicile,' but they are not, in all cases, to be treated as convertible terms. It is said that domicile is residence combined with intention. It has been well defined to be residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicile, for one and the same purpose, at any one time, though he may have numerous places of residence. His place of business may be, and most generally is, his place of domicile, but it obviously is

not by any means necessarily so, for no length of residence, without the intention of remaining, will constitute domicile."

Judge Cooley in his Constitutional Limitations, Volume 8, pages 1365 to 1367 said:

"A person's residence is the place of his domicile, or the place where his habitation is fixed without any present intention of removing therefrom. The words ('inhabitant', 'citizen,' and 'resident', as employed in different constitutions to define the qualifications of electors, means substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicile or home. Every person at all times must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place. One's residence is where he has an established home; the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It has been held that a student in an institution of learning, who has residence there for the purpose of instruction, may vote at such place provided he is emancipated from his father's family and for the time has no home elsewhere." \* \* \* "Temporary absence from one's home, with continuous intention to return will not deprive one of his residence, even though it extend through a series of years."

#### CONCLUSION.

It is the opinion of this office that one employed with the Veterans Administration in Missouri, as far as residence is concerned, may be a qualified voter. The nature of his job is not conclusive evidence of temporary residence in this state. His residence for the purpose of voting is largely a matter of intention on the part of the elector and is determined by overt acts and declarations of the elector. Once the elector has fixed his habitation for the required length of time within the State, county and City where he offers himself to vote, showing no present

Mr. Allen M. Thompson.

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August 1, 1934.

intention of moving, then he is a qualified voter of a resident ballot unless he declares his residence to be otherwise, to the judges of election. His declarations of intended residence is to be considered with great weight, when qualifying him as a resident voter.

Those electors who have always been a resident of this State but have shown no intention of being but temporary residents of the county, where they offer to vote, may vote an absentee ballot at the polls within this state on election day, said ballot to be voted and transmitted as the absentee ballot of any other qualified voter.

Respectfully submitted,

WM. ORR SAWYERS,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General.

WOS:MM

TAXATION: Municipalities may tax real estate within the city limits regardless of acreage.

8-13  
August 8, 1934.



Honorable L. W. Thurman  
City Clerk  
Southwest City, Missouri

Dear Sir:

This Department is in receipt of your letter wherein you state as follows:

"Will you please furnish the city of Southwest City, Mo., an opinion whether or not there is any law on the statutes books whereas the city can not collect city taxes on real estate within the city limits where the acreage is over twenty acres.

"We have a particular case in the city where the individual has an acreage of over twenty acres who claims that the city cannot collect city taxes on the real estate. We do not feel that this man is entitled to any more favors than any one else, should the state laws uphold us, it is our intentions to make a test case out of this certain tract as we have a city ordinance which gives us the right to go ahead and collect tax. Besides we have other tracts of land acreage and these persons have not made any kick."

Section 6, of Article X, page 135, Missouri Constitution sets out the property exempt from taxation and reads as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots of one mile of more distant from such cities or towns, to the extent of five



acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 7, of Article X, page 136, provides that all other exemptions are void and states as follows:

"All laws exempting property from taxation, other than the property above enumerated, shall be void."

The Legislature in the enactment of Section 9743 R. S. 1829, provided in part that:

"\* \* \* lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

Section 7013 R. S. Mo. 1929 provides that boards in cities of the fourth class shall not exempt any person from any tax and reads as follows:

"The mayor and board of aldermen shall have no power to release any person from the payment of any tax, or exempt any person from any burden imposed by law."

In the case of State v. Hemenway 273 Mo. 187; 198 S. W. 825, 1. c. 828, an action was brought by the State on behalf of the collector of the revenue of Glasgow, a city of the fourth class, for delinquent taxes assessed against the defendant's land, located in said city. By the laws of 1852-53, p. 351, lands never divided into lots were held exempt but the court held that since the Legislature had inherent power by permitting the city of Glasgow to become a city of the fourth class that defendant's

land, though divided into lots and always used agriculturally were subject to the municipal tax. The court in its opinion said:

"Taking a retrospective view of the situation, in connection with the Constitutions, statutes, and authorities heretofore mentioned, we deduce the following conclusions: (a) That the act of 1853, which incorporated defendant's property within the boundaries of Glasgow and exempted the same from taxation, was valid at the time of its enactment, and that said exemption continued, without question, until, at least, to the time of the adoption of the Constitution of 1865. (b) That, when the above statute of 1853 was enacted, the Legislature had the inherent right--if it had seen fit to exercise it--to include defendant's property within the boundaries of said city, with or without her consent, and to have subjected the same to the payment of city taxes thereafter. (c) That the Legislature of 1853 made no express or implied agreement with defendant, by which it obligated itself to continue said exemption for all time to come. On the contrary, it had the legal right to amend said act of 1853, after its passage, during the same session, or at any subsequent session, and to have subjected defendant's property therein to the payment of city taxes. (d) That, after Glasgow became a city of the fourth class, the property of defendant therein became subject to taxation, just as it would have been had said city changed from a village to a city of the fourth class. In other words, defendant's property having been included by the Legislature, in 1853, within the boundaries of Glasgow, continued therein, after the latter became a city of the fourth class, and subject to the general law of taxation relating to cities of such class.

On page 829 the court said:

"We are of the opinion that when the city of Glasgow elected to become, and did become, a city of the fourth class, defendant's pro-

August 8, 1934.

perty contained within the boundaries thereof became liable for the payment of the taxes sued for in this action."

And on page 830 the court further said:

"So far as the record discloses, defendant's real estate has been within the corporate limits of Glasgow since 1853, and she has never paid any city taxes thereon. She has received whatever benefits flowed from her relationship to the city, and ought not to complain at this late day, in being called upon to bear some of the city's burdens. The above conclusion is in accord with the expressed views of this and other courts."

#### CONCLUSION.

In view of the foregoing we are of the opinion that a city can collect city taxes on real estate within the city limits regardless of acreage, and further that this right cannot be defeated on the theory that the exemption was an inducement for bringing the land within the city limits.

As stated in the case of State v. Hemenway, supra, "Even if the Legislature had, by enactment, authorized a city like Glasgow to take in and exempt from taxation property like defendant's, the exemptions would be unavailing because of the provisions of our Constitution."

The city of Southwest City, Missouri, is a city of the fourth class, and since defendant's property is contained within the boundaries of the city it is liable for the payment of taxes regardless of the acreage.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H

TAXATION: Senate Bill 94. Published list of delinquent lands to be made according to any legal subdivision ~~as~~ the same may be according to ownership. Cost of publication to be pro rated against all lands in publication.

11-9  
October 31, 1934

Ruby W. Thomasson  
Collector  
Fulton  
Missouri



Dear Madam:

We acknowledge receipt of your letter addressed to Attorney General McKittrick, as follows:

"Will you please advise as how to figure the cost on this land that is to be sold for taxes. And how the land should be described. Please give this information as soon as possible."

1.

(a). Section 9952b Laws of Missouri 1933, page 430, requiring the county collector to cause a copy of a list of the delinquent lands and lots to be published in some newspaper of general circulation published in the county where such lands are located, provides, in part, that the land in the publication of such delinquent lists,

"\* \* \* shall be described in 40-acre tracts or other legal subdivisions \* \* \*."

Section 751 of the U S C A, title 43, treating of the surveys of public lands by the surveying authorities of the United States, details the manner in which surveys of public lands belonging to the United States must be originally made. The township lines must be run and the corners established in the first instance by the United States Government.

And,

"The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners."

And,

"The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles; and by making a corner on each of such lines, at the end of every mile. The sections shall be numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed."

And,

\* \* \* field books shall be returned to the Field Surveying Service, which shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. "

Section 752 U S C A, title 43, makes provision for the ascertainment of the boundaries and contents of sections, half-sections, and quarter-sections of public lands. It appearing therefrom that the United States Government may or may not survey sections into other legal subdivisions.

(b). Section 11590 Revised Statutes Missouri 1929, authorizes the several county courts in this state to obtain from the Surveyor General of the United States or other proper federal official, a certified copy of field notes of all surveys of lands lying within their counties.

Sections 11593, 11594, 11595 and 11596 provide for the subdividing of government surveyed sections of land into halves, quarters, eighths and sixteenths respectively, and from all of the foregoing it is apparent that half-sections, quarter-sections and quarter-quarter-sections are all legal subdivisions of land. In the absence of a contrary intention appearing it is generally held that when the words 'legal subdivision' are used it means and refers to a quarter-quarter-section or forty acres of land. This is held in:

Robinson v. Forrest 29 Cal. 317, 324.  
Hopper v. Nation 78 Kan. 198.  
Greenblum v. Gregory 161 Wash. 42.

However, the section above quoted makes reference to forty acre tracts 'or other legal subdivision,' so that the Legislature had in mind the describing of lands by legal subdivisions other than and in addition to forty acre tracts or quarter-quarter-sections.

We are of the opinion that the list of delinquent lands when published may describe such lands by any or all of the legal subdivisions above referred to, or if a legal subdivision be fractional, then according to the description of such fractional subdivision, as the same may appear from the delinquent list and according to separate ownerships.

2.

As to the distribution of the cost in publishing the list and making the sales referred to in said Section 9952b, it is further provided:

"The expense of such printing shall be paid by the purchaser or purchasers of the lands and/or lots sold, \* \* \* which cost of printing at the rate specified shall be taxed as part of the cost of the sale of any land or lot contained in such list and disposed of at such sale, and the total cost of printing such notice shall be pro rated against all such lands or lots so sold or redeemed prior to any such sale."



October 31, 1934

We think it was the intention of the Legislature that the cost of the publication should be spread out or pro rated among the respective forty acre tracts, or other legal subdivisions, according to the space occupied by each in making the publication. After the publication is made if the owner of lands contained in same paid the delinquent taxes he would also be required to pay his pro rata share of the publication; if the owner of lands contained in the publication redeemed the same after a sale was made and before finally completed or when the same was not sold because of insufficient bids, and if such landowner redeemed such land prior to the final sale of same he also would be required to pay his pro rata share of the newspaper publication, and if lands were finally sold for such delinquent taxes the pro rata share of such land and the cost of such publication could be taxed and collected as costs of making such sale.

Yours very truly,

GILBERT LAMB  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

ACTIONS: Where more votes are cast than names on the poll books, the illegal votes, if any, could be thrown out, but this would not necessitate throwing out entire vote of the precinct.

B-24

November 22, 1934.



Hon. Hampton Tisdale,  
Prosecuting Attorney,  
Cooper County,  
Boonville, Missouri.

Dear Sir:

This department is in receipt of your letter of November 14 relating to the recent general election in Cooper County, which is as follows:

"Some irregularities occurred in the recent election in Cooper County upon which some of the defeated candidates and the Chairman of the Democratic County Committee have requested an opinion.

No. 1. In Boonville Precinct No. 2 eleven more votes were cast for the offices of Presiding Judge, Judge of the Western District and Representative than there appeared names on the poll books. This irregularity appeared only in connection with these three offices. Would it be possible to throw out the entire precinct in case of a contest on this ground?

No. 2. In Clear Creek Precinct there were sixteen more votes cast for all offices than there appeared names on the poll books. In case of a contest, could this entire precinct be thrown out upon that ground?

The Republican candidate for County Clerk was elected by thirty-three votes and the Republican candidate for Representative by sixteen votes. In case either or both of the above named precincts were eliminated the result would mean the election rather than the defeat of these two officers. I am therefore, at their request asking for an official opinion in this matter.

The section dealing with contests of elections of Presiding Judge and Judge of the Western District is Section 10339, R.S. Mo. 1929, which is as follows:

"The several circuit courts shall have jurisdiction in cases of contested elections for county and municipal offices, and in all cities now having or hereafter attaining three hundred thousand inhabitants, the said circuit courts shall have jurisdiction in cases of contested elections for justices of the peace, and in cases of contested elections for seats as directors in the boards having charge of the public schools and public school property, and the county courts in contests of township offices; but no election of any such school director, of any county, municipal or township officers, shall be contested unless notice of such contest be given to the opposite party within twenty days after the votes shall have been officially counted; the notice shall specify the grounds upon which the contestant intends to rely, and if any objection be made to the qualifications of any voters, the names of such voters and the objections shall be stated therein, and the notice shall be served fifteen days before the term of court at which the election shall be contested, by delivering a copy thereof to the contestee, or by leaving such copy at his usual place of abode, with some member of his family over the age of fifteen years; or, if neither such contestee nor his family can be found in the county, and service cannot therefore be had as aforesaid, it shall be a sufficient service of such notice for the contestant to post up a copy thereof in the office of the clerk of the court wherein the contest is to be heard."

Section 10346, R.S. Mo. 1929 deals with election contests of a representative or a state senator, and is as follows:

"If any candidate of the proper county or district contest any election of any person proclaimed duly elected to the senate or house of representatives, such person shall give notice thereof, in writing, to the person whose election

he contests, or leave a written notice thereof at the house where such person last resided, within forty days after the returns of the election to the clerk's office. The notice shall specify the names of the voters whose votes are contested, the ground upon which such votes are illegal, and a full statement of any other ground upon which such election is contested, and the name of the justice of the peace who will attend to the taking of the depositions, and when and where he will attend to take the same."

While you have stated two questions in your letter, an answer to one will automatically answer the other, as they are practically the same, and in a condensed form your inquiry is: Can a contest be based on the fact that there were more votes cast in certain precincts than there were names on the poll books and if such contest were successful, could the entire vote of the precincts be thrown out.

It is the opinion of this department that if a contest were instituted, it would necessitate examining the ballots and comparing them with the poll books. A similar question was before the Supreme Court in the case of Windes v. Nelson, 159 Mo.51. The Court said (l.c. 74-76):

"On the recount the ballots cast were examined and compared with the poll books, and a report made to the court of the result. In this way it was disclosed how every voter in Camden County voted, and the secrecy of the ballot was destroyed. No objection was made to this proceeding by either party and therefore, the legality of the proceeding is not open to review in this case. But I cannot permit the fact to pass unnoticed. In my judgment there is no law in this state that permits such a practice. The Constitution (Sec. 3 Art. 8) provides that all elections shall be by ballot, which necessarily implies secrecy, but adds: 'Provided, that in all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law.' But an examination of the statutes of this state will show that

the legislature has never prescribed any such regulations or safeguards. Those so far prescribed do not go to the extent of allowing the secrecy of the ballot to be thus destroyed. So that, while the Constitution has made it possible for the Legislature to do so, the Legislature has, in my judgment, wisely refused to exercise this power or to destroy that secrecy. Every election of late years, in large cities, has been followed by an election contest, and the conduct of those cases shows that in a very large majority of instances such cases were not begun in good faith to change the result of the election as declared by the election officers, but for the ulterior purpose of ascertaining how the individual voters exercised their franchise with a purpose to intimidate them thereafter. The wisdom and the necessity of the secret ballot is more apparent today than it ever was before in the history of the world. The benefits of a secret ballot were recognized even in the days of Rome, for we find that Cicero in his defense of Plautius said, "The ballot is dear to the people, for it uncovers men's faces and conceals their thoughts. It gives them the opportunity of doing what they like and of promising all they are asked." Judge Cooley in his work on Constitutional Limitations (6 Ed.), p. 762, says: "The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in position, to question him for it, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice, have acquired knowledge on the subject should not be allowed to testify to such knowledge, or to give any information in the courts on the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it; his ballot is absolutely privileged; and to allow evidence



of its contents when he has not waived the privilege is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law from motives of public policy establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voters' action disclosed to the public."

Section 10343, R.S. Mo. 1929 sets forth the manner of trying a contested election and is as follows:

"Every court authorized to determine contested elections shall hear and determine the same in a summary manner, without any formal pleading; and the contest shall be determined at the first term of such court that shall be held fifteen days after the official counting of the votes, and service of notice of contest, unless the same shall be continued by consent, or for good cause shown."

Construing this section, along with a number of other sections pertaining to election contests, the Court in the case of *State ex rel. v. Oliver*, 163 Mo., 1.c. 694, said:

"In that case, Marshall, J., in delivering the opinion of the court, after quoting the foregoing constitutional and statutory provisions, said:

"Thus it will be seen that while Section 7044 authorizes the court before which any contested election may be pending to order the clerk of the county court (in St. Louis, the Board of Election Commissioners) 'to open, count, compare with the list of voters and examine the ballots in his office' and to certify the result of such count, comparison and examination to the court, it gives no such right to any one except the clerk--not even to the parties or their attorneys. The subsequent sections emphasize this feature and show that it is not simply a casus omissus but that it was deliberately and intentionally so framed. Thus, section 7046 provides that the ballots shall be opened in the presence of the parties and



their attorneys, "and after swearing them not to disclose any fact discovered from such ballots except such as may be contained in the clerk's certificate." It will be noted that the oath of secrecy relates only to what may be discovered from the ballots and does not impose any secrecy as to what is shown by a comparison of the ballots with the voting lists.

But this is not all. Section 7047 requires the clerk to permit the contestor and the contestee and their attorneys "to fully examine the ballots" and further that the clerk "shall make return to the writ .... of all the facts which either of said parties may desire, which may appear from the ballots affecting or relating to the election for the office in contest."

So that up to this time the legislature has only given the parties or their attorneys the right to fully examine the ballots and to require the clerk to certify all the facts which either of the parties may desire which appear from the ballots. No right has been given them to compare the ballots with the voting lists. Such a comparison would disclose how the elector voted and thereby lift the veil of secrecy without his consent to the parties and their attorneys and they would be under no obligation not to disclose the information so obtained, for their oath of secrecy is limited by the statute "not to disclose any fact discovered from such ballots" -- not from such a comparison. And if the contention of respondents that the term "ballot" employed in Section 7046 includes such a comparison of the ballots with the voting lists, be true, then it necessarily follows that the veil of secrecy would be lifted, not only to the eyes of the parties and their attorneys, but also to the whole world, for Section 7047 requires the clerk to permit the parties and their attorneys to fully examine the ballots, and to make return "of all the facts which either of said parties may desire which may appear from the ballots." So that under such a construction the clerk could be required by the parties to certify to the circuit court and thus make a public record of every fact that appears from the ballots and from a comparison of the ballots with the voting lists, and in this manner a

perpetual public record would be made of how every elector voted. And this is precisely what the circuit court ordered to be done in this case. That this is not the true or literal meaning of the law is conclusively shown by the fact that the parties and their attorneys are required to be sworn not to disclose any fact discovered from the ballots. If ballots include voting lists, then what useful purpose would be subserved by swearing the parties to secrecy when all the facts so discovered would be made matters of public record in the circuit court by the return of the clerk? And yet the prime purpose of voting by ballot is to preserve inviolate the secrecy of the vote.'

These views, thus expressed, necessarily condemn paragraphs 1 and 2 of the order made in this instance.

Nor is there any provision made or permission given in the sections of the statute quoted, for any of the parties or their attorneys to make notes; and in doing this they could easily go further. If they are allowed to make notes, it is easy to see that no one could prevent them from stating therein 'as to what political party any voter voting at such election voted for.' And it is also easy to see that they, having made notes containing such prohibited facts, the clerk would have no authority to supervise them; look over their shoulders, and see that they did not have and did not take such contraband matter out of his office.

The only rights the contestor or contestee or their attorneys can assert under the law, are those granted them under sections 7046 and 7047, which include the right named in the latter section, that of having 'the clerk to make return to the writ, under his hand and official seal, of all the facts which either of said parties may desire, which may appear from the ballots, affecting or relating to the election for the office in contest.' All things else are tabooed. When the clerk has done his office as in these two sections provided, the chapter is closed and the function ended."

The above decisions are quoted for the purpose of showing that in all probability in a contest the poll books and ballots could not be compared; however, these cases have apparently, though not directly, been overruled, as shown in the case of *Gantt v. Brown*, 238 Mo. 560, wherein the Court said (l.c. 575-578):

"By the preceding section the poll books are required to be put into the ballot boxes. Under Section 6228, supra, the commissioners are to securely keep such ballot boxes (contents, ballots and poll books). They are not to inspect them (meaning the contents, not the mere naked boxes) nor permit anybody to inspect them, 'except upon order of court in case of contested elections', etc. In such excepted cases what are to be inspected? Most certainly, the contents of those boxes, and this includes both ballots and poll books. Not only so but the commissioners in other cases are to securely keep them for twelve months, or until such time 'when it shall be necessary to produce them (not the naked boxes, but the contents, the ballots and poll books) at the trial of any offense committed under this article.' Now where do these ballots and poll books go? To a plain ordinary court of justice. For what purpose do they go? That they may be used in evidence on the trial of a cause. Not only so, but by the last clause of the section these ballots and poll books must be kept in tact even after the expiration of twelve months providing a contest or prosecution is intended. Kept for what? Certainly not in seclusion and for no purpose as held in the *Spencer* case and cases following its trend.

But even this is not all. Section 5939, R.S. 1909, reads: 'Either house of the General Assembly, or both houses in joint session, or any court before which any contested election may be pending, or the clerk of any such court in vacation, may issue a writ to the clerk of the county court of the county in which the contested election was held, commanding him to open, count, compare with the list of voters and examine the ballots in his office, which were cast at the election in contest and to certify the result of such count, comparison and examination, so far as the same relates to the office in contest to the body or court from which the writ is issued.'

This section has long been on the books and is discussed in the Spencer case. That discussion, however, does not meet with our views. In that case the return to be made by the officials under the order of the court must be confined to what is shown by the ballots themselves and not a return showing the result of an examination of the ballots, and the comparison of those ballots with the poll books. The plain reading of the statute is emasculated by the Spencer and Montgomery Cases. The statute commands the clerk (1) to open, count and compare the ballots with the list of voters and examine the ballots; and (2) 'to certify the result of such count, comparison and examination so far as the same relates to the office in contest to the body or court from which the writ is issued.' Now, what result shall the clerk certify? The result of an examination of the ballots only, as said in the Spencer case? We say No. The statute speaks for itself. The statute says, 'The result of such count, comparison and examination.'

The Spencer case and those following it eliminated from the statute the result of the comparison of the ballots with the poll lists, and in this thwarted the clear legislative intent as expressed by the statute.

Going further, we find still another section which throws light upon the question. Section 5905, R.S. 1909, insofar as applicable to the point in hand is concerned, reads: 'And the ballots, after being counted, shall be sealed up in a package and delivered to the clerk of the county court or corresponding officer in any city not within a county, who shall deposit them in his office, where they shall be safely preserved for twelve months; and the said officer shall not allow the same to be inspected, unless in case of contested election, or the same become necessary to be used in evidence and then only on the order of the proper court, or a judge thereof in vacation, under such restrictions for their safe-keeping and return as the court or judge making the same may deem necessary; and at the end of twelve months, said officer shall publicly destroy the same by burning, without inspection.'

This section goes to the ballots themselves. It is a part of the general election laws. Section 5911, discussed supra, left one of the poll books open for public inspection. Both sections are in the same article. In the quoted portion of section 5905, supra, note the language, 'or the same become necessary to be used in evidence.' Used in evidence how? 'Under such restrictions for their safe-keeping and return as the court or judge making the same may deem necessary.'

If this section does not disclose a legislative intent to the effect that the ballots themselves can be used in evidence in proper cases, I have misconceived what I take to be unequivocal language. In truth and in fact this section contemplates that the ballots upon the order of the court may be taken from the legal custodian and used in evidence. At least it does contemplate that the legal custodian can be called upon/produce them for use in evidence before the court. Of course the court must arrange for the safe-keeping and return of these ballots after they have been used in evidence, but that this is a clear provision for their being used in evidence there can be no doubt.

In determining the legislative intent the whole body of the law must be considered, and not selected portions thereof. We have, therefore, taken up some sections not discussed in the Spencer case. An examination of this body of laws as applied to the State at large and as applied to the city of St. Louis convinces us that the Legislature never intended to deprive a contestant of his right to show fraud by the best evidence, and never intended to hermetically seal the evidence of fraud in the ballot boxes and poll books, as is done by the Spencer and Montgomery cases, supra, and perhaps in a more modified form in some succeeding cases.

We have no doubt that if it becomes neces-



sary in the progress of these cases for this court to inspect certain of the ballots, we would be acting within the Constitution and statutes to send for them, or direct our commissioner, under proper restrictions, to procure for us the needed information.

We shall not go further. Upon the questions discussed herein the Spencer and Montgomery cases, *supra*, and those following them, are overruled. The charges of fraud are thereby rendered susceptible of proof, if fraud in fact exists, and the question of a *prima facie* showing of fraud is out of present consideration. This permits the case to be tried as other cases, as a whole, leaving the parties litigant to decide for themselves whether or not the evidence introduced thus far proves fraud. That question we will determine when the case is submitted for our decision."

A more recent case, which seems to decide the question conclusively, is that of *State ex rel. Phillips v. Barton*, 300 Mo. 76. The Court said (l.c. 89-90):

"This court has more than once had the question of the extent of this examination under consideration. In *State ex rel. Young v. Oliver*, 163 Mo. 679; *State ex rel. Funkhouser v. Spencer*, 164 Mo. 23, and *Montgomery v. Dormer*, 181 Mo. 5, what is now Section 4911 was given a cramped and narrow construction in holding that it granted no authority for a comparison of the ballots with the voting lists. These rulings the court held in *Gantt v. Brown*, 238 Mo. 560, were not in harmony with the purpose of the statute, and that the enforcement of the rule as thus announced would render contests of elections nugatory. The limitation upon the right of examination in the cases cited is held to prescribe a procedure, the tendency of which is to foster rather than expose fraud and thus defeat the purpose for which the law was enacted. These cases, therefore, are as they should have been, under the wholesome interpretation given to the statute in *Gantt v. Brown* overruled. The rule announced in the latter case is to the effect that where, as here, fraud is charged in good faith in an election



contest, that the ballots and poll books should be opened for the purpose of showing whether fraud, be it actual or legal, has been committed; that the mode and manner of proof should be as broad as the charges, and any available evidence tending to establish or disprove the charge is competent. Not only, says the court, are the balance and poll books admissible in evidence, but a witness may testify as to how he voted, as tending to show fraud or no fraud; that when a ballot is examined having a certain number, the party challenging it as fraud is entitled to an examination of the ballot to determine from the corresponding number thereon who cast it. The statute (now section 4880, R.S. 1919) so provides, and there is nothing in the Constitution to inhibit the admission of this character of testimony. On the contrary it is expressly provided (section 3, article 8, Missouri Constitution) 'that in all contested elections the ballots cast may be counted, compared with the lists of voters, and examined under such safeguards and regulations as may be prescribed by law.' The legal prescription referred to, has, so far as the matter at issue is concerned, been definitely drawn in the contest election statute. Not only from its terms but from the illuminating interpretation given to it in *Gantt v. Brown*, no difficulty should be encountered in complying with it."

As to the authority of the Circuit Court to go behind certificates of election, the same is decided in the case of *State v. Caster*, 12 S.W. (2d), 1.c. 465-466, wherein the Court said:

"Our decision, upon the question of which certificate the county clerk should use in making up his abstract, could in no sense determine the actual facts concerning the correctness of the vote shown by such certificate. That is an inquiry peculiarly appropriate to an election contest. In that proceeding the circuit court may go behind any and all certificates of the election officials and open the ballot boxes and recount the ballots themselves and declare the result accordingly.

Could this court have been permitted promptly to settle the legal question involved in the

amended petition, our alternative writ would not have been abused, a certificate of election could have issued without undue delay, and then, if so advised, the candidate denied such certificate could have taken whatever steps he deemed advisable. But the appointment of a commissioner would mean a long drawn out controversy in this court with the same ultimate effect of our final decision, to-wit, the determination as to which candidate should receive the certificate of election. Such determination would not prevent an election contest, if the losing party could, or decided to, institute an election contest thereafter."

#### CONCLUSION

In view of the above decisions, it is the opinion of this department that if the petition and notice be in proper form, the question of the apparent illegality of the election in the precincts you mentioned in your letter, i.e., the poll books containing less names than the ballots cast, could be inquired into and the votes, if any, found to be illegally cast could be thrown out; this, however, would not necessitate throwing out the entire vote of the precincts, as the court on the recount could determine the proper vote of the precincts and thus the vote as determined by the court would be the legal vote of said precincts.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General

DEAD BODIES - Definition of common carrier of, under R.S.Mo.  
1929, Chap. 52, Art. 3.

12-27  
December 18, 1934.

Mr. Fred A. Thompson, Secretary,  
The State Board of Embalming,  
1776 Main Street,  
Madison, Mo.



Dear Sir:

A request for an opinion has been received from you under date of November 23, 1934, such request being in the following terms:

"We are having some discussion over what is a 'common carrier of dead human bodies'.

For instance, Section 9067 is not clear--as it was written in the transportation ruling, some years ago; and revised in 1919, as section 5823.

Section 9072 seems to comply only to the shipment of dead human bodies on railroads, and classes the railroad as 'common carrier'.

Here is what we want to know; a great many bodies are being disinterred and removed from one cemetery to another, maybe from one state to another. Is an auto hearse, or a truck or a wagon, classed under this law as a 'common carrier'?

Thanking you for your ruling on this, I am"

There is no definition in the statutes of this State of the term "common carrier" which applies to such term wherever it appears in the statutes. Such term is defined in the Public Service Commission law (R.S.Mo. 1929, Chap. 33, Sec. 5122, Par. 9), but such definition only applies to the term "common carrier" when used in that chapter and, of course, the statutes relating to the transportation by a common carrier of dead human bodies are not in that chapter. Therefore, the common law definition of this term must be sought.

2. Mr. Fred A. Thompson.

December 18, 1934.

The term "common carrier" at common law applies to one having a peculiar position with respect to members of the public, both as to privileges and as to duties. In the case of *Collier v. Langan & Taylor Storage & Moving Co.*, 147 Mo. App. 700, 722, 127 S. W. 435, (1910), the court says:

"Says Chancellor Kent, 2 Kent (14 Ed.), \*p. 599, 'common carriers are those who undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods, and deliver them at a place appointed, for hire as a business, and with or without a special agreement as to price;' and he enumerates among those adjudged to be common carriers, wagoners, teamsters, cartmen and porters."

The part of the statutes with which you are concerned, that relating to the transportation of dead bodies (R.S.Mo.1929, Chap. 52, Art. 3), uses the term "common carrier" several times, but does not contain any definition of the term, nor is there anything in such article which by implication would restrict the meaning of the term "common carrier" to railroads or any other particular form of conveyance. At the time of the enactment of such article motor carriers operating on the highways of this State had not come into general use, and perhaps the General Assembly had in mind railroads only, but the Act itself does not say so, so that there is nothing in such article which would be in derogation of the common law definition.

The term "common carrier" came into use long before railroads were invented, and although a railroad perhaps is the most usual type of common carrier, the term "common carrier" of itself does not apply to railroads any more than to any other vehicle, and the above quotation would of itself indicate that the type of motive power has nothing to do with whether or not a person or other legal entity is a common carrier.

In conclusion, it is our opinion that a person, partnership, corporation or other entity holding itself out to the public as a common conveyor of dead human bodies, whether it be by railroad, motor vehicle or otherwise, is a common carrier within the meaning of the provisions of R. S. Mo. 1929, Chap. 52, Article 3.

Very truly yours,

APPROVED:

EDWARD H. MILLER  
Assistant Attorney-General

ROY McKITTRICK  
Attorney-General

COUNTY COLLECTOR: Subdivision XIV of Sec. 9935, R.S. Mo. 1929 unchanged by subdivision XIV of Sec. 9935, Laws of Mo. 1933, p. 454.

1-12

*[Handwritten signature]*

January 10, 1934.



Hon. Harry Truman,  
Presiding Judge - County Court,  
Court House,  
Kansas City, Missouri.

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"We would like an early ruling from your office on Section 9935, Laws of 1933, Article XIV, in regard to the Collector of this county retaining one-half of one percent commission on current and tax revenues."

Laws of Missouri, 1933, p. 454, Senate Bill No. 185, approved May 11, 1933, repeals Sec. 9935, R.S. Mo. 1929 and reenacts the section as it originally stood, and as repealed and reenacted, contained and contains fifteen subdivisions.

You have asked us for a construction of subdivision XIV of the Act of 1933, and we respectfully submit that subdivision XIV was not in any wise changed by the 1933 amendment.

The only change with reference to subdivision XIV is to be found in the first paragraph of the Act of 1933. Section 9935, R.S. Mo. 1929 provided in the first paragraph as follows:

"The collector shall receive as full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more: \*\*\*\*\*"

The Act of 1933 changed this paragraph by inserting after the word "collector" the words "except in counties where

Hon. Harry Truman

-2-

Jan. 10, 1934.

the collector is by law paid a salary in lieu of fees and other compensation".

We are informed by the Hon. John R. Ranson, Collector of Jackson County, Missouri that the collector of said county receives fees and other compensation in addition to his salary for the collection of the drainage tax under Sec. 10763, R.S. Mo. 1929, and that he also receives fees and other compensation in addition to his salary for the collection of state income taxes under Sec. 10133, R.S. Mo. 1929.

In view of these facts, the exception found in the Act of 1933 does not exclude Jackson County from the provisions of Sec. 9935, Laws of Missouri, 1933, p. 454.

Respectfully submitted,

JWH:AH

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General



CITIES, TOWNS & VILLAGES: Under Section 7030 R. S. 1929.  
Bond issue under Section 7030, R. S. 1929,  
for construction of waterworks carried by  
two-thirds vote of those voting at election  
held for that purpose.

October 10, 1934.

10-19



Hon. J. C. Turk  
Assistant Prosecuting Attorney  
Lawrence County  
Mt. Vernon, Missouri

Dear Mr. Turk:

This Department acknowledges receipt of your letter of  
September 28th, 1934, with request for an opinion, which letter  
is as follows:

"Section number 7030, Bonds May be Issued  
For What Purposes, relating to cities of  
the fourth class, we are asked for its  
construction. That is, especially the  
following clause thereof, to-wit: "But  
bonds for the purpose aforesaid shall not  
be issued until two-thirds ( $2/3$ ) of the  
legal voters of such city, voting at an  
election held for that purpose, have assent-  
ed thereto, in accordance with article 10,  
Chapter 38, R. S. 1929."

The city of Miller presents this question to  
us, is the required vote to legally authorize  
the city to issue bonds for construction of  
waterworks for the city, two-thirds of all  
legal voters of city, or two-thirds, simply,  
of the legal voters voting at the election  
called for that purpose, vote therefor.

Before going on record, we desire your  
opinion to the end, we may be sure we proper-  
ly reflect your construction of this vote  
as well as to have the benefit of same our-  
selves in this office. Thanking you for  
reply by early mail as parties are in waiting  
to know, at once, in order to get about the  
business of building this plant."

Your request calls for a construction of Section 7030, R. S. Mo. 1929, which section is as follows:

"Bonds may be issued for erection or purchase of public buildings, bridges, water-works, electric light plants and ice plants, public parks, and other improvements, and for establishing and maintaining a fire department. The board of aldermen shall have power to borrow money and issue bonds for the payment thereof, within the limits prescribed by the Constitution, for the purpose of erecting water-works, electric light works, public parks and ice plants, or acquire the same by purchase; also a city hall and other public buildings and improvements and for furnishing the same, and for the erection of public bridges across streams dividing counties, if located within one mile of its corporate limits, the expense of building said bridges to be borne in part by the counties, as provided for by section 7903, R. S. 1929, but bonds for the purpose aforesaid shall not be issued until two-thirds ( $\frac{2}{3}$ ) of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929."

We have underscored the portion of said section pertinent to your inquiry.

Your question is whether or not the city of Miller, a city of the fourth class, in voting to issue bonds for the construction of water works for the city, to issue said bonds it requires two-thirds of all legal voters of said city or whether it requires only two-thirds of the legal voters voting at the election called for that purpose.

October 10, 1934.

It will be noted that Section 9382, R. S. Mo. 1909, was amended by Laws of 1915, page 361, by inserting between the word "city" and the word "have" in the eleventh line of said section the words "voting at an election held for that purpose", which words were carried into the revisions of 1919 and 1929, so that said section stands as set forth above.

In the case of Bauch v. City of Cabool, 165 Mo. App. 486, decided by the Springfield Court of Appeals, the court held that it required a vote of two-thirds of the legal voters of a city of the fourth class to assent to the issuance of bonds for the purpose of erecting waterworks, and not merely two-thirds of those voting at the election. This decision, however, was rendered in 1912 and, of course, prior to the amendment of 1915 in which the words "voting at an election held for that purpose" were added.

Section 7030, R. S. Mo. 1929, as it now stands, is plain and unambiguous and provides that bonds for the construction of waterworks etc., "shall not be issued until two-thirds of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929."

#### CONCLUSION.

It is, therefore, our opinion that to authorize a city of the fourth class to issue bonds for construction of waterworks it is only necessary that two-thirds of the legal voters of such city, voting at an election held for that purpose, have assented thereto, and that two-thirds of the legal voters of said city is not required.

Very truly yours,

COVELL R. HEWITT  
Assistant Attorney-General.

APPROVED:

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ROY MCKITTRICK  
Attorney-General.

NOTARIES PUBLIC: Clerical position not within the intent of  
the words "an office of profit under the U.S."

1-22  
January 8, 1934.



United States Dep't. of Justice,  
Bureau of Investigation,  
Suite L - Federal Building,  
Kansas City, Missouri.

Gentlemen:

Attention: Mr. E.E. Conroy,  
Special Agent in Charge

This department is in receipt of your letter of  
December 11 requesting an opinion from this office as to  
the following state of facts:

"I am interested in having Mr. J.H.  
Hinds, clerk-typist at this office,  
secure a commission as Notary Public  
in the State of Missouri, which would  
greatly facilitate the work of this office.

It is noted that the Notary Public form  
of application, copy of which I am trans-  
mitting herewith, sets forth, 'I am not  
holding an office of profit under the  
United States.' The question as to whether  
this statement would bar Mr. Hinds from  
securing the commission was presented to  
the office of the Secretary of State at  
Jefferson City, who has suggested that the  
matter be submitted to your office for ruling.

I recall that when I was in charge of the  
office of this division located in North Caro-  
lina, I was confronted with a similar situation,  
when making arrangements to have a stenographer  
in that office secure a commission as Notary  
Public. At that time the officials at the State  
Capitol at Raleigh, North Carolina, rendered  
a decision to the effect that the word 'office'  
referred to a position in the Federal Government,  
subject to appointment by the President with  
the consent and approval of the United States  
Senate. As Mr. Hinds holds only a clerical posi-  
tion, it appears possible that your office might  
render a similar decision."

Jan. 8, 1934.

Sec. 11274, R.S. Mo. 1929 provides:

"When required, he shall give his opinion, in writing, without fee, to the general assembly, or to either house, and to the Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Schools, Warehouse Commissioner, Superintendent of Insurance, the State Finance Commissioner, and the head of any state department, or any circuit or prosecuting attorney upon any question of law relative to their respective offices or the discharge of their duties."

Under this statute we are required to render opinions to the officers enumerated above. At the present time we have so many requests for opinions from these officers that it is impossible for us to render opinions to others tho ordinarily it would be a great pleasure.

However, for your information, we wish to state, unofficially, that we agree with the officials of North Carolina that the word "office" as used in the application refers to a position in the Federal Government subject to appointment by the President with the consent and approval of the United States Senate. A mere clerical position would not seem to come within the intent of the words "an office of profit under the United States."

Regretting our inability to furnish you a complete opinion at this time, we remain

Very truly yours,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

Circuit Clerks.

Circuit Clerks are to be paid on a basis of fees collected by them and not on a basis of fees earned by them.

1-2  
December 28, 1934.



Mr. Burl E. Underwood,  
Circuit Clerk,  
New Madrid, Missouri.

Dear Sir:-

We have your letter of November 20, 1934, in which is contained a request for an opinion as follows:

"I would like an opinion from your office in answer to the following question:

'At the expiration of the present term of the Circuit Clerk's office, will the next Circuit Clerk who goes solely on a fee basis for payment of his salary be paid by fees earned by him or on a basis of fees collected by him?'

Since there is a large amount of accrued costs and fees in pending cases on the books at the end of the present term it will be necessary to have a distinction between the two problems of fees earned and fees collected.

I shall appreciate very much your opinion regarding this matter."

Section 11786, Revised Statutes of Missouri, 1929, as reenacted Laws 1933, page 369, provides in part as follows:

"Sec. 11786. Fees of Circuit Clerk in Certain Counties.- The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out.\* \* \*"

The above section, in our opinion, refers to fees collected and not to fees earned. That the legislature so intended is apparent from its use of the words "shall be allowed to retain". If the legislature had intended to refer to fees



#2- Burl E. Underwood

Dec. 28th, 1934.

earned, as the basis, we must presume it would have employed the phrase "shall be entitled to" or some such similar phrase. One can, of course, not retain that of which he has not possession, hence, in our situation a clerk could not retain fees which had not been actually collected,

We think the apparent legislative intent, as well as the general policy that Circuit Clerks are to be paid out of fees, is decisive of this question.

Very truly yours,

CHARLES M. HOWELL, Jr.  
Assistant Attorney-General.

CMH jr:MB

APPROVED:

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Attorney-General

**PROBATE CLERKS:**

Probate Court may not have more than one clerk in one place but deputy clerks may be appointed in same place by the clerk with the approval of the probate judge.

February 17th 2-26-34  
1934.



Judge D. F. Warren,  
Probate Court,  
Trenton, Missouri.

Dear Judge Warren:-

We have your letter of December 27, 1933, in which was contained a request for an opinion as follows:

"At the present time I have one clerk of this Court and my business is such that I desire to appoint a second clerk.

"I would like an opinion from your office as to whether or not this could be done in Counties of this size; in other words, whether or not I can have two clerks or whether the first should be designated as a clerk and the second as a deputy-clerk. In case you find the latter, should that deputy be appointed, take the oath and give the bond as did the original clerk?"

Section 2049, Revised Statutes of Missouri, 1929, provides in part as follows:

"Provided, that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge and shall hold his office at the pleasure of the judge. Said clerk shall take the oath required of other clerks of court in this state, and before entering upon the duties of his office, shall enter into a bond to the state of Missouri, etc."

Section 2063, Revised Statutes of Missouri, 1929, provides in part as follows:

"In all cases where probate courts are or may be held in more than one place in any county, the judge of probate of said county may, by entry of record in said court at either or each of such places, appoint a separate clerk of the court for either or each of said places, who shall be paid by said judge, and shall hold his office at the pleasure of the judge. Every such clerk shall take the oath required of other clerks in courts in this state, and before entering on the duties of his office, shall enter into a bond to the state of Missouri, etc."

Judge D. F. Warren

-2-

February 17th, 1934.

The question of whether the probate court is allowed to appoint more than one clerk depends upon the two statutory sections above quoted. Section 2049 is authority for the proposition that only one clerk may be appointed since the word "clerk" in the singular is used without any qualifying clause. A reading of the entire section discloses that only one clerk as such is intended. Section 2063 enlarges this somewhat but only in the event that the probate court is held in more than one place in the county, in which event a separate clerk (singular) may be appointed for either or each of said places. From your letter we judge that in your county the probate court is held in only one place, hence only one clerk as such is allowed.

We are, however, of the opinion that you may arrange for the appointment of one or more deputy clerks, and we arrive at such a conclusion by the following reasoning:

A probate court is by Article VI, Section 34 of the Constitution of Missouri, and by Sections 1826 and 2045, Revised Statutes of Missouri, 1929, declared to be a court of record.

Chapter 77 of the Revised Statutes of Missouri, 1929, sets out the law with regard to clerks of courts of record and is so entitled.

Section 11680, Chapter 77, Art. 1. R. S. Missouri, 1929, provides as follows:

"Deputies, their duties.-- Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Since the probate court is a court of record, since the clerks of all courts of record can appoint deputy clerks and since we find no exception in the statutes as to probate clerks in this matter,

Judge D. F. Warren

-3-

February 17th, 1934.

we are of the opinion that the probate clerk has the power to appoint one or more deputies to be approved by the probate judge. The deputy clerk must, according to the above quoted section, take the oath but need not give bond, as the clerk and his sureties are made responsible for the conduct of this deputies.

Very truly yours,

CMHJr:LC

CHAS. M. HOWELL, JR.  
Assistant Attorney General

Approved:

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**SCHOOLS -** A school director cannot enter into a contract with his school board for the sale of insurance or any other commodity - the same being against public policy.

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5131

May 29th, 1934.



Honorable Clarence Wahl, Secretary  
Board of Education  
Louisiana Public Schools  
Louisiana, Missouri

Dear Sir:

We have your request for an opinion upon the following facts:

" 1. Can a director on a school board sell the school district that he represents, any merchandise, or can a school director, who is a fire insurance agent, sell the school district insurance on the school building in his particular district?

2. If this cannot be done, what, if any, is the penalty for the director who has handled transactions of this kind?"

I.

THE SELLING OF ANYTHING TO A SCHOOL BOARD BY  
A PERSON WHO IS A MEMBER THEREOF AND WHO PROFITS FROM  
THE TRANSACTION, IS VOID AS AGAINST PUBLIC POLICY.

#2 - Honorable Clarence Wahl

It would appear that a school director who is an insurance agent would profit from any insurance which he sold the school district of which he was a member of the board of directors. This is especially true in view of the fact that a fixed premium or commission is paid to the agent for each contract of insurance sold, and under the provisions of Section 5868 and Section 5877, Revised Statutes of Missouri, 1929, insurance companies and their agents are prohibited from giving a rebate to the purchaser of insurance. They must, therefore, keep whatever commission is allowed them. It cannot be returned to the school district. The contract, therefore, is one of profit to the school director, acting in his capacity as insurance agent.

The general rule with reference to such transactions, stated in 46 C. J. 1037, Section 308, is as follows:

"A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. Thus public officers are denied the right to make contracts in their official capacity with themselves, or to become interested in contracts thus made, or to take contracts which it is their official business to see faithfully performed; and a board cannot make a legal contract with one of its own members in respect of the trust reposed in it. \* \* "

While we find no express statutory authority prohibiting a school district director from acting as in-



#3 - Honorable Clarence Wahl

insurance agent and selling insurance to his district, nevertheless such a contract is against public policy. *Witmer v. Nichols*, 8 S. W. (2d) 63; 320 Mo. 665; 56 C. J. p. 485, Sec. 515; 13 C. J. p. 434, Sec. 371.

In advancing this opinion, we are not unmindful of the fact that the term "public policy" has no fixed meaning, but should be applied to each particular set of facts, and the reason for this point of view is ably stated in *Lipscomb v. Adams*, 193 Mo. 530, l.c. 542 in the following language:

"To limit the term "public policy" within the bounds of a fixed definition would be to render evasion of the law in that respect a matter of easy invention."

In *State v. Bowman*, 184 Mo. App. 549, l.c. 553, it was said:

"The term 'public policy' is one of broad significance and cannot be comprehensively defined in specific terms. One of the best definitions perhaps is that of Justice Story, which applied the term to that which 'conflicts with the morals of the time, and contravenes any established interest of society.' "

Briefly, it may be said that the sale of merchandise or any other thing of value by a member of a school district to the school board is against public policy. To hold otherwise would merely open the door of abuse to public officers who could meet in their official capacity and divide up their public business by allocating a portion of it to each member of the board. Under such conditions, the administration of public affairs would descend to the level of "casting lots" and a public office would soon cease to be a public trust.

#4 - Honorable Clarence Wahl

It is, therefore, the opinion of this office that any contract of insurance, or sale of merchandise by a member of a school board to the school board or district itself, is void as being in contravention of public policy.

II.

CONTRACTS WHICH ARE AGAINST PUBLIC  
POLICY SHOULD BE CANCELLED.

A school district which has obtained insurance by purchasing the same from some member of its board, should take steps to have that insurance cancelled, and to seek insurance from some agent who is not a member of the school board. Otherwise, the school board, in the event of a loss, may find itself possessed of a contract which the courts will not recognize and which may be held void as against public policy. In this connection, it must be remembered that a public officer, such as a school director, may be held liable for the wrongful payment and disbursement of public funds in his hands. Consolidated School District v. Shawhan et al, 273 S. W. 182.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

ROY McKITTRICK  
Attorney General

FER:FE

Probate Judge:

1. Sheriff must be and remain in attendance upon the Probate Court when the same is in session.
2. The Probate Court has no power to appoint a bailiff as an officer of the Court to keep order, summon witnesses, etc.

June 20, 1934.

Hon. D. F. Warren,  
Judge of Probate,  
Trenton, Missouri.

Dear Sir:-

We have your letter of October 13, 1933, in which is contained a request for an opinion as follows:

"I want to get the opinion of your office about what is meant by the fee allowed the Sheriff for attendance in this Court. It has for many years been a practice here for the Sheriff to come and open the Probate Court and then go on about his business and no more is heard about him or his deputies during the entire day and he turns in a bill to the County Court for \$3.00 on each of those days. The sum total amounts to a good deal in the run of a year and in these times when the tax payers are watching all expenditures, the result is that I am not in session as many days as I would otherwise be on account of this \$3.00 charge.

"What I want to know is whether or not you think that he is entitled to this \$3.00 for merely opening court.

"Also I would like to know if it would be possible for this Court to appoint a Bailiff, someone who would act as an officer of the Court and would be present all of the time to keep order, summons witnesses or juries and carry out the orders of the Court. I am sure that I could at this time get someone to act in this capacity for in the neighborhood of \$1.00 a day and that would result in a saving to the tax payers and make it much more convenient for this court.

"If you rule that I have that authority I wish you would cite me the law and write up a form for an order for me to spread upon my records concerning the appointment of this bailiff, and advise if he should take an oath and, if so, give form of oath."

The fee to which a sheriff shall be entitled for attending a court of record is set by Section 11789, Revised Statutes of Missouri, 1929, at three dollars. The probate court is by Article VI, Section 34

6-28 FILED  
95

June 20, 1934

of the Constitution of Missouri, and by Section 2045, Revised Statutes of Missouri, 1929, declared to be a court of record, hence the sheriff is certainly entitled to the above mentioned fee for attending the said court.

The question then arises whether the sheriff is fulfilling his duty by merely opening the court and not remaining further.

Section 11518, Revised Statutes of Missouri, 1929, provides in part as follows:

"Sec. 11518. Duties generally.--Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace; and he shall attend upon all courts of record at every term, \* \* \* (Underlining ours.)

Section 1870, Revised Statutes of Missouri, 1929, provides as follows:

"Sec. 1870. Duties of Sheriffs.--The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

In the case of State v. Yager, 250 Mo. 388, the Supreme Court of Missouri, through Faris, J., stated at page 403 as follows:

"The defendant was the sheriff of Pike County. It was his duty under the law to be and remain in attendance upon the circuit court of his county when the same was in session (Sec. 11212, R. S. 1909), unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom."

The Section 11212, R. S. 1909 referred to therein is the same section as section 11518, Revised Statutes of Missouri, 1929, quoted earlier in this opinion. In the case of State v. Yager, quoted from above, the question of the attendance of the sheriff in the Circuit Court was at issue but the rule laid down readily applies to a Probate Court since the latter is just as much a court of record as the former.

In view, therefore, of the statutory sections and the decision above referred to we are of the opinion that the sheriff should attend the full session of the court and carry out the orders of the court as provided in said statutory sections.

Hon. D. F. Warren

-3-

June 20, 1934.

There being no statutory authority for the appointment of a bailiff by the court we are constrained to say that such appointment can not legally be made.

Trusting we have answered your questions to your satisfaction,  
we ~~remain~~  
*remain*

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

CMEJr:LC

Approved:

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Attorney General.

22  
County Treasurer & Ex-Officio Collector

Act of 1933 reenacting  
Sec. 12316, R. S. Mo.  
1929, goes into effect  
90 days after adjournment  
or July 24, 1933, and from  
that time on, rate of com-  
mission is based on new  
law.

June 21, 1934.

FILED  
95  
175

Mr. J. S. Walker,  
Treasurer & Ex-Officio Collector,  
Linneus, Missouri.

Dear Mr. Walker:-

We have your letter of October 23, 1933, in which was con-  
tained a request for an opinion as follows:

"Am just writing you for a little official  
information, regarding the commission we should get under  
this emergency law, for collection of 'back tax'.

"Under the old law, in Counties under  
'Township Organization' we were allowed 5% commission,  
the same to be charged as part of penalties, and collected  
from the tax payer.

"Under the new law (Senate Bill #94) which  
goes into effect Jan. 1st, 1934, we are allowed 2% commission.

"I have talked with several attorneys up in  
this part of the State, and they all seem to think that a  
part of a law cannot be placed in effect at one time, and  
another part of the same law, at another time.

"Now the question is, should we charge com-  
mission under the old rate of 5%, or under the new rate of  
2%.

"That is, for this month (Oct.) 50% of the  
original penalties are off, and I am charging commission  
of 1%, or 50% of the new rate of commission, while almost  
all of the collectors are charging 50% of the old rate of  
5%, which is 2 1/2% for this month.

"Please tell me if I am losing out on part  
of my commission, or am I correct?"

Section 12316, Revised Statutes of Missouri, 1929, provides  
as follows:

"Sec. 12316. Treasurer's salary-- county  
collector's commission.--The county treasurer in counties



adopting township organization shall be allowed a salary by the county court as at present provided by law, the county collector for collecting and paying over the same shall be allowed a commission of two per cent. on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and five per cent. on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: Provided, he shall receive nothing for paying over money to his successor in office."

Section 12316, Laws of 1933, pp. 468-9, as reenacted provides as follows:

"Sec. 12316. Compensation of treasurer and collector.--The county treasurer in counties adopting township organization shall be allowed a salary by the county court as at present provided by law, the county collector for collecting and paying over the same shall be allowed a commission of two per cent on all corporation taxes, back taxes, licenses, merchants' tax and tax on railroads, and two per cent on all delinquent taxes, which shall be taxed as costs against such delinquents and collected as other taxes: Provided, he shall receive nothing for paying over money to his successor in office."

Article IV, Section 36 of the Constitution of Missouri provides as follows:

"Sec. 36. Laws take effect, when--emergency, vote required.--No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

The date of adjournment of the legislature which reenacted the act in question was April 25, 1933; hence the act as reenacted should, since there is no emergency clause and no further provision, go into effect ninety days thereafter, or on July 24, 1933.

Mr. J. S. Walker

-3-

June 21, 1934.

You were correct, therefore, in proceeding under the new law in October, 1933.

Very truly yours,

CHAS. M. HOWELL, Jr.  
Assistant Attorney General

Approved:

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Attorney General.

Relating to classification of trucks which come under regulations of P. S. C. and discusses interstate and intra state transportation

February 10, 1934

2-17-34



Mr. W. T. C. Weimer, Manager,  
St. Francois Co. F.B.P. & #. Ass'n.  
Farmington, Missouri

Dear Sir:

This department acknowledges receipt of your letter dated February 1, 1934 in which you state and inquire as follows:

"Pursuant to a conversation held yesterday with the personnel of the Mo. Truck and Terminal Ass'n. in St. Louis, I am writing to set out fully the questions discussed.

Firstly, we operate our trucks on a farm to market basis hauling our own merchandise from central markets. We are organized under the Co-operative laws of the State and duly incorporated. Stock in our concern is held by farmers or land owners in this trade territory.

Question #1: Mr. X who owns some of our stock and has a farm in Louisiana wishes us to haul a load of mules to his La. farm. Would he be entitled to our services in this delivery? What, if any, arrangement would have to be made with the states traversed by our trucks?

Question #2: We have a bunch of cattle owned by the Association which we anticipate selling to Mr. X and delivering them to his La. farm. Are we entitled to interstate haul in this case without special license in any of the foreign states traversed?

Question #3: Mr. B who is a local stock buyer and owns stock in our concern, wishes us to haul

cattle to St. Louis, that he has bought from local farmers. Can we haul for him operating as farm to market haulers?

I would appreciate very much your earliest possible answer on these questions. \* \* \* \*

I.

Motor trucks, which come under the Regulations of the P.S.C. are classified, from the manner in which they are used, into two classes, namely "Motor Carriers" and "Contract Haulers."

Section 5264, Laws of Missouri, 1931, p. 306, reads in part as follows:

"(a) The term 'motor vehicle,' when used in this act, means any automobile, automobile truck, motor bus, truck, bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

(b) The term 'motor carrier,' when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier. Provided, however, this act shall not be so construed as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within any municipal corporation or a municipal corporation and the suburban territory adjacent thereto forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation.

(c) The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined.

For the purpose of this opinion, may it be said that Section 5264, supra, defines a motor vehicle as follows:

"Any automobile, automobile truck, motor bus, truck, bus or any self-propelled vehicle not operated or driven upon fixed rails or tracks."

Subdivisions (b) and (c) of said section, as they relate to trucks, classify the same by the manner used, into two classes. For convenience, we will call them "Motor Carriers" or Class (a) and "Contract Haulers" or Class (b), and define them in effect as follows:

"Class (a) or motor carriers are defined as the equivalent of that of a common carrier.

Class (b) or contract haulers, are defined as any person, firm or corporation engaged as his or its principal business in the transportation for compensation or hire of property for a particular person, persons or corporations, to or from a particular place or places, under special or individual agreement or agreements, and not operating within the corporate limits of a city or town and its suburban territory."

It readily appears that said legislative Act contains comprehensive and explicit provisions with reference to "contract haulers," wholly separate and apart from those regulations appertaining to "motor carriers". However, many provisions are common to both. Since neither of the questions presented in your request deal with that class defined as "contract haulers", therefore that phase of

the law relating to them will not be dealt with further in this discussion.

We are of the opinion from the questions presented in your request that all hauls made or contemplated to be made by the truck owned by your association are either exempt or that of a common carrier, and upon that hypothesis we proceed.

## II.

All farm-to-market hauls are such transportations as are exempt from the regulations of the P.S.C. and the law.

Section 5265, Laws of Missouri 1931, p. 306 provides as follows:

"The provisions of this act shall not apply to any motor vehicle of a carrying capacity of not to exceed five persons, or one ton of freight, when operated under contract with the federal government for carrying the United States mail and when on the trip provided in said contract; nor any motor vehicle owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to warehouse, creamery, or other original storage or market; nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof."

Now bear in mind we are discussing trucks for hire only, and not trucks used to transport stock, goods and/or merchandise belonging to the owner of a truck. Within the meaning of the law a motor vehicle as defined herein, used exclusively in transporting farm and dairy products from the farm or dairy to a warehouse, creamery



or other original storage, or to market, is exempt. For example: if Mr. X, a producer of livestock, such as cattle, hogs, horses, mules, etc., desires any of said livestock transported to market and employs the truck of your association to transport said stock, such a transportation would constitute a farm-to-market haul, and exempt. However, no freight for hire could be transported on the return trip by said truck or the whole operation would lose its exemption and be subject to the jurisdiction, orders and regulations of the Public Service Commission.

We are of the further opinion, derived from the statutory provisions herein cited, that if Mr. X, employs the truck of the Association to transport any stock from one farm to another, not for sale, then such a haul would not be exempt, but that of a common carrier movement and not a farm-to-market haul. Of if Mr. X purchases livestock, such as mentioned herein, from a producer and employs a truck of the Association to transport said stock to market or other point of destination, such transportation would not be exempt either.

### III.

Trucks, which come under the regulations of the P.S.C and the law, are either engaged in interstate transportation or intra state transportation.

Your inquiry also raises the question of interstate and intra-state transportations. Interstate transportation embraces hauls from a point within a given state to a point without that state, so a truck licensed as a common carrier within this state could not on that license lawfully make a haul of goods, stock, etc., in transit to a point without this state, for such would be interstate transportation and under Federal regulation, or jurisdiction of the state or states through which such goods, stock, etc., are transported. For example: if Mr. X in this state, the owner of livestock such as mentioned herein, desires said stock transported to a point--say, in New York State--and employs the truck of your association to haul same from the point of origin in this state to the state line, there to be transferred to another truck to haul to its destination in New York State, then, in our opinion, the Association's truck so used would be engaged in interstate hauling, as the haul made by said truck from the point of origin to the state line constitutes a link in the transportation from a point within this state to a point within New York State, and being an interstate haul and having only an intrastate certificate or permit, the operation would be unlawful. Intrastate transportation is transportation within the state, not forming a link

Mr. W. T. C. Weimer.

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February 10, 1934.

in interstate hauls.

We have endeavored to answer all the questions in your request and trust you will find them helpful.

Respectfully submitted,

W. W. BARNES,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

FWB:MM

TAXATION AND REVENUE: - Interstate Commerce under of 1933, Section 9,  
House Bill No. 5 - Applicability of Act to receipts  
by newspaper publisher in Missouri from advertising  
and newspaper service furnished to advertiser outside  
of Missouri.

3/13  
March 9, 1934.



Messrs. Watson, Ess, Groner, Barnett & Whittaker,  
Dierks Building,  
Kansas City, Missouri.

Gentlemen:

Your letter of February 26, 1934 has been received in which you requested an opinion on the applicability of the Act of the General Assembly of Missouri Special Session 1933, House Bill No. 5 to receipts from newspaper service and newspaper advertising by the publisher of a newspaper published in Missouri from an advertiser outside of Missouri. In order that the facts furnished by you on the basis of which we are rendering this opinion may be clear we deem it advisable to quote your letter above referred to in full, such letter being as follows:

"At the conference which you had with Mr. McCollum and me at Jefferson City on February 24th we informed you of the general course of business followed by the Kansas City Star in handling advertising. It was the purpose of that discussion to acquaint you with the facts so that you might render an opinion as to what portion, if any, of the gross receipts derived from advertising would be returned as a basis for the tax prescribed by House Bill No. 5, enacted by the legislature at the special session held in 1933. So that you may have the facts before you for such purpose this letter is written.

Preliminary to a discussion of the facts and the construction of the Act we wish to repeat what was said at the conference that it was quite clear that the receipts derived from circulation are not within the Act. This is so obvious that we do not discuss it further.

At our conference you inquired as to Mr. McCollum's conception of 'newspaper service.' This term is not defined by the Act. Mr. McCollum's conception of the term, which is based upon familiarity with the service gained from a long experience in the newspaper publishing business, is that it must mean services such as the furnishing of cuts or plates by a newspaper for a stipulated fee or the furnishing of such services by an advertising agent who prepares the copy, cuts and plates and charges the advertiser therefor. In the first instance the newspaper service would be furnished by a newspaper, while in the second instance it would be rendered by the advertising agent. But in both cases the advertiser would pay the fee for this service and the parties receiving the fee, if the service was rendered in Missouri, would pay the tax on the gross receipts derived from furnishing the same, subject to the qualification that the advertising to be printed and distributed was not distributed wholly or partially in interstate commerce. If the advertising was

March 9, 1934.

distributed in interstate commerce then the furnishing of the cuts, plates, and copy is so inseparably connected with the advertising that the gross receipts would not be subject to tax. If the advertising was distributed partially in interstate commerce and partially in intrastate commerce, then the portion of the gross receipts allocable to the distribution made in the state would be subject to the tax. This last applies, of course, only to the case where the contract is entered into in Missouri and the plates and cuts are manufactured and delivered in Missouri.

Having disposed of these preliminary matters which are merely mentioned because of their brief discussion with you, we now pass to a discussion of the methods employed by the Kansas City Star in newspaper advertising.

The aim of the advertiser, of course, is to have his advertising copy read by newspaper subscribers who are potential purchasers of his product, with the hope that better and greater distribution thereof may be made. We will outline the methods by which this result is accomplished by the advertiser and the metropolitan newspaper. These newspapers usually have offices in the large cities such as New York and Chicago, for the purpose of contacting with advertisers whose products have general distribution and who have need for advertising to insure such distribution. When one of these concerns concludes that it is going to advertise in the newspaper it enters into a contract with its advertising agent, probably in Chicago or New York, and authorizes such advertising agent to place the advertising agreed upon at the agreed rates, in the newspaper. After this contract or order is entered into the advertising agent of the advertiser writes the copy and makes the necessary drawings and cuts. The agent then makes the electrotypes or mats from these. The mats or plates are then furnished to the newspaper in which the advertisement is to appear, by the advertiser through his advertising agent, along with the contract or order and such other instructions, information or intelligence as may be given to the newspaper by the advertiser or his agent. When the newspaper receives the electrotypes or the mats it puts them into form and makes a matrix mold and from this form it puts them in a curved casting box. A curved plate which is thereby cast is attached to the press which is then ready to produce the advertisement for distribution to the newspaper subscribers. After the printing is completed the newspaper is then distributed to the subscribers in Missouri, Kansas and the other states where the Star is read.

Newspaper advertising is sold on the basis of circulation and coverage, determined from time to time by an organization known as the Audit Bureau of Circulations. This bureau maintains a staff of auditors who at frequent intervals audit the circulation of all newspapers and furnish advertisers with such audits showing the circulation and coverage of such newspapers. Thus from the bureau's audit the advertiser knows how many subscribers the newspaper had and where those

subscribers are located. This enables the advertiser to cover both the markets and the population within any area in the country. Hence, when a New York advertiser purchases advertising in the Kansas City Star he knows that his advertising will be read by the subscribers of that newspaper who reside in Missouri, Kansas, Oklahoma and other states. The advertiser in using that medium is seeking to advance the sale of his products to those subscribers.

According to Section 2 A. the tax imposed by House Bill 5 is for the privilege of a person engaging in the business, among other things, of newspaper advertising and newspaper service, measured by the gross receipts derived from such business. Under Section 3 there is specifically exempted from the provision of the Act and from the tax levied and imposed thereby, such portion of the gross receipts as may be derived from business conducted in interstate commerce, which the State of Missouri is prohibited from taxing under the Federal Constitution. If the course of business followed by the newspaper in newspaper advertising as above detailed, constitutes interstate commerce, then the gross receipts derived therefrom cannot be made the subject of a tax. A consideration of those facts and the applicable principles of law announced by the Federal and State Courts leads to the conclusion that such business is purely interstate in character and is exempted from the tax.

It must be borne in mind that the ultimate aim of the advertiser is to place the advertising copy in the hands of the newspaper reader. The sequence of acts necessary to accomplish this end commences with the transportation of the copy or plates and other intelligence, to the newspaper in Missouri, to be followed by the printing of the newspaper in Missouri and thereafter with its distribution to the subscriber. It was held by the Supreme Court in *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347:

'Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible; it carries only ideas, wishes, orders, and intelligence.'

The Circuit Court of Appeals for the Eighth Circuit, in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, held that the transportation or communication of intelligence constitutes interstate commerce just as much as the transportation of goods or merchandise. The Court said:

'Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce. \* \* \* It is sufficient to say that as new methods of transacting business are devised, if they are found



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to be in effect methods of carrying on commerce in any business, and the means for commercial transactions between the owner of the article on the one hand, and the person who wants to deal in it or use it in carrying on his business on the other hand, whether it be manufacturing, selling, trading, leasing, transportation, communication, or information, and it is sent or transported from one state to another, it is interstate commerce, and therefore, subject to be regulated by Congress under the commerce clause of the Constitution.'

This language of Judge Sanborn was approved by the Supreme Court of Missouri in *Securities State Bank v. Simmons*, 251 Mo. 2, 12.

It has been settled that the circulation and distribution of newspapers between the various states is interstate commerce. In *Post Printing & Publishing Co. vs. Brewster*, 246 Fed. 321, the Court held that a statute of Kansas which prohibited newspapers from printing and publishing a newspaper containing cigarette advertising was unconstitutional, because the statute was a burden upon interstate commerce. The Court said in part:

'That the business of printing and publishing a newspaper such as that printed and published by the plaintiff in the case in the State of Missouri, and causing the copies thereof to be carried into this State and here delivered to subscribers and customers of the plaintiff through its agents and representatives, as alleged in the petition herein, constitutes the doing of interstate commerce business, cannot to my mind be disputed.'

The Supreme Court of Kansas recently in *Little v. Smith*, 124 Kan. 237, 242, said:

'Advertisements of goods in interstate commerce is an aid to the sale and must be regarded as an essential part of the business. \* \* \*

Newspapers and other media of conveying information regarding proper subjects of interstate commerce must be deemed to be engaged in such commerce. Cigarettes transported from other states, sold in original packages, is commerce, and contracts for advertising and the newspapers themselves carrying such information and advertisements, in order to promote sales, are within the protection of the commerce clause of the Constitution. \* \* \* The \* \* \* articles advertised were legal subjects of commerce, \* \* \* publishers of newspapers carrying advertisements of articles were engaged in interstate commerce and \* \* \* prohibition of such advertising and circulation of the newspaper was beyond the power of the state to enact, and constituted a violation of the commerce clause of the Federal Constitution.'



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The fact that certain operations are made on the plates so as to conform them to the printing presses and in order that the printing may be done in Missouri, does not in any way alter the character of the interstate transaction.

We call your attention to *Caldwell v. North Carolina*, 187 U. S. 622, which is the so-called 'picture frame' case. Here the vendor shipped the picture frames and the pictures in separate bundles into the state of North Carolina where the pictures were placed in the frames and were then distributed to the buyer. The Court held that placing the pictures in the frame and selling the picture and frame in the state did not alter the interstate character of the entire transaction and held that a license fee for the conduct of such business could not be imposed.

A leading case upon the proposition is *International Text Book Co. v. Pigg*, 217 U. S. 91. In this case *International Text Book Co.*, a foreign corporation, maintained an office within the state of Kansas. At this office it had a staff of collectors and instructors who performed services within the state in connection with the Company's business. It was shown that the Text Book Company had entered into contracts with students located in Kansas, after which texts, questionnaires, pamphlets and papers were forwarded to the student, who was aided by resident instructors in the course of his studies. The question presented to the Court for determination was whether the business was such that it was subject to the regulation of the state, or whether it was interstate commerce. In holding that the business transacted was interstate commerce, the Court said, 1. c. 106-107:

"It involved, as already suggested, regular and, practically continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode - - looking at the contracts between the Textbook Company and its scholars - - involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different states - - particularly when it is an execution of a valid contract between them--is as much intercourse, in the constitutional sense, as intercourse by means of the telegraph - 'a new species of commerce,' to use the words of this court in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9. In the great case of *Gibbons v. Ogden*, 9 Wheat. 1, 189, this court, speaking by Chief Justice Marshall, said, 'Commerce, undoubtedly, is traffic, but it is something more; it is intercourse.' Referring to the constitutional power of Congress

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to regulate commerce among the States and with foreign countries, this court said in the Pensacola case, just cited, that 'it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.' This principle has never been modified by any subsequent decision of this court."

The Supreme Court of Missouri in *International Text Book Company v. Gillespie*, 229 Mo. 397, held to the same effect upon practically an identical statement of facts.

In *Star-Chronicle Pub. Co. v. United Press Ass'n.*, 204 Fed. 217, contracts were entered into between the Missouri publisher and the Press Association operating from Chicago and New York, under which the Press Association furnished news service from Chicago and New York to the publisher in St. Louis. The office of the Press Association was maintained in the publisher's building in St. Louis. From this office the publisher maintained a 'pony' service from St. Louis to smaller towns in the state. The publisher also furnished the St. Louis office of the Press Association with local news gathered in Missouri. The Court held that the contract and all of the service rendered was interstate in character and not subject to separation.

In *Lyons v. Federal System of Bakeries*, 290 Fed. 792, it was held that lease and mortgage contracts under which equipment is sent into another state for use there and the collection of royalties for such use is an interstate transaction.

The Supreme Court of Utah in *State v. Salt Lake Tribune Pub. Co.*, 249 Pac. 474, held that advertising contracts entered into with out-state advertisers for the publication of cigarette advertising within the state of Utah and the publication of that advertising in the state, all constitute interstate commerce not separable and all subject to the protection of the commerce clause of the constitution.

A case also very much in point in this consideration is that of *United States v. United Shoe Machinery Co.*, 264 Fed., 158, where it appeared that leases for the installation and use of the machines were entered into and the machines shipped into the state. The Court held that the execution of the leases followed by the transportation of the machines constituted interstate commerce.

In *Lanke v. Farmers Grain Company*, 258 U. S. 50, the state sought to tax and regulate a grain elevator which stored grain bought and stored entirely within the state and which was then loaded out of the elevator and shipped entirely without the state. The Court held that the entire business was interstate and that the state in which the buying and storage took place could not tax or regulate the business or the privilege of engaging in the business, or the receipts derived from the business.

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We recognize that the tax imposed by House Bill 5 is not levied upon the advertising contracts, but is levied upon the advertising services. The act of merely entering into the advertising contracts, of course, does not constitute interstate commerce.

In *Blumenstock Bros. v. Curtis Publishing Co.*, 252 U. S. 436, the advertising contract did not involve any movement of intelligence, but the Court did say that the execution of the contract, coupled with the furnishing of intelligence did constitute interstate commerce. There was no interstate transmission of intelligence involved in this case. See the opinion of the Court, page 442. Upon this ground alone the Court distinguished the case from *International Text Book Co. vs. Pigg*.

We concede that merely the execution of an advertising contract would not constitute interstate commerce of itself, but where the execution of the contract is followed by the transmission of intelligence in interstate commerce, such as is done under the method by which advertising is handled for the outstate advertiser, the transaction is wholly interstate commerce. The newspaper merely uses the plate and prints the copy in its newspapers, after which the copy moves to the subscriber. The newspaper distributes the advertiser's copy to the subscriber and in so doing it is merely passing on to the subscriber the intelligence which it received by the instrumentality of interstate commerce.

Your attention is directed to *Bowman v. Continental Oil Co.*, 256 U. S. 642, where the Supreme Court held a privilege tax void because the act imposing the tax did not segregate intrastate business from interstate business. It appears here that the legislature had the foregoing principles well in mind when it enacted House Bill No. 5, for Section 3 of the Act provides for the exclusion or exemption of transactions in interstate commerce as being subject to the tax and thus enables the state to tax transactions which involve intrastate commerce and to exempt transactions which affect interstate commerce.

Applying the principles stated in the foregoing authorities and many others which we could cite upon this academic principle, it seems conclusive to us that the first method of handling advertising is wholly interstate from its inception to the end and that no part of the receipts derived from such advertising is subject to the tax under House Bill No. 5.

The other method of handling newspaper advertising is where the copy of plates may be delivered by a Missouri advertiser at the newspaper's place of business in Missouri, or where the Missouri newspaper may manufacture the cuts or plates in Missouri and where instrumentalities of interstate commerce are not utilized for the transportation of the plates, copy, or any other intelligence relating to such copy, cuts or plates. It would seem clear that as to such of the advertising as may be distributed in Missouri the gross receipts derived from such distribution would

March 9, 1934.

be subject to the tax. Likewise it is equally clear that the tax could not be imposed upon the gross receipts derived from such advertising as to the distribution made of the advertising in states other than Missouri, because this would be interstate commerce.

After you have given consideration to the facts and conclusions herein stated it would be appreciated if you would give us your opinion relative thereto."

As we understand your position the claim on behalf of your client for exemption from tax on account of receipts derived from out-of-state advertisers in payment for newspaper service and newspaper advertising rests on two bases, I because certain things used by the newspaper in furnishing the service or advertising have come to the newspaper in interstate commerce, such things being either tangible, such as cuts, plates, etc., or intangible, such as intelligence or ideas (as to written matter, this classification of tangibles or intangibles will cover it) whether it be regarded as the intelligence which is the valuable part of that which is sent in interstate commerce, or the physical substance upon which it is written, and II because the newspaper in which the advertising matter appears is sent or sold in interstate commerce. We shall take up these two considerations separately and in order.

I.

The tax imposed with respect to the sale of "newspaper advertising" would be measured by the receipts of the newspaper from the advertiser because it is the newspaper which is selling the advertising service, and the advertiser which is paying for it. No payment is made by the newspaper to the advertiser for shipping any plates, cuts or other tangible property for use in connection with printing or for the sending in by the advertiser of intelligence or any sort of copy for publication and, therefore, there could be no sale of anything so sent from the advertiser to the newspaper or any receipts on account of such transmission. If the newspaper were buying such information or intelligence from a person outside the state then the case of *Star-Chronicle Publishing Co. v. United Press Associations*, 204 Fed. 217 (C. C. A. 8th, 1913) might become relevant as nothing tangible need pass in an interstate transmission to make such transmission interstate commerce. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347 (1903), *International Text Book Co. v. Pigg*, 217 U. S. 91 (1910). Likewise, if a person outside the state were selling or furnishing for some consideration plates, cuts or other tangible personal property to the newspaper and sending such property in to the newspaper in interstate commerce as a part of a sale or lease thereof, it might well be that this would be a sale in interstate commerce and no tax could be levied with respect to receipts from such a sale. *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887); *Real Silk Hosiery Mills v. Portland*, 265 U. S. 325 (1925). However, there is no sale of any kind of either the intelligence or the tangible property from the advertiser to the newspaper. The advertiser pays the newspaper a certain sum for printing upon a certain portion of the newspaper material furnished by the advertiser. The newspaper sells nothing tangible to the advertiser,



the only sale of tangible property by the newspaper being a sale of the newspapers themselves, and these are not sold to the advertiser but to subscribers. If the advertiser desires its advertisement to be only printed matter, it may be that nothing tangible will pass in interstate commerce from the advertiser to the newspaper and if the advertiser wishes its own plates, cuts, etc. used in connection with the printing the shipment which it may make in interstate commerce is not a part of any sale or lease of such tangible property, because the sale with respect to which the tax is levied is a sale by the newspaper to the advertiser and not by the advertiser to the newspaper. Aside from the sales of the newspapers themselves, the only sale involved in the transaction is a sale from the newspaper to the advertiser of the advertising service or space, and the fact that the newspaper in supplying such space or service uses cuts, plates or intelligence which have been brought into this state in interstate commerce does not exempt the occupation of making such sales from taxation any more than the occupying of selling personal property in this state is exempted from taxation because the goods sold have been shipped in from outside the state. *Woodruff v. Parham*, 8 Wallace 123 (1869); *Brown v. Houston*, 114 U. S. 622 (1885); *Machine Co. v. Gage*, 100 U. S. 676 (1880). To decide otherwise would logically require exempting the sale of a law book in Missouri printed in this state because it contained the report of a decision by the House of Lords.

## II.

As to the fact that the newspaper in which the advertising appears is distributed partially or wholly in interstate commerce, the contention that the advertising service is a transaction in interstate commerce because of such interstate distribution or sale is answered by the case of *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436 (1920). There complainant engaged in the business of acting as agent for the purchase for its principals of advertising space in magazines published by respondent filed his complaint for damages under the Sherman Anti-Trust Act alleging a monopoly by the defendant. The complainant alleged:

"\* \* \* that the business of editing, publishing, and distributing throughout the United States the advertising matter contained in said publications, pursuant to contracts made with its customers and advertising agencies, was interstate commerce;" \* \* \* (252 U. S. 438).

and the Court, in defining the issue in the case, said:

"It follows that if the dealings with the defendant, which form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act." (252 U. S. 441).

It was held that the declaration stated no case, and the court said:

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"In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration." (252 U. S. 442).

There is no question that the sale of a newspaper by a person in one state to a person in another state as a part of which the newspaper is to be delivered by a movement in interstate commerce is a sale in interstate commerce and that no tax could be imposed on account of such a sale, whether the newspaper be regarded in its physical aspect, *The Lottery Case* (1903), or in its non-physical aspect as the transmission of intelligence, *International Text Book Co. v. Pigg*, supra. This was all that was decided in *Post Printing and Publishing Co. v. Brewster*, 246 Fed. 321, District Court Kansas, 1917, i. e. that since interstate sales could not be prohibited by prohibiting the sale of the newspaper qua newspaper, so it follows that the same result could not be reached by saying that the sale could be prohibited unless the paper left out a valuable part thereof, for the whole sale was exempt from state interference, because the whole paper was only the sum of its parts.

It is undeniably true that the newspaper acts as the middle link in a chain for transmitting ideas from the advertiser to members of the public, and that ideas pass by such chain from advertisers in one state to members of the public in other states, and that what the advertiser pays for is the service of the newspaper in transmitting such ideas, but these considerations were present with even greater force with the *Saturday Evening Post*, *Blumenstock Bros. Advertising Agency v. Curtis Publishing Company*, supra.

A tax is imposed upon the occupation of selling measured by receipts from sales. The sale involved is not the sale of the newspaper containing the advertisements, for the newspapers were sold to subscribers, and the fact that such sales to subscribers are in interstate commerce cannot affect taxes based on receipts from other sales to other persons of something entirely different. If it could, a newspaper by having one out-of-state subscriber could say that carrying a want ad for a cook for a local resident was a transaction of interstate commerce, and the receipts therefrom exempt from taxation.

As to the type of "newspaper service" described in the third paragraph of your letter, the above will answer your question on the effect of interstate circulation on taxability on account of receipts from advertising. As to the last sentence of your third paragraph, the application of the tax to receipts from advertisers is not affected by the place of entering into the contract, as it is the service of publication from which the receipts



11. Messrs. Watson, Ess, Groner, Barnett and Whittaker

March 9, 1934.

are derived and not the entering into of the contract, nor is taxability affected by the place of manufacture or delivery of cuts, plates, etc. because the receipts with respect to which the tax is imposed with which we are concerned are receipts from the sale of the service to the advertiser, and not receipts from the sale of the plates, cuts, etc., to the paper by their manufacturer, or the sale of the plates to the advertiser by a manufacturer or advertising agent. The only receipts which we are considering are the receipts of the newspaper.

In conclusion, it is our opinion that receipts of a newspaper published in Missouri from advertisers outside of Missouri from publishing advertisements in or furnishing services in connection with such publication in such paper subject the publisher of the paper to a tax on account of engaging in the occupation of furnishing such service, and the fact that tangible personal property is sent into the state for use in printing such advertisements or furnishing such services, and the fact that the newspaper containing such advertisements is partially sold in interstate commerce, do not make receipts from such advertisers receipts from business conducted in interstate commerce, and that all of such receipts are taxable under the Act of the 1933 Special Session of the General Assembly of Missouri, House Bill No. 5, and that this would be true regardless of the place at which the advertising contract was entered into.

Yours very truly,

EDWARD H. MILLER

ASSISTANT ATTORNEY GENERAL.

APPROVED:

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ATTORNEY GENERAL.

SPECIAL ELECTIONS: Sec. 10389 not applicable - only necessary to appoint two judges and two clerks at each polling place for the Bond Election on May 15, 1934.

April 12, 1934

Hon. Gordon Weir,  
Prosecuting Attorney,  
Greenfield, Missouri.

Dear Sir:

This department is in receipt of your letter of April 5, 1934 requesting an opinion as to the following state of facts:

"The County Court wants to know if they will be required to select six judges and four clerks for the election to be held the 15th day of May, 1934, on the bond question or can they select only two judges and two clerks to take care of this, as this number, they think will be sufficient to do the work."

Section 10389, R. S. Mo. 1929 provides in part as follows:

"Whenever a proposed amendment to the Constitution or the proposition: 'Shall there be a convention to revise and amend the Constitution?' shall be submitted to the voters at a special election, said election shall be conducted in the manner provided by law for general elections and said propositions shall be submitted, voted on, the returns certified and the results proclaimed in the manner provided by law in case such propositions are submitted at a general election: Provided that it shall not be necessary to hold said election with booths for the voters and that said election shall be conducted by two judges and two clerks at each polling place, one judge and one clerk to be selected from each of the two parties which cast the highest and next to the highest number of votes for governor at the last general election;

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April 12, 1934.

except that in cities and counties where registration of voters is now provided for by law that said special elections shall be held in accordance with the provisions of law now in effect applicable to the holding of elections in said cities and counties: \*\*\*\*\*"

Dade County is a county having a population of some 11,000 inhabitants and there is no special law providing for registration of voters.

The general law respecting elections with reference to the appointment of judges is Section 10206, R. S. Mo. 1929, which provides in part as follows:

"In all counties in this state, four judges of election shall be appointed by the county court for each election precinct in each of said counties;\*\*\*\*"

This section is expressly made inapplicable to special elections held to amend the Constitution; it is therefore the opinion of this department that by reason of Section 10389, supra, it is only necessary to appoint two judges and two clerks at each polling place for the bond election to be held on the 15th day of May, 1934.

Respectfully submitted,

JOHN W. HOFFMAN, Jr.,  
Assistant Attorney General

APPROVED:

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ROY McKITTICK,  
Attorney General

JWH:AH

PHYSICIANS: ) A registered physician may hold himself out to the  
CHIROPODISTS: ) public as a chiroprapist, and in so doing does not  
violate criminal law.

5-1

May 1, 1934.



Hon. F. Richard Weber  
Member, House of Representatives  
341-2-3 Ridge Building  
Kansas City, Missouri

Dear Mr. Weber:

This is to acknowledge your letter as follows:

"I would appreciate it very much if you would give me the opinion of the Attorney General's Office on the following proposition:-

Can a duly licensed physician,- that is one holding an M. D. Degree,- also licensed in the State of Missouri, advertise and hold himself out and use the term, Chiroprapist?

There seems to be some misunderstanding between the Chiroprapist Association in regard to the use of this term by any-one other than a licensed Chiroprapist."

Section 9111, R. S. Mo. 1929, provides that:

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, \* \* \*."

A person licensed and registered as a physician may treat the human body of any of its infirmities. Thus, a registered physician may treat ailments of the human foot.

In your letter you state that the person holding himself out to the public as a chiropodist is a licensed physician in this State.

Article 4, Chapter 52, R. S. No. 1929, pertains to "chiropody". Section 9075 defines "chiropody" as follows:

"The definition of the word 'chiropody' shall, for the purpose of this article, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and massage in connection therewith except amputation of the foot or toes, or the use of anaesthetics other than local, or the use of drugs or medicine other than local antiseptics."

Section 9080, of the same article and chapter, provides the following:

"It shall be deemed prima facie evidence of the practice of chiropody, or of holding oneself out as a practitioner within the meaning of this article, for any person to treat in any manner the human foot by medical, mechanical or surgical methods, or to use the title 'chiropodist' or 'registered chiropodist,' or any other words, or letters, which designate, or tend to designate, to the public that the person so treating or holding himself or herself out to treat, is a chiropodist."

Section 9088, R. S. No. 1929, provides in part the following:

"This article shall not apply \* \* \* \* \*  
nor to any physician duly registered,  
\* \* \* \* \*."

May 1, 1934.

The word "chiropody" has a well defined meaning with the public, namely, that of treatment of ailments of the human foot. And the statute provides that only those who are registered as a "chiropodist" may treat such ailments; however, registered physicians are exempted. Thus, the provisions of article 4, chapter 52, do not apply in any particular to a registered physician. A registered physician may do all things that a registered chiropodist may do.

The Legislature has undertaken to regulate, as a safeguard to the public, persons from treating ailments of the human body unless such be competent; a person being deemed competent when he has met the qualifications required by statute. In other words, the public is protected against fraud. Thus, if one holds himself out as a chiropodist he must be qualified and licensed under the law to treat ailments of the human foot; and a registered chiropodist is qualified, and so is a registered physician.

It is our opinion that a licensed registered physician may hold himself out to the public as a chiropodist and in so doing does not violate the penal statutes of the State of Missouri.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

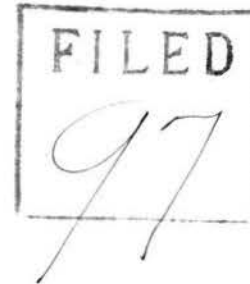
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SCHOOLS: Employment of teachers and number thereof discretionary with board -- contingent upon funds in possession or amount voted.

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May 24, 1934.



E. F. Weir, M. D.  
President of School Board  
Meadville, Missouri

Dear Doctor Weir:

This is to acknowledge your letter, as follows:

"We have 33 average daily attendance in High School, only enough for three high school teachers. Can we employ another high school teacher legally and use the school funds to pay his salary? Or the taxpayers money to employ a music teacher. I am anxious to know so that we may be able to complete our teaching staff."

I.

Section 9207 R. S. Mo. 1929, provides in part as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district etc."

Section 9209, Laws of Missouri, 1933, page 387, provides in part as follows:

"The board shall have power, at a regular or special meeting called after the annual school meeting, to contract with

and employ legally qualified teachers for and in the name of the district;  
\* \* \* \*. All transactions of the board under this section must be recorded by and filed with the district clerk."

Thus, the management and control of the school and employment of the teachers therein, is vested in the board.

## II.

Section 9213, R. S. Mo. 1929, provides:

"The board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district. Such gratuitous education, however, shall be provided only out of revenues derived by such school district from sources other than those described in section 6, article XI of the Constitution of this state, and only with so much of such revenues as are not required for the establishing and maintaining of free public schools in such school districts for the gratuitous instruction of persons between the ages of six and twenty years: Provided, that nothing in this section shall be construed as affecting the basis of apportionment of the public school fund of this state as now fixed by law."

Section 11, Article X, Constitution of Missouri, provides in part as follows:

"For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on

the hundred dollars valuation and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers voting at an election held to decide the question, vote for said increase. \* \* \* \*."

Section 9214, R. S. Mo. 1929, provides:

"The board of directors of each district shall, on or before the fifteenth day of May of each year, forward to the county clerk an estimate of the amount of funds necessary to sustain the schools of their district for the time required by law, or, when a longer term has been ordered by the annual meeting, for the time thus decided upon, together with such other amount for purchasing site, erecting buildings or meeting bonded indebtedness, and interest on same, as may have been legally ordered in such estimate, stating clearly the amount deemed necessary for each fund, and the rate required to raise such amount."

Section 9225, R. S. Mo. 1929, provides:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation for school purposes, or when any five resident tax-payers of such district shall petition

such board, in writing, that they desire an increase on the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district within the maximum rates prescribed by the Constitution for such purposes, and shall submit to the voters of said school district, at an election to be by such board called and held for that purpose, at the usual place of holding elections for members of such board, whether the rate of taxation be increased as proposed by said board, due notice having been given as required by section 9283; and if a majority of the voters who are taxpayers voting at such election on the proposition to increase levy shall vote in favor of such increase, the result of such vote, and the rate of taxation so voted in such district, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on the receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all the taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

See also, *Kansas City, Fort Scott and Memphis Railroad Company v. Chapin*, 162 Mo. 409.

It is thus seen that the board of directors of each district shall estimate the funds necessary to sustain the school for the ensuing year but said board is limited to the amount of the estimate by the Constitution and as provided by Section 9225, supra, if it becomes necessary to increase the annual rate of taxation for school purposes, then such must be done by petition and submitted to the voters of the school district.

## CONCLUSION.

Hereinabove it was shown that the board of directors have the management and control of the school; also, the employing of teachers; also, the estimating of the amount of funds necessary to sustain the school. It is incumbent upon the school board to provide for such needs (teachers) of the school district, to the end that gratuitous instruction will be provided for the pupils. The number of teachers to be employed is discretionary with the board. However, the board is limited to the number of teachers if the estimate for the paying of such teachers' wages exceeds the amount of the forty-cent levy on the one hundred dollars valuation; in which event, must be voted by the taxpayers.

Therefore, if a school district has enough funds or votes more money with which to employ additional teachers, then, in our opinion, such teacher, or teachers, may be employed and funds expended for their wages.

Yours very truly,

James L. HornBostel  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JLH:EG

ELECTIONS: Vacancies occurring before primary must be filled after the primary election.

7-16  
July 13, 1934.



Mr. R. F. White  
Attorney at Law  
Eldon, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion as to the following state of facts:

"Here, in Miller County, our candidate for County Clerk, has withdrawn, he being the only candidate for said office, leaves a vacancy in the Democrat Ticket, for the Primary Election. Now the question has arose, Can the county central committee fill the vacancy before the Primary or will it be necessary to wait until after the primary election and have such vacancy filled by the newly-elected committee.

Section 10268 R. S. 1929 does not seem to be clear on this particular point."

Section 10268, R. S. Mo. 1929, provides:

"Vacancies occurring after the holding of any primary or where no person shall offer himself as a candidate before such primary, shall be filled by the party committee of the district, county or state, as the case may be: Provided, however, that no name shall be allowed on any ticket until the required fee shall have been paid."



July 13, 1934.

It will be noticed that this section provides for the filling of vacancies only after the primary elections. As to this point the Supreme Court of Missouri in the case of State ex inf. Barrett v. McClure, 299 Mo. 688 said (l. c. 694):

"It is further contended that under the terms of the statutes quoted a political committee could fill only a vacancy on the ticket nominated; that vacancies referred to do not mean vacancies in an office. Of course a political committee can fill only a vacancy occurring on the ticket nominated. \* \* \* \* \*

\* \* \* \* \*

"In State ex rel. v. Kortjohn, 246 Mo. l. c. 42, this court, in considering Section 4838, Revised Statutes 1919, said: 'This section is broad enough to permit the party committee of such party to fill any and all vacancies upon their party ticket.'

"These direct rulings by this court, and the attitude of the majority in the Roach Case, makes clear the accepted doctrine that a party committee has authority to fill any vacancy which happens to be upon the nominated ticket, no matter how or when that vacancy occurs, whether by the death or resignation of someone nominated or by the failure or inability of the electors at the primary to make a nomination."

In view of the foregoing, it is the opinion of this Department that by reason of Section 10268, R. S. Mo. 1929, it will be necessary to wait until after the primary election in August before the county central committee may legally fill the vacancy

Mr. R. P. White

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July 13, 1934.

in the Democratic ticket for the office of County Clerk.

Respectfully submitted,

JOHN W. HOFFMAN, JR.,  
Assistant Attorney-General.

APPROVED:

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ROY McKITTRICK  
Attorney-General.

JWH:EG

CONSTABLE--HIGHWAY PATROLMEN--JUSTICE COURTS: Arrests made by Highway Patrolmen not predicated on warrant issued to a constable. Constable alone is not the only officer of a Justice Court. Constable fees out of Justice Court are limited to statutory allowance and are collectible only where actual service is rendered.

7-18  
July 16, 1934.



Honorable J. B. Wentker  
Prosecuting Attorney  
St. Charles, Missouri

Dear Sir:

This Department is in receipt of your request for an opinion wherein you submit three questions, as follows:

"1st. The Constable contends that in a case of every arrest made by the Patrolmen and Weight Officers that a warrant be directed to him as Constable for service.

"2nd. The Constable also contends that he is to deliver all papers, including warrants, out of the J. P. Courts. It is my contention that under Section 3418 Revised Statutes 1929 in misdemeanor cases out of the J. P. Courts, the Sheriff of the County or Constable of the Township may make the service, and that by reason of Section 13, Page 234, Laws of 1931, the State Patrolmen may also serve criminal process. As to civil process it is my contention that the Sheriff also has certain rights of service but that the matter is not of great moment here because the Constable has been regularly serving civil processes.

"3rd. The Constable claims that he alone has the right to collect fines and costs, and that he should be paid even in those cases in which the Justice has issued no warrant and he has performed no duties. It is my contention that the Constable is to collect such fines and costs only in those cases where execution has been issued and that it is proper for the Justice to receive the money upon pleas of guilty; in fact, Justices have been turning over to the Prosecuting Attorney the Prosecuting Attorney fees and the Prosecuting Attorney has been making his report of such fees collected."

I

Section 3511, R. S. Mo. 1929, provides that upon information being filed a warrant is to issue and reads in part as follows:

"Upon the filing of the information a warrant shall issue for the apprehension of the person charged with the offense, unless he be in custody or voluntarily surrender himself in custody of the court;\* \* \* \*."

Thus we see that if the alleged violator is immediately brought before the Justice of the Peace, he is in custody of the court, and under the above Section it is not necessary that a Justice of the Peace first issue a warrant.

Laws of Missouri, 1931, pages 234 and 235 set out the rules and regulations of the State Highway Patrol.

Section 11 provides in part as follows:

"\* \* \* All fees for the arrest and transportation of persons arrested and witnesses' fees for members of the patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law."

Section 12 provides in part as follows:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or main-

July 16, 1934.

tained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution.\* \* \* \*."

Section 13 provides in part as follows:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. \* \* \* \*."

Section 14 provides as follows:

"Any person arrested by a member of the patrol shall forthwith be taken by such member before the court or magistrate having jurisdiction of the crime whereof such person so arrested is charged there to be dealt with according to law."

Under the above rules and regulations of the State Highway Patrol the members of the Patrol are declared officers of the State and are vested by law with powers possessed by peace officers, except service of civil process. The members of the State Patrol are further given the authority to arrest any person detected by him in the violation of any law of this State.

Section 7790, R. S. Mo. 1929, provides that the Highway Commission may deputize and appoint persons to enforce the provisions of Sections relating to Motor vehicles, and reads as follows:

"It shall be the duty of the sheriff of each county or city to see that the provisions of sections 7787 to 7792, inclusive, are enforced and any peace officer or police officer of any county or city shall

July 16, 1934.

have the power to arrest on sight or upon a warrant any person found violating or having violated the provisions of said sections. The sheriff or any peace officer is hereby given the power to stop any such conveyance or vehicle as above described upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of the preceding sections and if he finds such vehicle loaded in violation of the provisions hereof he shall have a right at that time and place to cause the excess load to be removed from such vehicle; and provided further, that any regularly employed maintenance man of the state highway department shall have the right and authority in any part of this state to stop any such conveyance or vehicle upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 7787 to 7792, inclusive, and if he finds such vehicle loaded in violation of the provisions thereof he shall have the right at that time and place to cause the excess load to be removed from such vehicle; and provided further, that the highway commission of this state may deputize and appoint any number of their regularly employed maintenance men to enforce the provisions of said sections, and the maintenance men herein delegated and appointed shall report to the proper officers any violations of sections 7787 to 7792, inclusive, for prosecution by said proper officer."

Here again peace officers have the power to arrest on sight or upon a warrant any person found violating the rules and regulations of highways pertaining to width, height, length and weight of motor vehicles.

From the foregoing statutory provisions we are of the opinion that in case of an arrest made by a patrolman or weight officer a warrant need not be directed to the Constable for service. In fact, according to Section 7790 supra, and Section 13 of the Laws of Missouri 1931, supra, the above designated officers may arrest on sight, and under Section 3511 supra, a warrant is unnecessary where the alleged violator is in custody of the court.



However, where the alleged violator is not in custody of the court, and a warrant is necessary, it may be served by the sheriff, patrolman and weight officer, as well as by the constable.

## II

Section 11756 R. S. Mo. 1929, sets out the general powers and duties of constables, and reads as follows:

"Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Section 11757 R. S. Mo. 1929, provides how the process is served in case of a vacancy or refusal to act, and reads as follows:

"In case of a vacancy in the office of constable in any township, or when the constable is interested in or is a party to the suit, or upon the refusal of the proper constable to serve the civil process directed to the constable of such township, the same may be executed by the constable of any adjoining township in which there may be an acting constable, to be designated by justice issuing such process, in the same manner and with like effect as if executed and returned by the constable of the township so interested, or in which the vacancy exists or refusal occurs. If any township be divided, the constable in office at the time of the division shall continue to be the constable of the township in which his residence is, and another constable shall be appointed for the other township, as in case of vacancy."

In the case of Huhn v. Lang, 27 S. W. 345; 122 Mo. 600 1. c. 606, the Court said:

"The duties and powers of the constable within the jurisdiction of a justice are identical with those of a sheriff,\* \* \* \*."

Again in the case of Stegall v. Pigment and Chemical Co., 150 Mo. Ap. 251, l. c. 285 the Court said:

122 "It is said in the case of Huhn v. Lang, 129 Mo. 600, 27 S. W. 345, that the powers and duties of constables within the jurisdiction of the justice are identical with those of a sheriff, and so with reference to this special constable, while his returns, as we hold are not as conclusive, his powers and duties in the service of process which he has power under the statute to make, are as broad as those of the constable himself or of a sheriff.

Although the Huhn and Stegall cases, supra, hold that the duties and powers of the constable within the jurisdiction of a justice are identical with those of a sheriff, yet the converse is not necessarily true. That is, that the duties and powers of the sheriff within the jurisdiction of a justice are identical with those of a constable.

Section 2193 R. S. Mo. 1929 sets out to whom the process is directed and reads in part as follows:

"In all cases not otherwise specially provided for, the process shall be a summons, and every summons shall be directed to the constable of the township in which the justice who granted the same resides." \* \* \*"

Section 2195 R.S. Mo. 1929 sets out the form of a summons and reads in part as follows:

"The state of Missouri, to the constable of \_\_\_\_\_ township," \* \* \* \*"

Section 2198 R. S. Mo. 1929, provides when a justice may empower a suitable person to execute process, and reads as follows:

"Every justice issuing any process authorized by this article, upon being satisfied that such process will not be executed for want of an officer to be had in time to execute the same, or in all cases where the constable

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is a party to the pending suit or is otherwise interested in the result thereof, may empower any suitable person, not being a party to the suit, to execute the same, by indorsement upon such process to the following effect: \* \* \* "

Under Sections 2193, 2195 and 2197, supra, it is clearly set out that the constable is the proper officer to serve warrants issued by any Justice of the Peace, in case of civil process, and the Justice may only empower a suitable person to execute the process when the constable is unavailable or when the latter is a party to the pending suit or otherwise interested. We are of the opinion that only the constable may serve civil processes unless as set out in Section 2197 supra, he is unavailable, etc.

Section 3418 R. S. Mo. 1929 provides as follows:

"Upon the filing of a complaint before a justice of the peace, verified by the oath or affirmation of a person competent to testify against the accused, if the justice be satisfied that the accused is not likely to try to escape or evade prosecution for the offense alleged, it shall be his duty to forthwith forward such complaint to the prosecuting attorney; and it shall be the duty of the complainant to forthwith inform the prosecuting attorney what facts can be proved against the accused, and by what witnesses, and the residence of such witnesses; and if, after investigation of such facts, the prosecuting attorney be satisfied that an offense has been committed, and that a case against the accused can be made, it shall be his duty to immediately file his information before the justice taking the complaint, and give to said justice a list of the witnesses to be subpoenaed on the part of the state; and upon the filing of the information by the prosecuting attorney, as herein provided, with the justice of the peace, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the justice to forthwith issue a

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warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

Section 11518 R.S. Mo 1929, provides in part as follows:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections; shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace; \* \* \* \*."

It is true that under Section 3418, supra, a justice may issue a warrant directed to the sheriff of the county or constable of the township, but that Section deals with proceedings before justices in misdemeanors. It deals with "criminal and not civil process". The constable (Section 11756, supra,) is a proper officer to deliver writs of attachment, subpoenas, and all other process both civil and criminal, but that does not mean that the constable alone is to deliver all papers out of the Justice of the Peace Courts. Section 11518, supra, sets out the general duties of the sheriff and gives him the power to "execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by justices of the peace."

### III

Section 11777 R. S. Mo. 1929, sets out the fees of constables, and we are of the opinion that in those cases in which the justice has issued no warrant and the constable has performed no duty that he cannot collect fines and costs. The constable can only collect such fines and costs in cases where an execution has been issued by the Justice.

In the case of State ex rel. v. Brown, 47 S. W. 504; 146 Mo. 401, 1. c. 406, the court said:

"It is well settled that no officer is

July 16, 1934.

entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645.

The statute (Section 11777) does not provide that the Constable is to collect fines and costs in those cases in which the Justice has issued no warrant and the constable has performed no duties and, therefore, is not entitled to same.

Section 3456, R. S. Mo. 1929, sets out the duties of officers in the collection of fines, and reads in part as follows:

"It shall be the duty of the justice before whom any conviction may be had under this article, if there be no appeal, to make out and certify, and, within ten days after the date of the judgment, deliver to the treasurer of the county and clerk of the county court each a statement of the case, the amount of the fine and return day of the execution, and the name of the constable charged with the collection thereof; \* \* \* \*"

We are of the opinion that the constable alone has the power to collect fines and costs, but only in those cases where execution has been issued. Where the Justice has received the money upon a plea of guilty and execution of course is unnecessary for the money has already been collected.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

ROY McKITTRICK  
Attorney General.

MW:H



TAXATION: House Bill 124 page 166, Laws Missouri Extra Session 1933-1934, not a temporary measure.

12-27  
December 26, 1934.



Hon. Jim Wells  
Collector of Revenue  
Buchanan County  
St. Joseph, Missouri

Dear Mr. Wells:

Acknowledgment is herewith made of your request for an opinion of this office on the following matter:

"I am writing you in regard to the penalties that will be effective January 1, 1935. We are operating now under House Bill #124 which makes penalties apply on all back taxes as of 1933.

I am wondering whether this will continue throughout the new year or whether we will have to revert back to the old high penalties that were effective prior to the passage of this bill.

I have had a great many requests for statements of delinquent taxes figured for payment some of them in January, others in February, 1935 and I am at a loss as to how to figure these penalties."

Senate Bill 125, page 166 Laws of Missouri, Extra Session, 1933-34, reads as follows:

"That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1933 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

It is to be noted that the foregoing section makes no limitation upon the time during which the taxes must be paid to obtain the benefit of the relief thereby given. This law is quite different from Senate Bill 40, page 152 Laws, Missouri, 1933-34, Extra Session, which provides:



"Section 3. The provisions of this act shall cease and be of no effect after December 31, 1933."

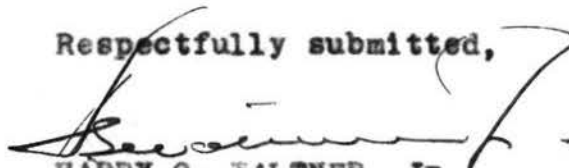
And Senate Bill 80, Laws Missouri 1933, page 423, which provides:

"Provided, further, that after Dec. 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed."

By the provisions of this act it is apparent that the State and County have finally and fully remitted the penalties which accrued prior to 1932 and that hereafter so long as this law is effective, delinquent taxes for 1932 and prior years are to be considered insofar as the calculation of penalties and interest are concerned, as 1933 taxes.

Therefore, it is the opinion of this office that baring further legislative action, you should during January and February and thereafter, accept taxes for the years 1932 and prior years and require only the penalties to be paid upon such taxes as you would compute for like taxes delinquent for the year 1933.

Respectfully submitted,



HARRY G. WALTNER, Jr.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General

HGW:MM

NEPOTISM: Right of City Council in Louisiana, Missouri, to appoint a brother of one of their members as an election judge in a city election.

3-13

March 10, 1934.



Honorable F. D. Wilkins  
City Attorney  
Louisiana, Missouri

Dear Sir:

We are in receipt of your letter dated March 1, 1934, which reads as follows:

"The situation concerning the approaching city election is this, E. M. Sizemore, who is at present, councilman-at-large is candidate for mayor on the Republican ticket, Dr. J. W. Crewdson, who is the present mayor and who has been the mayor of the city for sixteen years is the candidate on the Democratic ticket.

"Under our City ordinances, the council selects six judges for each ward and there are four wards in the city, three of these judges are Democrats and three Republicans. E. M. Sizemore lives in the second ward, likewise his brother, Chas. Sizemore lives in the second ward. At the last council meeting the Republican members handed up their list of judges, likewise the Democrats and the council confirmed and appointed these judges. It so happens that Chas. Sizemore, one of the Judges in Ward No. 2 selected by the Republicans and appointed by the council is a brother of E. M. Sizemore, candidate for mayor on the Republican ticket.

"The question involved is, is Chas. Sizemore a competent judge in ward No. 2 under the circumstances, his brother being a candidate for mayor?"

We also acknowledge receipt of a copy of the City Charter for the city of Louisiana, Missouri, incorporated under a special act of the Legislature. Section one, Article II of said charter provides:

"The corporate powers and duties of the inhabitants hereby incorporated under the name and style of 'City of Louisiana,' shall

be vested in and exercised by a city council, to consist of two members from each ward, to be chosen by the qualified voters of the several wards, on Tuesday after the first Monday in March, annually, except as hereinafter provided."

Section 6, of Article II of said charter provides:

"The council shall be the judge of election returns and qualifications of its own members, and shall determine contested elections."

Section 12, of Article II of said charter provides:

"Each member of the council shall, before entering upon the duties of his office, take and oath that he will support the Constitution of the United States and of this state, and that he will faithfully demean himself in office."

Section 2, of Article III of said charter as amended, provides in paragraph 31:

"To provide for the election of all elective city officers, and to provide for removing from office any person holding an office created by this act, or by ordinance, not otherwise provided for."

Section 3, of Article V of said charter provides:

"Judges of elections shall be appointed by the city council; they shall take an oath to faithfully and impartially discharge their duties; they shall open the polls at 6 o'clock in the morning, and continue them open until 6 o'clock in the afternoon, when they shall proceed at once to ascertain and certify the result of the election in the presence of so many candidates or other persons who may see proper to be present as can conveniently be accommodated in the room; provided, that there shall never be less than ten voters present at any count."

The last decennial census for Louisiana, Missouri, shows its population as 3,549, hence it would be governed by the laws relating to cities of that size, operating under special Charters.

March 10, 1934.

It is our understanding that Louisiana, Missouri, has never elected under the provisions of 6092 R. S. Mo., 1929, to become a city of the third class.

You state that your city ordinance authorizes the City Council to select election judges for the general election of your city elective officers, authorized by law. These offices are the offices set out in Section 7294 R. S. Mo., 1929, which provide:

"At the next general election for municipal officers in all cities and towns under special charters and having three thousand inhabitants and not more than ten thousand inhabitants, and at each general election for municipal officers thereafter, there shall be elected a mayor, a councilman-at-large, one councilman for each ward, a constable, an attorney, a treasurer, who shall be, by virtue of his office, collector of the revenue of such city, an auditor, and a clerk, each of whom shall hold their respective offices for two years, and until their successors are elected and qualified. And the city council shall provide by ordinance for the election or appointment of the following officer, to-wit: an assessor. (R. S. 1919, 8709. Amended, Laws 1927, p. 357.)

The service of an election judge in your city election is a service to a political subdivision of the State of Missouri, and by your City Ordinance the City Council has the right to name persons to render this service, in your general election for city officers, that is, within constitutional limitations.

Section 13, of Article XIV of the Missouri Constitution provides:

"Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

State ex rel. v. Whittle 63 S. W. (2d) 100, provides:

March 10, 1934.

"It is a matter of common knowledge that at the time of the Constitutional Convention in 1922-1923, and for a long time prior thereto, many officials appointed relatives to positions, and thereby placed the names of said relatives upon the public pay rolls. The power was abused by individual officials and by members of official boards, bureaus, commissions, and committees, with whom was lodged the power to appoint persons to official positions. It also was abused by officials with whom was lodged the power to appoint persons to official positions, subject to the approval of courts and other functionaries of the state and its political subdivisions.

"It also is a matter of common knowledge that many of the relatives were inefficient, and some of them rendered no service to the public. To remedy this widespread evil, the convention proposed to the people an amendment to the Constitution, designated therein section 13, art. 14, \* \* \* \*

"It was adopted by the people on February 26, 1924. The submission and adoption of the amendment conclusively shows that the abuse of said power was statewide.\* \* \* \* \*

"The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power), either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment.  
\* \* \* \* \*

State v. Ellis , 28 S. W. (2d) 363, 325, No. 154, provides:

"Section 13 provides that any official violating its provision, '\* \* \* shall thereby forfeit his \* \* \* office employment.'



"He forfeited by the act forbidden, and therefore his act results in a status. See, also, State ex rel. v. Sheppard, 192 Mo. loc. cit. 511, 91 S. W. 477.

"The debate in the Constitutional Convention which put forward section 13 as an amendment to the Constitution shows that it was intended to be self-enforcing. It was assumed that no legislative act would be necessary to put it into effect. One reason why it is self-executing is because some of the very state officials affected by it should not be depended upon to put it into force. It was intended, as quoted from Corpus Juris above, to put it 'beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect.' That was clear in the debates.

"No doubt that idea was prominent in the minds of the voters who adopted it. As a matter of common knowledge it was so agitated in the newspapers.

Thus we see that our Supreme Court has reasoned that it is against public policy for a public officer to name his relative, within the prohibited degree, to perform a service for a political subdivision of the State. The office of councilman-at-large is provided for by Statute, and the courts will take judicial notice that it is a public office, and also that the City of Louisiana, which is operating under a special charter is a political subdivision of the State. In State v. Whittle a school district was held a political subdivision of the State and we submit how much more so a city must be. We also note in State v. Ellis and State v. Whittle, that our Supreme Court held that this constitutional provision is self enforcing. It is true that in those cases the court was only concerned with the effect of the constitutional inhibition upon the officer naming the person to perform the legal service, and they have consistently held that the office of the appointer was forfeited by such conduct.

Our Appellate Courts have never applied this constitutional inhibition to the officer or servant who was the intended beneficiary of the act appointing or naming him. In our opinion we think that the mischief intended to be eliminated and the evil sought to be eradicated should be kept in mind in order to determine what was intended by the people when they voted this Constitutional Amendment on Nepotism. The reasoning applied in the



March 10, 1934.

Whittle and Ellis cases, above set out, for forfeiting the office of the officer making the appointment should apply with equal force in determining the status of the officer or servant who happens to be appointed or named, by his presumptive relative. As was said in the Ellis case, this constitutional amendment does not require an enabling act by the Legislature in order to be in force. Since it be self enforcing, in voiding the office of the appointor, it should be ~~equally~~ self enforcing, in its application to the status of the intended beneficiary, the nominee or appointee. When the people said in the amendment, "shall thereby forfeit his or her office or employment." we find no limitation in that phrase, especially when construed together with the whole amendment, which would limit its application to the nominating or appointing officer.

As heretofore set out we see, that in the city of Louisiana, election judges are provided for by ordinance, as is their oath, duties and fees. We submit that any person named or appointed as an election Judge in Louisiana, Missouri, in a manner provided by law, is a public officer. As was said in *Zevly v. Hackman*, 300 Mo., 59, 1. c. 69:

"In the most general and comprehensive sense a 'public office' is an agency for the State and a person whose duty it is to perform this agency is a 'public officer'. Stated more definitely a 'public office' is a charge or trust conferred by a public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law. (*State ex rel. Smith v. Theus*, 38 So. 870 - 72, 114 La. 1098; cited in *State ex rel. v. Maroney*, 191 Mo., 1. c. 545)."

We reason that since it is against public policy for one to appoint his relative contrary to the constitutional inhibition, and the appointor forfeits his office by this self enforcing act, it is equally against public policy for one who has been named or appointed to have any official status by reason of the overture of his ex officio relative. The appointor being automatically subject to ouster from office by reason of his ultra vires and unconstitutional act, done contrary to what our Supreme Court reasons to be the public policy of this State, the appointee should not be tolerated to benefit by the bad conduct of the appointor. The act being grave enough to forfeit the office of the appointor, then it

March 10, 1934.

is grave enough to leave the appointee without any legal rights to his office based upon the appointment by the appointor. The appointee finds himself without any title to the office which was the same status as he was in before the appointing officer acted or spoke. To reason otherwise would nullify the constitution and allow an office holder by a nepotistical appointment to perpetuate his relative in office merely upon a forfeiture of office on his part after a suit of ouster be adjudicated. Such was not the intention of the people for it would allow nepotism, the very thing the people voted to abolish, by a constitutional self enforcing amendment.

#### CONCLUSION.

It is the opinion of this office that Louisiana, Missouri, is a political subdivision of the State of Missouri, and that E. M. Sizemore, the councilman-at-large of said city, is a public officer of a political subdivision of this State. It is our opinion that he and his acts are subject to the constitutional inhibition relating to Nepotism.

It is our further opinion that when he as a member of the City Council, voted to name and appoint his brother, Chas. Sizemore, as election judge for Ward No. 2, in Louisiana, Missouri, and the Council pursuant thereto did name and appoint him to this public office, he was named and appointed contrary to the Missouri Constitution as it relates to Nepotism, and he has subjected himself to having his office forfeited.

We are further of the opinion that the letter and spirit of the Nepotism law was violated by your councilman-at-large and his appointment is a nullity and the office remains as vacant as it was before the Council named him. Cases like this where a man names his own brother as an election judge to sit in an election booth and collect his fee while counting votes in an election where his name heading the ticket as candidate, was the very thing the people thought they had eliminated when they passed this amendment on Nepotism. We say that the office of election judge in Ward No. 2 at Louisiana, Missouri, is vacant, and that the City Council should be forced to fill the vacancy in a manner prescribed by law and the Constitution of this State.

Respectfully submitted

WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.  
WOS:M

PUBLIC HEALTH: Deputy State Commissioner of Health - - Effect of Laws of 1933, page 271 on right to office under R. S. Mo. 1929, Section 9025.

SCHOOLS: Salary of County Superintendent of Schools as changed by Laws of 1933, page 304.

3-26  
March 19, 1934.



Honorable Dockery Wilson,  
Prosecuting Attorney, Harrison County,  
Bethany, Missouri.

Dear Sir:

A request for an opinion was received from you under date of January 3, 1934, such request being in the following terms:

"The County Court of Harrison County has asked me to get an opinion from your office on the following questions:

1. The present County Health Physician or Deputy State Commissioner of Health was appointed by the County Court in February 1932 for a three year term.

Question: Does his term of office expire in February 1934 and it become the duty of the County Court to appoint a County Health Physician at its next regular February term under Sec. 9025 (p. 271) Laws of Missouri, 1933?

2. The term of office of the County Superintendent of Schools of Harrison County expires in 1935. His salary under the old law is \$2100.00 per year. Under Sec. 9463 (p. 304) Laws of Missouri 1933 his salary would be \$1800.00 per year (the population of Harrison County according to the last census was slightly over 17,000).

Question: Should the County Superintendent of Schools be paid the old salary or \$1800.00 per year as presented by new law.

Will you kindly furnish opinion so the Court may have same by February 5th, 1934."

The above request was supplemented by additional information contained in a letter from you under date of February 28, 1934, as follows:

"On or about the 5th day of January, 1934, at the request of the County Court of Harrison County, Missouri, I wrote your office asking for an opinion as to the interpretation of Sec. 9025 Laws of Missouri 1933, which repeals Sec. 9025 of Article 1, Chapter 52, R. S. of Missouri 1929. I received no answer and the Court has asked me to write again.

The situation as to Deputy State Commissioner of Health in this County is as follows:

At the regular February term of the County Court 1932 the Court

2. Honorable Dockery Wilson

March 19, 1934.

appointed Dr. D. G. Reid of Bethany, Missouri, for a term of three years and entered into a contract with him fixing his compensation and expenses and reciting that the duties of such Deputy State Commissioner of Health as prescribed by Statute were made a part of the contract. The contract was accepted by Dr. Reid and duly approved by the Court. The present County Court would like an opinion from the Attorney General as to whether or not the contract made by the old Court under the old law is binding on them.

Opinion of the Court is divided. One view is that when the old law was repealed by the new Sec. 9025 that the appointment and contract entered into under the old law is at an end and another appointment should be made. The other view is that the contract entered into by the Court in February, 1932 does not expire until February, 1935, and that there is no occasion to make an appointment at this time.

The Court will meet again March 5th. If you have an opinion covering this matter or can give us an opinion as to the effect of the new law on the old appointment and contract we will appreciate it."

I.

As to your question about the Deputy Commissioner of Health, this matter has already been ruled on in an opinion by the Attorney General signed by the Attorney General and William Orr Sawyers, Assistant Attorney General, rendered on February 13, 1934 to Honorable W. W. Crockett, Prosecuting Attorney, Hall's County, New London, Missouri. In the course of that opinion the Attorney General ruled as follows:

"It is our opinion that by virtue of the new act repealing Section 9025 R. S. 1929 that one who rightfully claimed title by appointment under the old law is by the new act legislated out of office, and is not entitled to the honor and emoluments of the new office unless he receive his appointment under the provisions of the new law. Under the new law, it is not compulsory for any county court to employ a deputy State Commissioner of Health. In counties where the Court deems such an officer necessary, the Court has to follow the provisions of the new act."

We are enclosing a copy of such opinion which more fully elaborates the reasoning upon which this ruling was based.

II.

As to your question regarding the County Superintendent of Schools it is our opinion that this question is also governed by the above opinion. The County Superintendent of Schools is, like the Deputy Commissioner of

3. Honorable Dockery Wilson

March 19, 1934.

Health, an official whose office is created by statute and whose salary is fixed thereby, and if an office holder acquires no vested right to his office but, on the contrary, holds it subject to the implied condition that the Legislature may abolish his office so likewise would an incident of such office such as salary be subject to change by the Legislature which originally fixed the salary. It is, therefore, our opinion that Laws of 1933, page 384, which repealed Revised Statutes Missouri, 1929, Sections 9463, 9464 and 9465 and added three new sections in lieu thereof having the same numbers have the effect of reducing the salary of a county superintendent of schools in a county containing 17,000 inhabitants according to the last decennial census of the United States to \$1,800.00 per year if such salary had previously been \$2,100.00 per year, and that such such change has been in force from the effective date of such statute of 1933.

Very truly yours,  
EDWARD H. MILLER

APPROVED:

ASSISTANT ATTORNEY GENERAL.

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ATTORNEY GENERAL.



**WITNESS FEES:**

Expert Witness Fees for State Witnesses are properly chargeable under certain circumstances.

4-9  
March 31, 1934.

Miss Agnes Mae Wilson  
Prosecuting Attorney  
Grundy County  
Trenton, Missouri



Dear Miss Wilson:

This department is in receipt of your letter and enclosure dated March 24, 1934. Your letter states as follows:

"I shall be very grateful if you will give me an opinion upon the following question. Is a county liable for expert witness fees in criminal cases?"

"I am enclosing a statement of facts in a particular case to which the above question is pertinent."

Your enclosure reads in part as follows:

"Jerald Beverlin has been convicted on three charges and is now serving sentences amounting to thirteen years. These were important cases to the community and particularly to the merchants of this city as every time we filed a charge against him, he would furnish bond and break into another store until we had five cases against him and one or two others we had not filed. Ratel was suspected of being his partner in more than the Cisco case, and we feel he should be prosecuted. But now we are confronted with the objection of the county court to paying for the expert testimony which I consider necessary if he is to be tried. The amount of the fees of both Capt. Pettit and B. T. Andrews, St. Joseph, in the Beverlin case, including witness fees, travel and the preparation of exhibits was about \$122.00. Our County Court in the past has paid for the analysis of liquor and for expert testimony in liquor and forgery cases when necessary, but they objected to these fees. They have, however, paid them grudgingly, but object to paying such fees in the Ratel case."



Section 4, Article II, of the Constitution of Missouri sets out the purpose of government, the natural rights of persons and reads as follows:

"That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government and when government does not confer this security, it fails of its chief design."

Article X, Section 12 of the Constitution of Missouri dealing with municipal and county indebtedness states in part as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; \* \* \* \*"

Section 3826 R. S. Mo. 1929, provides when the State shall pay the costs in criminal cases and reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each jurymen and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs,

unless in the event of conviction, the same can be made out of the defendant."

Section 3827 R. S. Mo. 1929, provides when the county is to pay the costs, and reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 3828 R. S. Mo. 1929, provides when the costs are to be paid by either state or county and reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the cost shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 3830 R. S. Mo. 1929, provides when the costs are to be paid by the county and reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Section 3841 R. S. Mo. 1929, provides when the clerk is to make out fee bills, and reads as follows:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof,

he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Section 3842 R. S. Mo. 1929, sets out the duty of the Prosecuting Attorney and Judge in regard to fee bills, and reads as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

Section 3850 R. S. Mo. 1929, provides only for the costs of three witnesses to establish any one fact, and reads as follows:

"The judge and prosecuting attorney shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact, nor with the costs of witnesses unnecessarily summoned and not examined, but the costs of such surplus or unnecessary witnesses shall, in the discretion of the court, be taxed against the party or attorney causing them to be summoned."

Section 11776 R. S. Mo. 1929, provides for the allowance of fees of witnesses and reads as follows:

"The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their

services rendered in discharging the duties imposed upon them by law as are hereinafter provided, \* \* \* \* ."

Section 11798 R. S. Mo. 1929, provides fees for witnesses and reads in part as follows:

"Witnesses shall be allowed fees for their services as follows: \* \* \* \* ."

Section 2962 R. S. Mo. 1929, provides for the form and execution of contracts by counties, towns, etc., and reads as follows

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

Laws of Missouri 1933, page 340, provides for a County Budget Law. Section 2 provides for the classification of expenditures and reads in part as follows:

"The court shall classify proposed expenditures in the following order.

"Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1."

Section 5 provides the classes of expenditures and reads as follows:

"The court shall show the estimated expenditures for the year by classes as follows:

"Class 3: Expense of conducting circuit court and election, not to include the salary of any officer

or employee on a yearly salary nor deputy or assistant of any kind whatever though on irregular time, such shall be estimated for under class four. Class 3 shall include pay of jurors, witnesses if properly paid by the county, and other incidental court costs, pay of judges and clerks of elections and all other expense of elections chargeable against the county. This estimate shall not be less than last preceding even year in even years and last preceding odd year in odd numbered years.\* \* \* \*

The Court in State ex rel. Keek et al. v. Seibert, Auditor 32 S. W. 670, 1. c. 674 states as follows:

"For many years this court in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed, except such as the law in terms allows. Shed v. Railroad Co. 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State v. Hill, 72 Mo. 512; Thompson v. Elevator Co., 77 Mo. 520, Williams v. Chariton Co., 85 Mo. 646. This is the rule elsewhere. Crofut v. Braudt 58 N. Y. 108, and cases cited; City of St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30; State v. Oliver, 116 Mo. 188, 22 S. W. 637. At common law no recovery of costs was allowable, and, when statutes were passed allowing costs, they were always strictly construed. Crofet v. Braudt, supra; Kneass v. Bank, 4 Wash. C.C. 106, Fed. Cas. No. 7,876,; Hart v. Fitzgerald, 2 Mass. 509. The right to costs being thus purely statutory, such right can have no existence, except the statutes authorizing the item or items can be directly pointed out \* \* \* \* \*

Stewart Rapalje on the Law of witnesses, page 531, paragraph 307, states in part as follows:

"As a general rule witnesses are not compensated for loss of time, merely, but the case of an expert witness would seem to differ from that of an unprofessional witness called simply to depose to matters of fact. The expert is summoned to speak to a matter of opinion, depending on his skill in a particular profession or trade; the ordinary witness is bound, as a matter of public duty, to speak to the fact which has occurred within his knowledge; but the expert is under no such obligation, and is



selected by the party to give his opinion merely; and he is entitled, therefore, to demand a compensation for loss of time."

In the case of *People v. Montgomery*, 13 Abb. (N.Y.) Pr. N. S. 207 1. c. 239, the court states as follows:

"Upon these facts we do not see that the calling of Dr. Hammond as a witness, and the payment to him of a sufficient sum to secure his attendance at the court, during the trial, was in any respect an irregularity or did any wrong to the prisoner. It seems to us that the district attorney was acting in the line of his duty as a public prosecutor in securing the attendance of a proper medical witnesses of high repute, to meet the distinguished medical experts which he knew the prisoner expected to call on his side. The question at issue on the trial was chiefly a medical one, in respect to which the opinions of medical men would be likely to exert a great, if not a controlling influence. The witnesses who had testified before the county Judge, and those who had acted on the commission, were among the most distinguished members of their profession upon the particular questions involved on the trial. Those witnesses the prisoner was expected to call on the trial, and the district attorney would, it seems to us, under the circumstances of the case, have been derelict in his duty to the people of this county, if he had not taken the requisite steps to secure the attendance of witnesses of equal distinction and consideration in their profession, on the part of the people."

The court further states:

"A witness meets the requirements of a subpoena if he appears in court when required to testify and give impromptu answers to such questions as are then put to him. He cannot be required, by virtue of the subpoena to examine the case, to use his skill and knowledge to form an opinion, nor to attend, hear and consider the testimony given, so as to be qualified to give a deliberate opinion on a question of science arising upon such testimony; hence, a professional witness called as an expert



may be paid for his time, services and expenses; and the question what amount is paid cannot, in the absence of anything to show bad faith, affect the regularity of the trial, though it may, perhaps, affect his credit with the jury. It is not improper for the district attorney to procure the attendance of skilled witnesses in appropriate cases, for a special compensation.\* \* \* \*

The Court in *Peltzer v. Gilbert*, 260 Mo. 500 1. c. 504, states as follows:

"The administration of public justice is not only a necessary object of government, but one of the highest for which it is organized. The protection of life and conservation of peace and good order in the state cannot remain in abeyance. The payment of taxes is the price the citizen pays for his security. Section 4, Article II, of the Constitution declares that: 'To give security to these things is the principal office of government, and when government does not confer this security it fails of its chief design.' It would be a burlesque upon the law--a just and indefensible reproach upon our institutions--if crimes should go unpunished, persons accused of murder would remain untried for want of power in the officials of the county where the alleged crime was committed to pay out of the public funds the expenses reasonably necessary to establish the facts.

In the case of *State ex rel. Dalton v. Hill*, 72 Mo. 512, the court had under consideration the question whether the Judge and the Prosecuting Attorney could be compelled to certify for payment a bill of fees for witnesses summoned by the defendant in a criminal case. The court states:

"The number of witnesses set out in the alternative writ, and referred to in the return as unnecessary and not examined, is seventy-five, whose fees aggregated \$771.70. The statute under which was taxed the bill of costs containing the fees of witnesses who were examined, was that of March 28, 1874. Sec. 25 of that Act provides: 'The judge and the circuit court or prosecuting attorney shall in no case tax

the state or county with more than the cost of three witnesses to establish any one fact.' Laws of 1874, page 27, Section 25. How many witnesses were examined, and whose fees were certified for payment by the judge, does not appear; but it does appear and stand admitted by the demurrer, that they were not to exceed six facts constituting the defense of the defendant, and if so, leaving out of the question the witnesses who were examined, eighteen witnesses, even if examined, were all who were necessary and all whose fees could, prima facie, under the law quoted, have been certified to the auditor for payment.  
\* \* \* \* \*

The leading case in this State upon the power of a county court under the present Constitution to contract a debt for any purpose in excess of its revenue for the current year is Book v. Early 87 Mo. 246, in which it was said:

"The evident purpose of the framers of the constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12 (Missouri Constitution) supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it.\* \* \* \*

The Earl case supra, was subsequently followed in Kansas City, Fort Scott and Memphis Railroad Co., v. Thornton, 152 Mo. 570, wherein the court says (l. c. 575):

"The result was, overwhelming debts were contracted, which necessarily went unpaid or excessive taxation had to be levied to pay them; the effect of which impaired the credit of the counties and cities, en-

generated recklessness and extravagance in the management of the public business and constantly oppressed the tax-payers, these were the evils that section 11 and 12 of Article X of the Constitution were intended to remedy, first, by limiting the rate of taxation, and second, by limiting the yearly expenses to the revenue provided for each year. The wisdom of these safeguards has been fully demonstrated by the experience and improved financial status of the counties and cities since those provisions were adopted. It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it whether it was passed before or after the Constitution was adopted. Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year.\* \* \* \* \*

#### CONCLUSION.

In the light of these sections and these cases we are of the opinion that an expert witness cannot be placed in the same category as an ordinary witness, in-so-far as compensation and duty to depose to matters of fact are concerned. It is true that as a general rule witnesses are not compensated for loss of time, but it must be remembered that the unprofessional witnesses is called simply to bear witness to matters of fact, while the expert is summoned to speak to a matter of opinion depending on his skill in a particular profession or trade. It is further true that a witness is bound as a matter of public duty to testify to the fact which has occurred within his knowledge, but it cannot be said that an expert is under such an obligation. The latter party is merely selected to give his opinion, and is, therefore, entitled to demand compensation for any loss of time while engaged in the capacity of an expert.

We are of the opinion that Section 11776 R. S. Mo. 1929, supra, providing for the allowance of fees, and Section 11798 R. S. Mo. 1929, supra, setting out the fees of witnesses should be strictly construed. Our courts have for many years, in obedience to strict statutory construction, persistently maintained that no

costs could be taxed except such as the law in terms allows. Although this is the law, we find nothing in our statutes which can be construed as to prevent the procuring and employing of expert witnesses to assist the prosecution. In fact our Missouri Constitution, Art. II, Section 4, supra, declares in part: "To give security to these things is the principal office of government, and when government does not confer this security it fails of its chief design." We may even go further and say that a prosecuting witness is derelict in his duty to the people if he does not take the requisite steps to procure the attendance of skilled witnesses in appropriate cases for a special compensation. As the court so well stated in *Peltzer v. Gilbert*, supra, "It would be a burlesque upon the law--a just and indefensible reproach upon our institutions--if crimes should go unpunished, persons accused of murder would remain untried for want of power in the officials of the county where the alleged crime was committed to pay out of the public funds the expenses reasonably necessary to establish the facts."

We are also of the opinion that in order to carry out the spirit and comply with the county budget law as contained in the laws of Missouri, 1933, and as specifically provided for in Section 2, class 3, and section 5, class 3, supra, the latter class stating in part, "expense of \* \* \* \* \* witnesses if properly paid by the county," it is necessary that the prosecuting attorney obtain the approval of the county court before he engage such expert witnesses. We do not lose sight of the desirability of obtaining expert witnesses to combat crime but to permit a prosecuting officer, to employ expert witnesses without the approval of the county court would be in direct contravention of the county budget law and Article X, Section 12 of the Missouri Constitution. As the Court stated in *Kansas City, Fort Scott and Memphis R. S. C. v. Thornton*, supra, and *Book v. Earl* supra, in which it was said "The evident purpose of the framers of the Constitution and the people who adopted it was to abolish, in the administration of county and municipal government, the credit system and establish the cash system\* \* \* \* \*".

We are therefore of the opinion that the court should be guided in the light of Section 4, Article II of the Missouri Constitution, supra, in ruling upon the desirability of engaging expert witnesses, and that it will then be the duty of the prosecuting attorney to proceed by contract to employ such expert witnesses in the name of the county and with the final approval of the court as set out in section 2982, R. S. Mo. 1929 supra. We are further of the opinion that section 3850 R. S. Mo. 1929, supra, and as discussed in *State ex rel. Dalton v. Hill*, supra, applies also to expert witnesses and that the court and prosecuting attorney, "shall in no case tax the state or county with more than the costs of three witnesses to establish any one fact."

Respectfully submitted,

APPROVED

Attorney General

WOS:H

WM. ORR SAWYERS,  
Assistant Attorney General.



STATE BOARD OF EQUALIZATION: Has implied powers to employ clerks necessary in the preparation of the Journal of the State Board of Equalization, assessments, examination of co. tax returns, etc.

4-9  
April 3, 1934.



Honorable Andy W. Wilcox, et al,  
Members State Tax Commission,  
Jefferson City, Missouri.

Gentlemen:

This department acknowledges receipt of your request for an opinion, the essence of which is as follows:

"The 1933 Legislature in its appropriation, House Bill No. 643, appropriated \$682,000 to pay the State's part in assessing and collecting the revenue. The question we desire you to rule on is whether or not a certain part of this \$682,000 can be used to pay for the necessary clerical help in doing work for the State Board of Equalization, which the State Tax Commission is without funds to furnish."

We note that for a number of years, by resolution, the State Board of Equalization has been instructing the Secretary of the Board to employ certain clerks, agents and stenographers to perform such clerical research and stenographic work as may be necessary and incident to the proper performance of the statutory duties of the said Board and to incur other incidental and contingent expenses necessary to the carrying out of its duties.

We note further that the employees you desire to be paid out of the appropriation are to be employed in the preparation of the annual Journal containing the minutes of the Board. We assume this is in conformity with Section 9862, R.S. Mo. 1929, which is as follows:

"The board shall meet at the capitol in the City of Jefferson on the last Wednesday in February, 1894, and every year thereafter, the majority of whom shall constitute a quorum, and the members thereof shall each take an oath or affirm-

ation that he will, to the best of his knowledge and ability, equalize the valuation of real and personal property among the several counties in the state, according to the rules prescribed by this chapter for equalizing and valuing real property; and the secretary of the board shall keep an accurate account of all their proceedings and orders, and file the same, together with all their papers, in the office of the State Auditor."

House Bill No. 643, referred to in your letter, is as follows (Laws of Mo. 1933, p. 23):

"There is hereby appropriated out of the state treasury, chargeable to the state revenue fund the sum of seven hundred thousand dollars (\$700,000.00) to pay the cost of assessing and collecting of the revenue for the years 1933 and 1934 including the per diem of the members of the State Board of Equalization and the secretary and other expenses, as follows:

A. Personal Service:

To pay the per diem of the members of the State Board of Equalization.....\$10,000.00

Per diem of the Secretary..1,000.00

General expense, including communication, printing and binding.....7,000.00

To pay the state's part in assessing and collecting the revenue.....682,000.00  
\$700,000.00 "

Since you desire to pay these employees under the last item of House Bill No. 643, i.e., "to pay the State's part in assessing and collecting the revenue," it is necessary for us to determine what items may be included under that item.

The Appropriation Act itself states that the amount of \$700,000.00 is to be used "to pay the cost of assessing and collecting of the revenue for the years 1933 and 1934", and then proceeds to divide this amount into four items, the first three



being definite as to the amounts and purposes thereof. The last item, "to pay the State's part in assessing and collecting the revenue" is general and might be comprehensive in its terms. Under Sec. 9839, R.S. Mo. 1929 the State Tax Commission would have the right to transfer items in one class to another class if the mode of procedure were properly followed under said section. Sec. 9839, supra, is as follows:

"It shall be unlawful for any state agency or other person to whom or for whom any appropriation was made by the general assembly to approve or pay any salaries, wages, per diem, or any bill or amount or to expend the funds so appropriated for any other purpose than that for which such appropriation was specifically made except that upon the written application of such state agency to the governor and with the written consent of the governor previously filed with the state auditor and the state treasurer any item or items of appropriations made under class 'C' of section 9835 may be transferred in whole or in part to any other item and become a part of the item to which transferred in Class 'C' as defined in said section and except also upon the written application of such state agency to the Governor and with the written consent of the Governor and filed as under class 'C' any item or items of appropriations made under class 'D' may be transferred in whole or in part to any other item of class 'D' and become part of the item to which transferred, the state auditor shall audit and the state treasurer shall pay such item or items so transferred as if it had been so appropriated originally and the state auditor and the state treasurer shall show such transfer or transfers in any annual or biennial report required by law, and to the tax commission for use in preparing the budget or other purposes, but no item appropriated under class 'A' or class 'B' or class 'E' as such classes are defined, in section 9835, shall be transferred for any purpose whatever, and no item or items appropriated under one class shall be transferred to any other class."

We find no similar section relating to the right of the State Board of Equalization to transfer funds from one item to another.

Sec. 10133, R.S. Mo. 1929 provides for the payment of assessors and collectors, and is as follows:

"Assessors and collectors shall be compensated in like manner and in like amounts as for the assessments of other taxes: Provided, that in counties in which the assessors and collectors are paid a fixed salary, that in addition to the salary paid, they shall be permitted to charge for work performed in the assessing and collecting of the income tax, as provided by this article, the same fees as are charged by assessors and collectors whose salary is not fixed by law, and which fees so charged by said assessors and collectors for services rendered in assessing and collecting income tax shall be paid by the state."

Sec. 10007, R.S. Mo. 1929, the pertinent part being paragraph VII, provides as follows:

"VII. For filing, preserving and safe-keeping of the assessment lists, one-half of one cent per list, to be paid one-half by the state and one-half by the county.

"To the collector--When the collector is required to make payment into the state treasury by any provision of this chapter at any other time than within one month after his annual settlement with the county court, he may send such moneys by express or by a draft on a national bank in St. Louis, the express charges to be paid by the state out of the appropriation for assessing and collecting the revenue."

Sec. 9877, Laws of Missouri 1933, p. 422 is as follows:

"When the books or lists for the collectors are completed, the county clerk, except in St. Louis city, shall make a complete statement of the assessment and taxes charged, on blanks and in conformity to instructions, furnished him by the state auditor. The clerk shall record said statement and forward it to said auditor. The clerks of the

county courts shall receive ten cents per hundred words and figures for all words and figures extended by him in making out the tax book, one-half thereof to be paid by the state and other half by the counties, respectively: Provided, that compensation of clerks for making out and certifying to the auditor an aggregate abstract of the tax book shall be paid by the state."

We quote the above sections for the purpose of showing the various expenditures to be made by the State Board of Equalization out of the item of \$682,000.00. You will note that the Legislature in designating the item of \$682,000.00 has not enumerated the various items and elements of expenditure which make up the State's part in collecting and assessing the taxes.

The decision in the case of Church v, Hadley, 240 Mo. 680 involves an entirely different question, but the various expenditures are specifically designated and more or less incidental in their nature and discussed under an appropriation which we believe bears indirectly on the question now under discussion. The Court said (l.c. 695-6):

"The power granted in this law is to sell bonds. The limitation of the power is that the actual sale shall not be less than par. The power of sale is granted in general terms, in so far as the means of sale is concerned. The statute granting the power does not undertake to prescribe the means and manner of sale.

"In State ex rel. v. Gates, 67 Mo. l.c. 143, Sherwood, C.J., thus announces the fixed rule in such cases: 'If there is one principle in the law which finds abundant and oft repeated recognition, it is this: that where an agent is clothed with general powers, the means and measures necessary to effectuate the powers granted, attend the grant of authority as inevitable incidents. (Edwards v. Thomas, 66 Mo. 468) Thus, an agent employed to get a bill discounted may, unless expressly restricted, indorse it in the name of his employer; a broker employed to effect a policy of insurance may adjust the loss and do all that is requisite towards such adjustment; an agent employed to

issue process may receive the debt and costs, and, in general, an agent has implied authority to use those means of which the principal could not but have foreseen the necessity, and therefore could not but have intended to authorize. (Smith, Merc. Law, 176, 175, and cases cited); and the same principle which applies to private agents is equally applicable in this regard to public ones.

\* \* \* \* \*

"It will be observed that the court holds that from the express power to sell followed these implied powers, (1) to contract for printing, engraving and the like, (2) to pay counsel for an opinion on the bonds, and (3) to pay a commission to brokers for selling the bonds. It will be noticed that the latter is not emphasized in this opinion because it was not involved in that case." (l.c. 699)

### CONCLUSION

From the decision and the statutes hereinabove quoted, it is the opinion of this department that the item "to pay the cost of assessing and collecting of the revenue for the years 1933 and 1934" is general in its terms, and we assume that the State Board of Equalization has implied powers to employ the necessary clerks in the preparation of the Journal of the State Board of Equalization and the preparation of assessments, examination of county tax returns, utility tax returns and any other functions which by law are imperative on the State Board of Equalization to fully and efficiently carry out its duties under the Constitution and laws of the State of Missouri.

Since you state that certain employees of the State Tax Commission are thoroughly familiar with the work enumerated above, and for that reason are more competent than employees which might be secured elsewhere, and in view of the fact that you desire these employees to perform this work, we would suggest that if an appropriate resolution be passed by the State Board of Equalization, these employees could be transferred from the payroll of the State Tax Commission to the payroll of the State Board of Equalization until such time as the work is completed.

Respectfully submitted,

APPROVED:

Attorney General

OLLIVER W. NOLEN,  
Assistant Attorney General

TAXATION AND REVENUE:

Application of Senate Bill 94 to delinquent city tax collections depends on classification of cities.

5-12  
May 11, 1934.

Hon. Fred D. Wilkins  
City Attorney  
Louisiana, Missouri

*See 1933  
Opinion no 63  
to State Tax Commission*



Dear Mr. Wilkins:

Your request for an opinion of this office received some time ago has been referred to me on reassignment. Your request reads as follows:

"The writer is City Attorney of the City of Louisiana, Missouri and has been such attorney for the last six or seven years. He is trying to determine the effect of the new tax and revenue laws as the same may apply to this city. This is the law passed by the General Assembly of 1933 and reported beginning at page 425 of the laws of Missouri, Session Acts 1933.

I desire an opinion from your office as to whether or not this law is applicable to the City of Louisiana, Missouri, a town of less than 5000 inhabitants. In connection with my request, I desire to call your attention to the title of this act on page 425, which makes no reference whatever to the duties of cities either of 5000 inhabitants or more, but the title of this act provides that certain things shall be done by the County Collector and no reference in the title as far as I have been able to find is made to the duty of the collector, or other revenue officers of any city.

I must call your attention to Section 9945 at page 426 of the Session Acts which specifically refers to County Collectors, County Courts and to Cities containing a population of 5000 or more inhabitants.

It would seem to me that cities such as Louisiana are exempt from this act, but I want a ruling from your office." \* \* \* \*



Senate Bill 94 found at page 425 et seq. Laws of Missouri 1933, prescribes a new and different method for the collection of delinquent taxes. It is true that the title of the Act found at page 425 does not appear to reflect an intention to effect the collection of delinquent city taxes, however, we refer you to Section 9963c found at page 448. This Section reads as follows:

"In all counties that have adopted or may hereafter adopt township organization, wherever the word 'collector' is used in this act, as to such counties such designation shall be construed to mean 'treasurer and ex-officio collector,' or in Section 9962 may be township collector. Where applicable it shall also refer to the collector, or other proper officer, collecting taxes in any city or town. Where applicable the word 'county' as used in this act shall be construed 'City' and the words 'county clerk' shall be construed 'city clerk, or other proper officer.' "

I think that this clearly indicates a legislative intention to adopt the procedure prescribed for the collection of state and county taxes to the collection of delinquent city taxes.

As we do not pass upon the constitutionality of the Act but assume its constitutionality. For the purpose of our opinion we shall not go into the question as to the apparent failure of the title to reflect the subject matter of the enactment. It is apparent however from a comprehensive investigation of the other enactments referring to the collection of delinquent city taxes that there is a close connection between the method of collecting city taxes and the method of collecting state and county taxes, and this connection is to be found by referring to Chapter 38 of the R. S. Mo. 1929. It is our belief that the various sections of this Chapter pertaining to the collection of delinquent taxes are in pari materia with Senate Bill 94 and that these sections must be read and construed together. By doing so, it is our opinion that full effect is given to Senate Bill 94 without relying upon the provisions of Section 9963c. In this way any constitutional question respecting the sufficiency of the title of Senate Bill 94 is avoided.



Hon. Fred D. Wilkins.

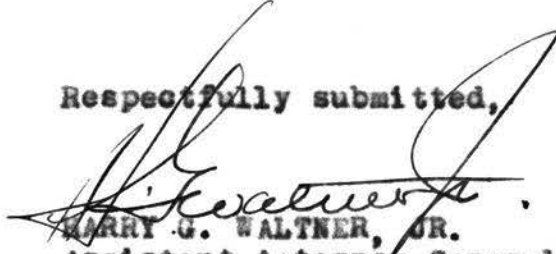
-3-

May 11, 1934.

We have heretofore prepared an opinion to the State Tax Commission as to the bearing of Senate Bill 94 upon the collection of city taxes. In this opinion we have dealt with cities of the first, second, third and fourth classes and with towns and villages. We believe that you will find this opinion solves your problem and are herewith forwarding a copy of that portion of the opinion dealing with this subject.

If your city operates under a special charter it would of course be necessary to examine the charter provisions regarding this particular matter before we could determine what effect if any is to be given this enactment in the collection of delinquent city taxes.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

HGW:MM  
Enc .

7-5  
SCHOOL DISTRICTS - FINANCIAL STATEMENTS shall contain what.  
School Boards may be compelled to publish  
annual statements, how.

6-8  
June 6, 1934



Honorable J. H. Wilson  
Justice of the Peace  
Forest City,  
Missouri

Dear Mr. Wilson:

Receipt of your letter to the Attorney General  
dated May 25, 1934 is acknowledged.

As we understand, you desire to know:

1.

"Whether or not a person summoned  
as a juror in a civil case in jus-  
tice court is entitled to his per  
diem regardless of whether such per-  
son is selected as a juror or not,  
because of the disqualification of  
such juror or for any other reason."

In reference to the matter inquired about  
Section 11797 Revised Statutes Missouri 1929 provides:

"Jurors shall be allowed fees for  
their services as follows: \* \* \* \*

"For each person, who shall be sum-  
moned, attend and report for duty  
as a juror in any case before a jus-  
tice of the peace, per day, . . . .75'."

The above quoted provision of the Section does  
not require a person summoned for jury service to actually  
serve on a jury in order to be entitled to his per diem, but  
such per diem is allowed every person who shall be summoned

June 6, 1934

and who shall attend and report for duty as a juror. The summoning, attending and reporting for duty necessarily precedes any service as a juror.

We do not think the above statute is to be construed according to the case of State ex rel Suter, et al v. Wilder 196 Mo. 418, 433. That case construed a statute providing that the jurors summoned in a criminal case, where the punishment might be death or imprisonment for life, or for not less than a specified number of years and no limit to the time, should be allowed the sum of \$1.00 per day for each day that he might be in attendance on the court,

"Whether he sits in the trial of the cause or is challenged off."

The court construed the statute as providing for jury fees to only such persons as were selected on the panel of forty from which the panel of twelve to try the cause were to be selected, but put the construction on the ground that the use of the words 'challenged off' showed that the statute had reference to those who could qualify on the panel of forty, and not those who were disqualified or were not chosen on the panel of forty.

We are of the opinion that that part of Section 11797, above quoted, means what it says - that is - that when a person is summoned as a juror in a civil cause in justice court and when such person shall attend and report for duty as a juror, then such person is entitled to his fees the same as if he had sat as a juror and tried the case.

2.

Your next inquiry is in reference to the duties of the boards of directors in school districts in this state with reference to the publication of annual financial statement.

Section 9360 referred to in your letter, in part, provides:

"\* \* \*it shall be the duty of each of said boards, and of the boards of directors in other school districts in this state having graded schools, to make and publish, annually, on or before the 15th day of July in each year, in some newspaper published in such school district, and if there be no newspaper published therein,

June 6, 1934

then by written statements posted in five public places in such district, a detailed statement of all receipts of school moneys, when and from what source derived, and of all expenditures, and on what account; also, the present indebtedness of the district and its nature, and the rate of taxation for all school purposes for the year\* \* \*."

We have only been able to find one case dealing with the subject of your last inquiry. State ex rel. McKinney v. Commissioners of Washington County 47 N. E. 565, decided by the Supreme Court of Ohio, is a construction of the laws of that state requiring the Commissioners (whose duties compare to our county judges) to make and file a detailed report in writing of their financial transactions during the year preceding the time of making such report, and which report is required to be published. The report is set out in full in the opinion, but is too long to be included in this opinion in its entirety. The court at page 568 of the opinion, discussing the report, said:

"If, by requiring of the county commissioners an annual 'detailed' report of their financial transactions, the general assembly intended that they should reduce their account to its ultimate analysis, then the account set forth by the commissioners in their answer did not comply with the statute; for it is obvious that many, if not all, of the items (so called) in this report, are made up of a large number of more minute items. For illustration, under the statement of expenditures from dog tax fund, only two items are found:

For claims for sheep killed by dogs..	\$1,259.16
Witness fees, mileage, and blanks.....	79.70
Total.....	<u>\$1,338.86</u>

A subsequent part of the record discloses that there were at least 57 distinct claims paid on account of sheep killed or injured by dogs. Probably there were a number of others. If, however, the number was 57 only, as the statute requires each claim to be established by two witnesses, and as each witness would be entitled to a specific fee of 50 cents and mile-

age, and as the account, reduced to its last analysis, must state the fee and mileage separately, each sheep claim would require 5 distinct items, making for the 57 claims 275 items instead of 2, as stated in this report; requiring nearly as much space for stating it, and expense for its publication, as will be necessary in respect of the entire report as made. This part of the report perhaps shows a greater condensation than any other portion of it; but an inspection of the whole statement, as reported, will clearly show that a reduction to its final analysis would enlarge it manifold. In the more populous and wealthy counties - Hamilton and Cuyahoga, for instance - the report would swell into an immense volume if thus extended. No one would be found patient enough to wade through the vast mass of detail, and each item would be lost in the multitude of its fellows. It is, of course, within the power of the general assembly to require such minuteness as this in the report made by the commissioners; but, unless the language chosen by that body imperatively demands such construction, the section should not, in our opinion, be so construed. Doubtless an account or report which gave the most minute circumstances of a transaction, or resolved into its ultimate component parts every composite item, would properly fall within the definition of a detailed account or report; but the common acceptation of the term, as applied to the ordinary transactions of mankind, denotes also a much less specific and extended subdivision of a transaction. None of the lexicographers assign to this word 'detail' such a fixed and unyielding sense as to limit its application to such transactions and accounts only as have been subjected to the most minute and extended subdivision or analysis of which they were susceptible; nor do we think the legislature used the word in the section under consideration in this narrow sense.

In the report under consideration the county commissioners classified the several heads of expenditure concisely and clearly, and, under its appropriate head, stated, separately, each particular subject of expenditure. In every instance the purpose to be attained by

Honorable J. H. Wilson

-5-

June 6, 1934

the money expended was clearly shown. The report afforded the data necessary to enable the committee appointed, pursuant to the statute, to intelligently examine it. It advised the taxpayers of the county of the several subjects to which the public revenue had been devoted, and the amount expended upon each subject; and this, we think, is all the statute requires."

Every statute must, of course, be construed according to its own peculiar wording, keeping in mind the purpose the enactment was intended to serve. So far as Section 9360 is concerned, the foregoing quotation from the opinion of the Supreme Court of Ohio may be taken as a fair statement of the duties of a board of directors of a school district and as to what a published financial statement should show.

For your further information we are inclosing you herewith copy of an opinion of this department dated November 3, 1933, with reference to compelling members of school boards to publish annual reports.

Very truly yours,

GILBERT LAMB  
Assistant Attorney General,

APPROVED:

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ROY McKITTRICK  
Attorney General.

GL:LC

Inclosure



COUNTY FUNDS: Classes should be paid in order of their priority; not necessary to retain funds in Class 1 to detriment of other classes in advance of time payments are due; balance in special road fund and grand and petit jury funds for 1933 can be transferred to 1934 county revenue fund after out outstanding warrants are paid.

June 21, 1934.



Miss Carrie Williams,  
Treasurer of Barry County,  
Cassville, Missouri.

Dear Madam:

This department acknowledges receipt of your letter of May 10, same being as follows:

"Heretofore the county court has apportioned the county revenue as follows: 30% to the State and county pauper fund, 30% to the official fund, 20% to the contingent fund, 10% to the grand and petit jury and election fund, and 10% to the special road fund. This amount has been sufficient to take of the warrants for the years for which they were written.

As our warrants for 1934 are to be paid in classes, it seems to be the general opinion that as the county revenue is paid in it is all to be applied to class 1 until all of same have been paid before paying any others, instead of the revenue being apportioned and the warrants on each fund being paid in order of protest, according to the amount paid in and apportioned as before.

We now have a balance in our special road fund and in the grand and petit jury and election fund for the year 1933. Should this amount be transferred to 1933 county revenue and apportioned to pay outstanding warrants on the other funds for that year, or should it be transferred to 1934 county revenue and be paid on class 1?

There are some other items paid into the

treasury such as abstract of fees from the Circuit Clerk's office and Prosecuting Attorney fees which have been credited to the official fund, and board of prisoners from the state in criminal costs, bank interest, etc. which has been credited to the contingent fund. Should this be continued as before or credited to the county revenue and apportioned to the different funds?"

As you appear to be familiar with the County Budget Law as passed by the 1933 Legislature, we will not quote the same here.

You are correct in inferring from the six classes as mentioned in the law and the fact that Class 1 has priority over all others, that the funds as collected should be placed in Class 1 until the amount of the budget in that class is reached, and likewise as to the other classes; however, we can readily see the situation, when this procedure is followed, of the remaining classes of funds and it is our opinion that while the classes in the order of their priority should be followed so far as practical, yet funds should be placed in the other classes from time to time so that the warrants from all the other classes will not have to be protested.

It is the opinion of this department, further bearing in mind that each preceding class is a priority over the other classes, that each preceding class cannot demand priority until the close of the year. It is the custom of many of the courts to issue warrants to the state institutions, or the Insane Fund, twice a year, i.e., April and October. We assume that your county has paid its April obligation. It is therefore our opinion that it would not be necessary to retain funds in Class 1 to the detriment of the other classes so long in advance of the time that payments are again due.

With reference to the balance in the Special Road Fund and the Grand Jury and Petit Jury Funds for 1933, if all the outstanding warrants have been paid, these funds could be transferred to the 1934 County Revenue Fund, as was held in the opinion of this department rendered to the Honorable Ralph W. Haselwood, Clark of the County Court, Edina, Missouri, copy of which is enclosed herewith.

Regarding the last paragraph of your letter, we are enclosing herewith copy of an opinion written on June 13, 1934 to Honorable Red Frossard, Prosecuting Attorney, Cassville, Missouri,

June 21, 1934

which we believe fully answers your question.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General

OWN:AH

CONFEDERATE SOLDIERS' HOME - Compensation of treasurer of board of trustees.

12-27  
December 18, 1934.

Mr. Roy D. Williams,  
Boonville, Missouri.

Dear Sir:



A request for an opinion has been received from you under date of November 23, 1934, such request being in the following terms:

"The Board of the Confederate Home has asked me to propound to your office the following question.

Can the Board fix the salary of the treasurer unhampered by statute?

In explanation I will say that the 1933 law revamped the law applicable to the Confederate Home and this question has arisen."

I

RIGHT OF TREASURER TO COMPENSATION

R. S. Missouri, 1929, Sections 13928 and 13929, as repealed and re-enacted by Laws of 1933, page 398, relate to the organization and powers of the board of trustees of the confederate soldiers' home. In Section 13929 it is provided that the board of trustees "shall elect a \* \* \* treasurer from their number", but there is no provision fixing any definite compensation for such treasurer. However, it is apparent that this statute contemplates that the treasurer shall receive some compensation for it provides that "the treasurer shall also act as secretary, without additional compensation therefor."

This conclusion is not impugned by another provision of Section 13929 which provides that "the members of the board of trustees shall receive no compensation" except necessary hotel and traveling expenses. This prohibition against compensation for their services as trustees could hardly mean that a member of the board could not receive any compensation for his services as treasurer in view of the provision of such section quoted in the preceding paragraph hereof.

2. Mr. Roy D. Williams.

December 18, 1934

II

BY WHOM COMPENSATION OF TREASURER TO BE FIXED

Since the statutes fix no definite compensation for the treasurer and since he may be entitled to compensation, some person or entity must be authorized to fix the amount thereof, and that this power is in the board of trustees of the confederate soldiers' home is indicated by the following statutory provisions governing the powers of such board, which are sufficiently broad to encompass such power in the absence of any specific statute:

"The control and management of the confederate soldiers' home, located at Higginsville, shall be vested in the board of trustees," (Sec.13928)

"Said board of trustees shall have power and authority to make all necessary rules and regulations for the control and maintenance of said home" (Sec.13929)

In answer to your question as to whether or not the Board could fix the compensation of the treasurer "unhampered by statute" our conclusion is that no general statute would hamper the exercise of such power, but, of course, it would be subject to the qualifications that (1) an appropriation is necessary for the payment of such compensation (note the appropriation made by the Fifty-seventh General Assembly, Laws of 1933, page 75, in which the salary of the treasurer is specifically mentioned), and (2) such compensation must be reasonable in the light of the office involved.

In conclusion it is our opinion that the treasurer elected by the board of trustees of the confederate soldiers' home may receive compensation for his services as treasurer, that the amount of such compensation is not fixed by statute, but is to be fixed by the board of trustees of the confederate soldiers' home, subject to the limitation that the amount be reasonable.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK  
Attorney-General

**GAMBLING - "Bank Night"**

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4-20  
April 12th, 1934.



Winger, Reeder, Barker and Hazard  
Attorneys at Law  
Waltower Building  
Kansas City, Missouri

Attention: Leland Hazard

Dear Sir:

We have your request for an opinion relative to the use of "Bank Night" in theaters.

We have carefully examined the "Bank Night Instructions", and from these instructions we find that the following elements of lottery or gift enterprise prohibited by Section 4314 R. S. Mo. 1929 are:

- 1st. Prize - Money deposited in bank.
- 2nd. Chance - Made under Paragraph 6 of the Instructions in the form of a public drawing where the winning number gets the prize.
- 3rd. Consideration - In the form of good will and advertising, as specified in Paragraph 8 of "Bank Night Instructions".

Consideration, chance and prize, the essential elements of lottery or gift enterprise, are therefore present. State v. Emerson, 1 S. W. (2d) 109.

It is, therefore, the opinion of this office that "Bank Night", as set out in the instructions in your letter, is prohibited by the laws of Missouri.

Yours very truly,

APPROVED:

FRANKLIN E. REAGAN  
Assistant Attorney General

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ROY McKITTRICK



COUNTY CLERK DEPUTIES: Entitled to increase authorized by  
Section 11811 Laws of Missouri 1933,  
page. 371

5-21  
May 17, 1934.



Hon. Wm. Womack  
County Clerk  
Madison County  
Fredericktown, Mo.

Dear Mr. Womack:

Acknowledgment is herewith made of your request for  
an opinion of this office on the following matter:

"In our County according to population my salary  
is \$1250.00 per year and my deputy \$600.00 (Sec-  
tion 11811 of the last General Assembly fixes my  
salary at \$1100.00 and my deputy at \$900.00 a  
year.) However, a provision is made that I shall  
be paid the same rate until the expiration of my  
term of office, and further provides that this  
act shall not apply to Counties paying a fixed  
salary. We are on a salary basis. Must my  
deputy continue to work for \$600.00 or is he en-  
titled to \$900.00? If not can we according to  
Law change to the new rate which will reduce my  
pay \$150.00 a year but will raise my deputy pay?  
I am not clear on this matter and will appreciate  
this information from you. Thanking you for  
this and past favors."

I.

COUNTY CLERK OF MADISON COUNTY  
ENTITLED TO \$1250.00 PER ANNUM  
UNTIL EXPIRATION OF PRESENT TERM.

Under the provisions of Section 11811 R. S. Mo. 1929,  
it is provided:

May 17, 1934.

"The aggregate amount of fees that any clerk under Articles 2 and 3 of this chapter shall be allowed to retain for any one year's services shall not in any case exceed the amount hereinafter set out." \* \* \* "In all counties containing fifteen thousand inhabitants or less the clerks shall be permitted to retain twelve hundred and fifty dollars for themselves, and be allowed to pay for deputies or assistants not exceeding six hundred dollars:" \* \* \* "

It is under the provisions of this section that you have in the past been permitted to retain \$1250.00 per annum as compensation for your services and \$600.00 per annum for the hire of deputies. We direct your attention to the word "retain" as used in the foregoing extracts from this section. An examination of the entire section reveals that this is the term used throughout the law respecting the payment of your compensation. No provision is made for the payment of a salary from the general revenue funds of the county. You are simply permitted to retain from the fees which you earn in the conduct of your office a sum sufficient to compensate you in this amount annually. The same is true of your deputy hire. In this Section as amended by the 57th General Assembly found at page 370 Laws of Missouri 1933, we find the pertinent parts of this amended section to read:

"The aggregate amount of fees that any clerk of the Circuit Court under Articles 2 and 3 of this Chapter shall be allowed to retain for any one year's service shall not in any case exceed the amount hereinafter set out." \* \* \* "in counties having a population of 7,500 and less than 10,000 persons the clerks shall be allowed to retain \$100.00 for themselves, and shall be allowed to pay for deputies and assistants \$900.00." \* \* \* "Provided, further, that until the expiration of their present term of office, the person holding the office of County Clerk shall be paid in the same manner and to the same extent as now provided by law provided that this act shall not apply to counties in which such clerks now or may hereafter receive a fixed salary in lieu of all fees, commissions and emoluments."

Under the provisions of this Section the characteristic feature of the prior section has been reenacted, to-wit, that the county clerk is allowed to "retain" fees which he has earned up to the maximum amount stated. No provision is made for the payment of a

May 17, 1934.

salary from the County Treasury. It is therefore our belief that the last proviso of this Section referring to "a fixed salary" has no reference to any clerk paid under the provisions of this Section but is intended to refer to certain counties whose clerks receive their compensation from the general revenue funds of the County irrespective of the amount of the collection of fees.

It is therefore the opinion of this office that you are entitled to retain the maximum of \$1250.00 for your compensation from fees collected under the provisions of Articles 2 and 3 of Chapter 84 R. S. Mo. 1929 until the expiration of your present term of office.

## II.

COUNTY CLERK ENTITLED TO RETAIN  
\$900.00 PER ANNUM FOR DEPUTY HIRE  
IN MADISON COUNTY MISSOURI.

The 1933 amendment to Section 11811 increased the allowance for deputy hire in your County from \$600.00 to \$900.00 per annum. This law became effective on July 24, 1933, and unless there is some constitutional objection it is apparent that it was meant to be operative upon its effective date. Whether or not this law might conflict with the constitutional provisions is determined by the question as to whether or not a deputy county clerk has a "term" within the meaning of the constitution. The authority for the appointment of deputy county clerks is found in Section 11680 R. S. Mo. 1929 which is as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

Nothing is stated in this Section which could in any manner be construed as fixing a term for deputy circuit clerks. Nor is any term fixed in the provisions of Section 11811. It appears

that a deputy county clerk serves at the pleasure of the appointive power. It cannot therefore be said that he has any "term of office" in a legal sense. See Throop on Public Officers, Section 303:

"The word 'term' is uniformly used to designate a fixed and definite period of time" \* \* "and an officer who holds his office at the pleasure of another officer" \* \* "has no official term, within the meaning of a constitutional or statutory provision relating to such term." "

This has been adopted by the Courts of this State as the rule to be observed here. In the case of State ex rel. v. Gordon, 238 Mo. 168, 1. c. 181, Judge Lamm stated:

"It seems to us that the cited authorities directly apply to the situation thus presented; for the sum of the matter is that any one who holds office at the pleasure of the appointing power has no 'term of office.'" "

This issue was directly before the St. Louis Court of Appeals in the case of Horstman vs. Adamson, 101 Mo. A. 119. In this case the clerk of the County Court had gone so far as to enter into a contract with the deputy for a stipulated salary for the whole period that the County Clerk should remain in office. After determining that the section authorizing the appointment failed to define the period of deputyship, the Court held that regardless of the contract the clerk was empowered to reduce the compensation or discharge the deputy at any time, 1. c. 124:

"\* \* \*The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the Courts of many States, including our own.\* \* \*"

Hon. Wm. Womack.

-5-

May 17, 1934.

"This right of control over the period of deputyship, the public interests and the proper administration of the office alike prohibited the official from restricting, by any action or consideration on his own part.\* \* \* \*"

In view of the foregoing authorities it is the opinion of this office that the Clerk of the County Court of Madison County is now entitled to retain from fees collected under the provisions of Articles 2 and 3 of Chapter 84 R. S. Mo. 1929, the maximum of \$900.00 for deputy clerk hire.

Respectfully submitted,

  
HARRY G. WALTNER, JR.  
Assistant Attorney General.

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM

MOTOR VEHICLES: Right of City to license is not affected by Motor Bus and Truck Law.

May 29, 1934.

6-5



Honorable Geo. E. Woodruff  
City Attorney  
Trenton, Missouri

Dear Sir:

Your request for an opinion dated April 4th, reads as follows:

"The City of Trenton imposes a license tax of one-third the State fee on all motor vehicles.

"The question has arisen as to whether or not we can collect this fee from local owners of busses operating under certificates of convenience and necessity, in view of Section 5272, R. S. 1929. Would you kindly give me your opinion as to this matter."

Section 5272, R. S. Mo. 1929, as amended in laws 1931, page 311, provides in part as follows:

"(a) In addition to the regular registration license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier, except as provided in Section 5265 of this act shall, at the time of the issuance of a certificate of convenience and necessity and/or an interstate permit, and annually thereafter, on or between January 1 and January 15 of each calendar year, pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; all such fees levied upon the issuance of a license to any motor carrier for any motor vehicle hereunder shall be reckoned from the beginning of the quarter in which such license was issued; \* \* \* ."



May 29, 1934.

Laws 1933 Extra Session, page 99, the last paragraph of Section 7761 provides:

"License taxes may be levied on motor vehicles by municipalities of this state provided that the fees charged by municipalities for said license shall not exceed the amount authorized therefor by said municipalities during the year 1933."

CONCLUSION.

The right of the City of Trenton to tax a city license is granted by the above statute, so long as said tax is not in excess of one-third of the state license tax authorized by the state law in the current year of 1933.

This city tax is a privilege tax and is charged for the privilege of using the city streets. When you refer to "local owners" in your request and ask if a city tax within the statutory limitation is chargeable against local owners of motor vehicles, our answer is yes. A tax on a local owner is not limited to resident owners only, who live within the city limits, but also is broad enough to include as a "local owner" one who resides without the corporation limits but maintains a permanent citus for business purposes within the city and uses a motor vehicle in connection with said local city business. On the other hand the law would not recognize that one, not a local resident, operating a motor vehicle through and over the city streets of Trenton on a regular schedule or route, be a local owner within the application of a city license tax ordinance.

You state that the City of Trenton imposes a license tax on "all motor vehicles" and we assume that it is on such vehicles owned and operated on the streets of the City of Trenton and particularly by local owners. A motor bus or truck operated in Missouri, under and by virtue of a Certificate of Convenience and Necessity from the Public Service Commission, is a motor vehicle and if such is operated by local owners and on the streets of the City of Trenton, such may legally be within the purview of the City Ordinance. However, your letter deals in generalities and not with specific facts, consequently, our opinion is in the main relegated to broad principles of law, and we leave to you the applying of such principles of law to the facts in the individual case. In other words, if the facts show that owners of motor vehicles, which are operated under Certificates of Necessity and Convenience, have a legal citus for tax purposes in the City of Trenton and use the streets of the City as a terminal, then in our opinion the City of Trenton may exact from them a city license tax for the privilege of so using the streets. However, it suffices to say that if one city license is paid in one place, then, of course, that eliminates at all events the necessity of paying another city license at another place.

Hon. Geo. E. Woodruff

-3-

May 29, 1934.

Section 5272 of the bus and truck law, above set out, imposing a license fee for the privilege of operating a bus or truck in this State on a certificate of convenience and necessity expressly provides this license fee in addition to the regular State license fee and the tax on the bus or truck as personal property. It is the further opinion of this office that this license fee is likewise in addition to any city tax imposed by the City of Trenton within the limitations of Section 7761 supra.

Respectfully submitted

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WM. ORR SAWYERS  
Assistant Attorney General.

APPROVED:

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ROY McKITTRICK  
Attorney General.

WOS:H

C  
CHIROPRACTORS: Right to possess or prescribe narcotics.

8-23  
August 21, 1934.



Mr. Will B. Wood, District Supervisor,  
Treasury Department, Bureau of Narcotics,  
Kansas City, Mo.

Dear Sir:

A request for an opinion has been received from you under date of August 15, 1934, such request being in the following terms:

"Please advise this office if chiropractors, under the State law of Missouri, are authorized to possess and prescribe narcotic drugs."

Revised Statutes Missouri 1929, Section 13546, provides as follows:

"The practice of chiropractic is hereby defined to be the science and art of palpating and adjusting by hand the movable articulations of the human spinal column, for the correction of the cause of abnormalities and deformities of the body. It shall not include the use of operative surgery, obstetrics, osteopathy, nor the administration or prescribing of any drug or medicine. The practice of chiropractic is hereby declared not to be the practice of medicine and surgery or osteopathy within the meaning of article 1, chapter 53, or chapter 102, R. S. 1929, and not subject to the provisions of said chapters."

In view of this statute it is our opinion that a chiropractor in the State of Missouri would have no authority to prescribe or administer narcotic drugs, or to possess such drugs with any greater degree of legality than a layman.

Yours very truly,

EDWARD H. MILLER

APPROVED:

ASSISTANT ATTORNEY GENERAL.

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ATTORNEY GENERAL.

TAXATION:-where drainage district acquired land upon which there are delinquent state, county, school and road taxes, it takes such land subject to the taxes, which may be enforced by such political subdivision if not paid.

September 14, 1934.



Mr. H. A. Wright,  
Clarence, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"Some months ago one of the assistant attorney generals wrote a letter to W. E. Roy, Secretary of Valley Drainage District, advising him that drainage districts do not have to pay state and county taxes on lands taken over by the district. Since a drainage district is a "municipal corporation," etc.

"One of the Supervisors of Valley Drainage District asked me today to inquire of you for the Supervisors of this district whether the district would be liable for state and county taxes on land which they will most certainly have to take over in the next few weeks because of delinquent taxes and on which land state and county taxes are delinquent now.

"In other words, the Supervisors want to know whether, in suing for delinquent drainage taxes and having the land sold for such drainage taxes and having to buy in the land for the district, they are chargeable with delinquent state and county taxes.

"The letter written from your office and referred to above was dated Dec. 29, 1933, and addressed to W. O. Jackson, Attorney at Butler, Missouri. It seems to me that Attorney General Gilbert Lamb is the one who sent that letter construing this drainage law in regard to state and county taxes."

On December 29, 1933, this Department issued an opinion to Mr. W. O. Jackson, Prosecuting Attorney at Butler,

Missouri to the effect that the drainage district did not have to pay taxes on land while it was owned and held by them for the reason that under Section 9743, R. S. Mo. 1929, the properties of a municipal corporation are exempt from taxation, and a drainage district is a municipal corporation under Section 6 of Article X of the Constitution of Missouri.

We also ruled in that opinion that if there were delinquent state, county, school and road taxes against the land at the time it was acquired by the drainage district, the drainage district took the land subject to the prior lien of those taxes. Section 10764, R. S. Mo. 1929, among other things, provides:

"All drainage taxes provided for in this article, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee, to be fixed by the court and taxed as costs in the action brought to enforce payment, shall, from date of filing the certificate hereinafter described in the office of the recorder of deeds for the county wherein the lands and properties are situate, until paid, constitute a lien, to which only the lien of the state for general state, county, school and road taxes shall be paramount, upon all the lands and other property against which such taxes shall be levied,\*\*\*\*."

In answer to your letter, therefore, it is our opinion that if it becomes necessary for your drainage district to take over land for the district on which there are delinquent state, county, school and road taxes, the district takes the land subject to the paramount lien of those taxes, and unless those taxes are discharged by the district the political subdivision involved might, by proper proceedings, enforce its lien against the land in question.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

*Carroll R. Hunt*

(ACTING)  
Attorney General.

CIRCUIT CLERKS WHO ARE EX-OFFICIO RECORDERS OF DEEDS - Bond required for each capacity - both offices to be assumed on first Monday in January.

12-16  
December 8, 1934

Hon. Robert T. Wise,  
Clerk of the Circuit Court,  
County of Callaway,  
Fulton, Mo.



Dear Sir:

A request for an opinion has been received from you under date of November 30, 1934, such request being in the following terms:

"At the recent election I became the Circuit Clerk Ex-Officio Recorder of Callaway County, Missouri.

Up until this time the two offices have been carried on separately, being consolidated under the laws passed at the last session of Legislature.

Naturally a number of questions have arisen out of this consolidation of offices upon which our County Court and Prosecuting Attorney seem to hold conflicting views.

I should like to have your opinion as to whether or not I shall have to give two bonds.....one as Circuit Clerk and another as Recorder? I am of the opinion that one bond as Circuit Clerk Ex-Officio Recorder should be sufficient. Will you please let me have your opinion on the above matter; also stating as definitely as you can the probable amount of such a bond.

I should like also to know your opinion as to the exact date I shall take over this office... meaning the combined offices of Circuit Clerk and Recorder. It has always been the custom in this county for the Circuit Clerk to take office on the first Monday in January and the Recorder on the first day of January. It is my belief that I take over both offices as one officially on the first



December 8, 1934.

Monday in January, 1935, but I should like definite information on this subject.

I shall very much appreciate any assistance you may give me in these matters."

I

CIRCUIT CLERK WHO IS EX-OFFICIO RECORDER OF DEEDS MUST GIVE BOND IN EACH CAPACITY.

A Circuit Clerk who is Ex-Officio Recorder of Deeds under R. S. Missouri, 1929, Section 11523, as repealed and re-enacted by Laws of 1933, page 360, is required by R. S. Missouri, 1929, Section 11529, as repealed and re-enacted by Laws of 1933, page 360, to give a bond for the faithful performance of his duties as Recorder, such section requiring this bond being as follows:

"Every clerk, before entering upon the duties of his office as recorder, shall enter into bond to the state, in a sum not less than one thousand dollars (\$1000) nor more than five thousand dollars (\$5000) at the discretion of the county court, with sufficient sureties, to be approved by said court, conditioned for the faithful performance of the duties enjoined on him by law as recorder, and for the delivering up of the records, books, papers, writings, seals, furniture and apparatus belonging to the office, whole, safe and undefaced, to his successor."

All Circuit Clerks are required to give bonds for the faithful performance of their duties as Circuit Clerks by R. S. Missouri, 1929, Section 11666, which is as follows:

"Every clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Missouri, with good and sufficient securities, who shall be residents of the county for which the clerk is appointed or elected, in any sum not less than five thousand dollars, the amount to be fixed and the bond to be approved by the court of which he is clerk, or by a majority of the judges of such court, in vacation. The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hand by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

December 8, 1934.

Under the two statutes above set out, where one person holds and performs the duties both of Circuit Clerk and Recorder of Deeds, the County or other interested parties have a right to protection of not less than \$5,000 in connection with the activities of the Circuit Clerk and not less than \$1,000 in connection with the functions of the Recorder. Although these two offices may be held by the same person, the duties are separate and distinct and the bonded indemnity for the proper performance of such duties should be likewise separate and distinct. By Section 11529 the Recorder's bond is to be approved by the County Court and the amount between \$1,000 and \$5,000 fixed in the discretion of that Court, while the Circuit Clerk's bond by Section 11666 is to be approved by the Circuit Court, or a majority of the judges thereof. The securities on the Circuit Clerk's bond must be residents of the County for which the Clerk is appointed or elected, while no such requirement is made for the Recorder's bond. The fact that these statutes are separate and the provisions of such statutes which have just been discussed, show us that a Circuit Clerk who is Ex-Officio Recorder of Deeds must furnish a bond for the faithful performance of his duties as Circuit Clerk, and another bond for the faithful performance of his duties as Recorder.

## II

DATE OF TAKING OFFICE OF CIRCUIT CLERK WHO IS  
EX-OFFICIO RECORDER OF DEEDS.

This second question presented in your letter has already been ruled upon by this office in an opinion signed by Hon. Roy McKittrick as Attorney General, and Hon. Charles M. Howell, Jr. as Assistant Attorney General, addressed to Miss Veda F. Smith, Recorder of Deeds, Carrollton, Missouri, such opinion being dated June 16, 1934. In such opinion the following conclusion is stated:

"Section 11534, Laws 1933, page 361, provides that present recorders shall serve out their terms as separate officers. The change occurs on the first Monday in January or January 7, 1935, the date on which the newly elected circuit clerk takes office. (Sec. 11664 Revised Statutes of Missouri, 1929). Since the newly elected circuit clerk is the successor of the recorder, the recorder will hold over until that time."

In conclusion, it is our opinion (1) that a Circuit Clerk who is Ex-Officio Recorder of Deeds under R.S. Missouri, 1929, Section 11529, as amended by Laws of 1933, page 360, must give a bond for the faithful performance of his duties as Circuit Clerk, and another bond for the faithful performance of his duties as Recorder of Deeds, and (2) where the Recorder now in office is not the same person as Circuit Clerk, and his term of office under the law under which he was elected does not terminate until January 7, 1935, the

4. Hon. Robert T. Wise.

December 8, 1934.

newly elected Circuit Clerk who is Ex-Officio Recorder of Deeds does not assume the office of Recorder of Deeds until January 7, 1935, at which time he likewise assumes the office of Circuit Clerk under R. S. Missouri, 1929, Section 11664.

Very truly yours,

EDWARD H. MILLER  
Assistant Attorney-General

APPROVED:

Roy McKittrick  
Attorney-General

COUNTY CLERK FEES: County Clerk not entitled under Section 11781 to  
50¢ for attesting each county warrant.  
SALARIES & FEES.

December 26, 1934.

Hon. Wm. Womack  
County Clerk  
Madison County  
Fredericktown, Missouri



Dear Mr. Womack:

Acknowledgment is made of your request for an opinion of  
this office on the following matter:

"Sometime ago we asked you to render an opinion  
in regards to the amount of fees I could retain  
for deputy hire, we received this opinion and  
thank you for same. However, our Court has failed  
to act claiming they are not sure of the amount  
we are allowed for issuing County Warrants. Our  
Prosecuting Attorney has written in regards to this  
matter several times and has called your office long  
distance but so far we have had no word in regard  
to the matter. We have always charged fifty cents  
as fees earned and as far back as we have record  
of clerks fees which is 1899 our Courts has allowed  
fifty cents and the clerk taking credit for a seal  
and acknowledgment, we do not actually place the  
seal on the warrant but take credit for same accord-  
ing to Section 11678, attached herewith are warrants  
now in use in this County.

Kindly render us an opinion as to what amount we  
are allowed for issuing County Warrants and please  
do so at once as our Court has held up payment to  
us for the last five months. Kindly give this your  
immediate attention and accept the sincere thanks."

Under the provisions of Section 12161 R. S. Mo. 1929, the  
Clerk is required to issue warrants on the Treasury for all moneys  
ordered to be paid by the Court. This Section reads in part as  
follows:

"It shall be the duty of the clerk of the county court: \* \* \* \* \* fourth to issue warrants on the treasury for all moneys ordered to be paid by the court, keep an abstract thereof, present the same to the county court at every regular term, balance and exhibit the accounts kept by him as often as required by the court, and keep his books and papers at all times ready for the inspection of the same, or any judge thereof."

Under the provisions of Section 12163 R. S. Mo. 1929, it is provided:

"\* \* \* \* \* When the court shall ascertain any sum of money to be due from the county, they shall order their clerk to issue a warrant therefor in the following form: \* \* \* \*"

Under the provisions of Section 12169 R. S. Mo. 1929, it is provided:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form: \* \* \*"

Under the provisions of Section 12170 R. S. Mo. 1929, it is provided in part:

"Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the Court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year: \* \* \*"

All of the foregoing sections refer specifically to the issuance of county warrants by the clerk and his attestation thereof. Each of the sections is a part of Article VIII, Chapter 85. The last section of this Article, excluding the enactment of the 1933 General Assembly, not pertinent hereto, is Section 12183 which provides:



"The Court shall allow to the clerk of the county court, for his services under this article (except sections 12145, 12146 and 12147), such compensation as may be deemed just and reasonable."

By virtue of the foregoing section it has been customary in some counties to allow a small sum to the county clerk for keeping the account of the county with the county treasury and for also keeping the records of claims running to and against the county. This compensation also must include any allowance made to the clerk for issuing warrants. The sections laying this duty upon the Clerk are found in this article and would be covered by this section. In other words, this is a specific section fixing the compensation for the acts required to be performed by the Clerk under this Article.

We are not unmindful of the provisions of Section 11781 R. S. Mo. 1929, which is the general schedule of fees allowed county clerks. One item of this schedule reads as follows:

"For taking every acknowledgment of a deed or other instrument of writing to include the certificate and seal--50¢."

It is clear that this is a general statute allowing the specific fee for acknowledgment to deeds or acknowledgments of other similar instruments. In our opinion this refers specifically to acknowledgments of the type and character of those necessary to validate a deed to real estate. It is also specifically provided that this fee is to be allowed when the acknowledgment includes the certificate "and seal". Another item found in this schedule reads:

"For every certificate and seal not hereinbefore provided for---50¢."

This requirement also involves the attachment of the seal of the Court and is similar to the foregoing extract in that a full certification must be made to entitle the clerk to payment of the fee. By the foregoing letter it is apparent that you have not been affixing the seal of the Court to these warrants, therefore, it seems that there has been a failure to comply even granting this section were applicable.

Under the provisions of Section 1827 R. S. Mo. 1929, a seal of the County Court is established. Section 1828 R. S. Mo. 1929, reads as follows:

"When no seal is provided, the clerk may use his private seal for the authentication of any record, process or proceeding required by law to be authenticated by the seal of the court;



December 26, 1934.

and the attestation of the clerk, stating that he has no seal of office, and that he has affixed his private seal, shall be received as sufficient authentication, without requiring any proof of such private seal, or that it was affixed."

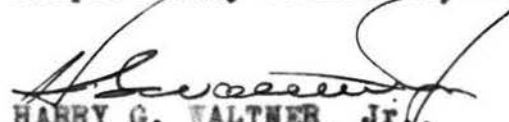
It is apparent that the affixing of the seal is necessary to properly authenticate any record of the county court and a failure to affix the seal would render the certificate insufficient.

The foregoing is not to be construed as a holding that seals are required to validate county warrants or that if the seal is affixed compensation can be allowed under the provisions of Section 11781. We simply direct attention to the foregoing so that there may be no question in your mind but that under the facts stated in your letter no compensation could be allowed under this section even if it were applicable.

C O N C L U S I O N

It is the opinion of this office that no compensation is allowable to the County Clerk for the issuance of county warrants under the provisions of Section 11781 and that if any compensation is allowed it must be by general order under Section 12183 R. S. Mo. 1929

Respectfully submitted,

  
HARRY G. WALTNER, Jr.,  
Assistant Attorney General

APPROVED:

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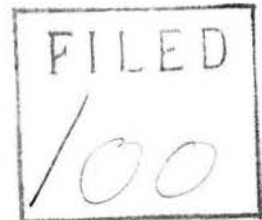
ROY McKITTRICK  
Attorney General

HGW:MM

**TAXATION:** Past due bonds and coupons of drainage and levy districts may be used to pay tax imposed for purpose of paying such bonds and coupons. Section 9911 R. S. Mo. 1929.

June 9, 1934.

6-11



Hon. Charles Young  
County Treasurer  
Livingston County  
Avalon, Missouri

Dear Mr. Young:

We are in receipt of a request forwarded through Col. Scott J. Miller of your city upon the following matter:

"\* \* \* We have a drainage district under the amendment of 1929 authorizing the payment of the taxes and assessments due levied for the purpose of paying bonds issued; bonds having been sold in 1922 previous to this amendment, raising the question whether under the Constitution the amendment of the statute was in violation of the Constitution. Now this is the situation: I have a vast amount of land in the drainage district and owe back taxes and delinquent assessments. I hold bonds sufficient to pay these taxes. The question of the violation of the Constitution of this amendment does not appear apparently in my case. I want to pay my taxes with these bonds and default coupons thereon. Can I compel the County Treasurer to accept these bonds and coupons in payment of the taxes and assessments levied against my land to pay these bonds? Being the holder of the bonds I, of course, waive the constitutional right by presenting them for payment."

Section 9911 R. S. Mo. 1929, authorizes the collectors to receive certain warrants of the state, county, city or municipal subdivision in payment of certain taxes, fines, penalties and obligations. This statute in some form or other has been on our books for many many years and in fact predates our present constitution by approximately forty years. Although it has been changed in some respects, the intent and purpose has remained the same as it was as indicated by Section 3205 R. S. Mo. 1835. Not until the adoption of our present

constitution were any restrictions imposed upon the power to tax for valid existing indebtedness. With the adoption of Sections 11 and 12 of Article X of the Constitution, providing that no county should become indebted in an amount exceeding the anticipated revenue for that year without a two thirds vote of the voters assenting to such increased obligation, it became necessary to amend the then existing law so as to definitely state that no warrant would be received in payment of any tax unless issued during the year for which the tax was levied. With the organization of the drainage and levy districts, it became evident that there was no good reason why the warrants of such districts should not be accepted in payment of assessments for the support of such districts. Similarly as the law provided

"past due bonds or due bonds of any county, city, township or any school shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue but not in payment of any tax levied for any other purpose;"

it was reasonable and logical that the law be amended so as to bring drainage and levy district bonds within the provisions of this Section. This was done in 1929.

The right of the legislature to pass such an enactment as is found in Section 9911 has been long recognized by the judiciary of this State. One of the early cases is that of Logan vs. County Court of Barton County, 63 Mo. 336. In that case the Collector had accepted in payment of taxes warrants issued more than ten years before. In holding that the Collector had acted properly in receiving these warrants in payment of taxes the Court stated:

"\* \* \*The county treasurer is required to receive this warrant from the collector, provided that the collector satisfies the treasurer in a mode prescribed that he received it in payment of county taxes.

There is no suggestion that any of the formalities required were wanting in this case. The county court rejected the credit claimed, simply and solely on the ground that the warrants were issued more than ten years before the collector received them.

The collector and treasurer are agents of the county. Their agency is regulated by law, and in this case there is no dispute that they strictly complied with the law.\* \* \* \*"

The Federal Courts have likewise recognized this Section and its application to taxes collected for a specific purpose. In the case of United States ex rel. vs. Macon County Court, 45 Fed. 400, the statement of facts reflects this situation, l. c. 401:

"\* \* \* By virtue of other provisions of the laws of the state, county warrants cannot be assigned merely by a blank indorsement, but must be indorsed in full. It is also the law that county warrants may be received in payment of taxes levied for county purposes, and county collectors are especially enjoined to receive them in payment of such assessments.\* \* \*"

The relators allege, in substance, that during the year 1889 the county court of Macon county drew a large number of small warrants, ranging in size from \$1 to \$40, on the special Missouri & Mississippi railroad fund, in payment of coupons on Missouri & Mississippi Railroad bonds, which were presented to the court for allowance and payment during the year; that these warrants were duly presented to the county treasurer for payment, and the date of presentation noted thereon; and that thereafter divers and sundry tax-payers made use of the same to pay their county taxes, including therein taxes belonging to the special Missouri & Mississippi Railroad fund, on which the relators claim to have a prior lien by reason of the presentation of their warrants in September, 1879, as before stated.\* \* \*

One position taken in this case was that the taxpayers were without authority to pay a special levy with county warrants. The Court held the contention without merit and stated, l. c. 404:

"\* \* \* In the first place, it is said that they had no right to receive county warrants in payment of the special Missouri & Mississippi Railroad tax of one-twentieth of one per cent., and that their action in this respect was unlawful. This claim, however, is not made with much apparent confidence, and in my judgment there is no ground upon which it can be sustained. The fact is that county warrants have been receivable for county taxes for more than 25 years. Gen. St. Mo. 1865, c. 38 46, p. 232. Such was the law when relator's bonds

were issued, and the statute is very general in its terms. County warrants are made receivable in discharge of 'any county or city revenue, license, tax, assessment, fine, penalty, or forfeiture.' Language could hardly be made more comprehensive.\* \* \* \*

The Supreme Court of the United States affirmed the decision of the Court in this case, that decision being found at 134 U. S. 332.

The further case of State ex rel. George W. Harshman, vs. John Winterbottom, 123 U. S. 215, the Supreme Court of the United States held, 1. c. 221:

"\* \* \* This formal accounting and settlement between the county court and the defendant Winterbottom, as set out by the plaintiff himself in his own declaration, is one which the county court undoubtedly had a right to make; and, in paying over these county warrants to the treasury of the county, and in receiving the acknowledgment of the county court that he was fully discharged from his obligations in that respect, he presents a defense to this action which nothing in the declaration removes or invalidates. He had a right to receive county warrants in payment of taxes. The law in express terms declares it to be his duty to receive them. Whether they were received by him under the exact circumstances which the law directs, as to original ownership or assignment to the party who presented them, were matters for which he might have been called to account by the county court, and that body, in making the settlement with him, might possibly have had the power to reject warrants so received in making up the account; but, inasmuch, as they were actual obligations of the county, payable out of the county funds, and receivable in discharge of taxes if properly tendered, the county court, which, by law, has full charge of all the financial operations of the county, could waive any such irregularity in the time and mode of presenting their own obligations, and credit the Collector with them in the account.\* \* \* \*



In spite of this judicial approval of the law as applied to county warrants, we recognize that the Courts have criticized this Section as applied to drainage and levy district warrants. Unquestionably an inequality might exist in an application of this law to such warrants. As stated in State ex rel. vs. Bates, 235 Mo. 262, 1. c. 296:

" \* \* That provision of the levee laws making warrants of the district receivable on levee taxes the same as county warrants are receivable for county taxes, sections 8367 and 8365, Revised Statutes 1899 (secs. 5710 and 5711, R. S. 1909), is incapable of full enforcement. The law making county warrants receivable for county taxes (Sec. 3800, R. S. 1909) provides that county warrants can only be received for taxes of the year during which such warrants are drawn; and this works out satisfactorily, because county warrants cannot be legally issued in excess of the county revenue for each year. However, no such rule applies to the issue of warrants for building levees and excavating ditches. When once a levee or ditch is begun, it must, to become effective, be completed with all convenient speed; and this will often result in the issue in one year of enough, or more than enough warrants, to consume the tax levies of four years. This gives parties who own lands in the district an opportunity to collect their warrants promptly, by using such warrants in payment of their taxes; but leaves other warrant-holders who do not own such taxes to wait an unreasonable time for their money.  
\* \* \* \* \*

Difficulties such as confront the relator and the levee district in this case are likely to continue to arise until the Legislature repeals or modifies that section of the law which makes levee taxes payable in warrants. \* \* \* "

Although the application of this law resulted in embarrassment to the drainage district and difficulty for the contractor in the Bates case supra, yet the Court fully recognized the power of the Legislature to pass such a law.



June 9, 1934.

In the instant case, however, this law would not necessarily result in any embarrassment or difficulty for the drainage district for it is to be noted that the statute provides that only "past due" bonds or coupons may be used to pay the levy or drainage tax "levied for the payment of bonds or coupons of the same issue."

We shall now turn to the question presented by the inquiry, to-wit;- that the bonds in question were issued prior to the 1929 amendment which authorizes their use in the payment of taxes levied to pay interest on lands of this same issue. As has been said in many of the cases dealing with this statutory provision, it is but a legislative admission of the right to set off. It is a declaration of the right of the taxpayer to satisfy the tax claim of the district with his claim against the district represented by the bonds and interest coupons. The logic of the Mason County case, supra, in dealing with another point raised in that case, is applicable to your proposition. It was contended in that case that the law of 1873, permitting more than one county warrant to be issued if the claim exceeded \$25.00, impaired the remedy in force when the relators' debt was contracted, and that the action of the county collector in accepting warrants issued under this law of 1873 in payment of taxes was illegal. The Court held this position untenable and stated l. c. 404:

"The act of 1873 did not attempt to alter the obligations of the county in any of its outstanding contracts or to change the remedy for their enforcement. It facilitated to some extent the use of county warrants in paying county taxes and this is all that can be alleged against it."

In the instant case the application of the amendment of 1929 to bonds or coupons then outstanding does not in any way change the obligation of the drainage districts on account of such bonds or other contracts, nor does it change or impair any remedy then existing for the collection or enforcement of such bonds or coupons. No vested right has been altered or impaired and no constitutional provision impinged by the operation of the law in the instant case.

It is therefore the opinion of this office that past due bonds or coupons of levy or drainage districts may be used by the holders thereof to pay taxes or assessments which are levied by the drainage or levy district for the purpose of paying bonds or coupons of the same series.

Respectfully submitted,

  
HARRY G. WALTNER Jr.  
Assistant Attorney General.

Approved \_\_\_\_\_

ROY MCKITTRICK,  
Attorney General.

COUNTY BUDGET LAW: Balance in any of five classes entitled to priority may be transferred to Class 5 on certain conditions;

Boarding of prisoners should be in Class 4;

Receipts for expenses paid by relatives of patients in Hospital No. 2 should be taken into consideration in estimating receipts under Sec. 1.

November 10, 1934.

Hon. J.A. Yadon,  
Clerk of County Court,  
Albany, Missouri.



Dear Sir:

This department is in receipt of your letter of some time ago, also your supplemental letter, in which you make the following inquiries:

"In No. 5 the Contingent fund, so many things have been thrown into this fund, and the law does not permit us to use more than 1/5 of the anticipated revenue. Can we transfer from any of the other funds into this fund, and if this is impossible, are there any possible steps that can be taken to relieve this situation, as we have only about enough to run us two more months at the rate we have been going during the past eight months?

The first six months of 1934 we paid the board of prisoners out of No. 5 contingent fund. Then we got your opinion that it should be paid out of No. 4 or Salary Fund. Now, can we transfer the same amount of money from the salary fund to the contingent fund that we used to pay their board the first half of this year?

We have about thirty-two patients at St. Joseph Hospital No. 2 that the county pays for and out of that number there are six of them that their relatives pay to the county all of the expense the county has paid for them. That will make \$1200 or \$1500 a year. Will this amount be counted in our budget, or will we have that much more to write warrants against? A good deal of the expense of the up-keep of our County Home is for feed for cattle, hogs and poultry. When this stock is sold, can we deduct the amount we get in cash from our Budget, or No. 5, and write warrants for that much more? "

Class 5, Sec. 2 of the County Budget Law, Laws of Mo. 1933, page 342 is as follows:

"The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes."

We shall answer your questions in the order presented.

I

We are of the opinion that if there be any balance of funds in Class 6, which is as follows: (Laws 1933, P. 342)

"After having provided for the five classes of expenses heretofore specified, the county court may extend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes, together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations, such warrants shall first be paid before any expenditure is authorized under Class 6",

same may be transferred to Class 5.

Class 6, Section 5, of the County Budget Law, Laws of Mo. 1933, page 344 provides:

"Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there

is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

The New County Budget Law contains the phrase (Sec. 1, page 341) "the County Court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved." We are, however, of the opinion that if any balance now remains in any of the five classes which are entitled to priority, the balance, or surplus, may be transferred to Class 5, this being upon the condition that the County Court has over-estimated the amount needed for the various classes and that it is obvious there will be a surplus at the close of the year, or when the new budget is made and that the priority of any of the classes will in no wise be jeopardized. However, we recommend this course purely at the risk of the County Court, as there is no provision made for transferring balances of funds unless same is done in compliance with Section 12167, R.S. Mo. 1929, which is as follows :

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

We know of no recourse for you as to the deficiency in Class 5, as set forth in your letter, unless it would be Section 8, Laws of Mo. 1933, page 345, which provides:

"It is hereby made the first duty of the county court at its regular February Term to go over the estimates and revise and amend the same in such way as to promote efficiency and economy in county government. The court may alter or change any estimate as public interest may require and to balance the budget, first giving the person preparing supporting data an opportunity to be heard, but the county court shall have no power to reduce the amounts required to be set aside for classes 1 and 3 below that provided for herein. After the county court shall have revised the estimate it shall be the duty of the clerk of said court forthwith to enter such revised estimates on the record of the said court and the court shall forthwith enter thereon its approval. The county clerk shall within five days after the date of approval of such budget estimate, file a certified copy thereof with the county treasurer, taking his receipt therefor, and he shall also forward a certified copy thereof to the State Auditor by registered mail. The county treasurer shall not pay nor enter protest on any warrant for the current year until such budget estimate shall have been so filed. (This shall not apply to warrants lawfully issued for accounts due for prior year, lawfully payable out of funds for prior years on hand). \*\*\*\*\*"

## II

Your question relating to the boarding of prisoners has finally been decided by this department. It is our opinion that this expense should be placed under Class 4; however, we call your attention to the fact that the new Budget Law does not provide for such a contingency. It is therefore our opinion that if funds have been wrongfully or erroneously paid out of one class, whereas, they should have been paid out of another class, it would not be illegal to replace the amount wrongfully or erroneously paid out of such fund.

## III

As to your third question, relating to the thirty patients in Hospital No. 2, the expenses of six of them being borne by relatives, it is the opinion of this department that the amount paid, or anticipated to be paid by the relatives,



should be taken into account in the yearly budget. Section 1, page 340, Laws of Mo. 1933, provides:

"This act may be cited and quoted as the county budget law. All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive, of this Act. Whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided in this act regardless of the source from which derived. The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31.\*\*\*\*\*"

By the terms of the above section, it is the duty of the County Court to prepare an estimate, including receipts of the amounts paid by the relatives of the patients and it is the opinion of this department that the same should be taken into consideration when estimating the amount of the receipts under Section 1.

Respectfully submitted,

OLLIVER W. NOLEN,  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK,  
Attorney General



TAXATION: House Bill 124 Extra Session, applies to penalty on "taxes", does not apply to drainage district assessments.

11-24  
November 12, 1934.



Hon. Charles Young  
Treasurer  
Livingston County  
Chillicothe, Missouri

Dear Mr. Young:

Acknowledgment is made of a request for an opinion of this office bearing upon the following subject:

"Please advise me whether or not House Bill 124 applies to drainage taxes. This bill provides that all penalties and interest on personal and real estate taxes shall be computed after April 12, 1934, on the same penalty basis as the taxes delinquent for the year 1933, and I was wondering if this act applies to drainage taxes."

House Bill 124, introduced by Representative Clinkscales of Boone County, is found at page 166 Laws of Missouri Extra Session, 1933-34, and reads as follows:

"Section 1. Penalties and interest--how computed.--That all penalties and interest on personal and Real Estate Taxes, delinquent for the year 1932 and prior years shall be computed after December 31, 1933, on the same penalty basis as the taxes delinquent for the year 1933 until paid."

By virtue of the foregoing section specific relief is given delinquent taxpayers as to penalties and interest on "personal and real estate taxes." The gist of your inquiry is to be determined by the interpretation that is to be put upon the word "taxes" as used in the foregoing statute. If we can arrive at a proper determination of the purport of this term as used in the phrase "personal and real estate taxes" we will have determined whether or not drainage assessments are included within that term and the penalties and interest thereon are to be computed upon the same penalty basis as assessments for the year 1933.

I.

**GENERALLY SPEAKING "TAXES"  
DO NOT INCLUDE SPECIAL BENEFIT  
ASSESSMENT.**

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Turning to 25 R. C. L. page 83, we find the following:

"There are, however, well recognized distinctions between special assessments and taxes levied for general revenue purposes, and the terms "assessments" and "tax" or "taxation," as used in constitutions and statutes, are not synonymous, but have been given entirely distinct meanings by the courts.\* \* \* "

And again on page 90 we find:

"It is the well settled general rule that special assessments for local improvements are not taxes within the meaning of the constitutional provision that taxation shall be equal and uniform throughout the state, county, or municipality laying the tax.\* \* \* "

This latter general statement of law is recognized in 70 A. L. R. page 1292.

In other states, we find these general rules have been adopted by the great majority. We refer to but a few of them. One of the earliest cases is that of *In Re The Mayor of New York*, 11 John 77. Several churches owning property on Nassau Street had been specially taxed for the improvement of that thoroughfare. The churches claimed that they were exempt from the operation of the tax because of the provisions of the New York state law which provided:

"No real estate belonging to any church shall be taxed by any law of this state."

The Court determined that "taxed" referred to general taxes to be assessed for the benefit of the town, county and state at large, and not to special benefit assessments.

By virtue of a special constitutional provision of the constitution of the State of Texas, the general statute of limitation does not operate upon "taxes" and is no defense to a suit for "taxes." In the case of City of Cisco vs. Varner, 8 S. W. (2d) 311, Varner had sued to cancel the lien of special tax bills representing local improvements, and asserted the statute of limitation against the City's cross action to enforce the tax bills. The Court held that a local benefit assessment was not a tax and therefore Varner was privileged to interpose the statute of limitation, l. c. 312:

"The assessment for the local improvements in question is not a tax, within the meaning of the Constitution and laws of this state, such as would prevent the running of the statute of limitation against a municipal corporation, suing to enforce, as against an abutting landowner, a claim and an alleged lien securing the same." \* \* \* "

From the foregoing it is clear that in the general and accepted sense the term "tax" does not include a special benefit assessment. Let us now turn to our own cases to see the construction that has been placed upon these terms by our own Courts in analogous situations.

## II.

### MISSOURI DECISIONS CONSTRUCT "TAXES" TO EXCLUDE SPECIAL BENEFIT ASSESSMENT.

What appears to be the first case in which this question is raised, in respect to the drainage or levee district law of this state, is the case of the Egyptian Levee Company vs. Hardin, 27 Mo. 495. In this case a corporation had been authorized to construct levees and dig canals for the purpose of reclaiming from overflow a district of country between the Des Moines, Fox and Mississippi rivers in Clark County. It also authorized the fund necessary for such improvements to be raised by tax not to exceed fifty cents per acre, on the landholders of the district. Suit was brought to recover some of the assessments and the defense made by the landowners was that the act was unconstitutional because the land was taxed by the acre and not in proportion to its value. Passing upon this objection the Court stated, l. c. 496:

\* \* \* That provision of our state constitution, which requires taxation to be proportioned to the value of the property on which it is laid, is only applicable to taxation in its usual, ordinary and received sense, and is, therefore, limited to taxation for general purposes alone, where the money raised by the tax goes into the state treasury, or the county treasury, or the general fund of some city or town, and is applicable to any person to which the legislative body of such state, county or town may choose to apply it; and is not intended to apply to local assessments, where the money raised is to be expended on the property taxed. These local assessments are not necessarily, under our constitution, apportioned by reference to the value of the property assessed, but may be regulated by the value of the benefit which the improvement, to which the money is devoted, is expected to confer on the proprietor. Legislative sanction of such assessments is usually brought about by the action of the parties interested, and it is for the legislature to determine in what ratio the burden shall be distributed. It ought to be according to the value of the benefit to be derived; but, if the plan adopted should not, in the opinion of the judiciary, attain the object, it is still not their province to interfere. \* \* \*

This distinction is also made in the case of *Morrison vs. Morey*, 146 Mo. 543-564:

"But while it is a public subdivision of the State and not a private corporation, it does not follow that the money to be raised from the landowners to carry out the objects intended, is a tax. It is an assessment which is justified by the benefit, public and private, conferred. The cost of the abatement of nuisances, for the construction of sewers or for the improvement of a street, may be assessed against the property benefited, notwithstanding the public and the owner are both interested. As a tax it would be un-

constitutional, because not uniform (Constitution, Sec. 3, art 10) and because not in proportion to the value of the property (Const. sec, 4, art. 10) and because it is prohibited by the limitations of section 12 of article X of our Constitution, but being an assessment of benefits and in no sense a tax it is a constitutional exercise of the power of the State.\* \* \* \*

That "taxation" as used in the constitution does not embrace drainage and levee district assessments and assessments for similar projects is established without a question of a doubt. Of the more recent cases so holding, we refer to State ex rel. Drainage District vs. Thompson, 41 S. W. (2d) 941-945, wherein it is stated:

"The uniform tax clause of our Constitution invoked by respondent has no application to this case for the reason that special assessments levied in a drainage district to pay for local improvements made in the district are not taxes within the meaning of this clause of the Constitution.\* \* \* \*

And in the more recent case of State vs. Sewer District, 58 S. W. (2d) 988-995, it is said:

"\* \* \* but a more sweeping and conclusive answer is that the constitutional provisions invoked do not apply to such taxes, because they are special taxes in the nature of benefit assessments. State ex inf. Atty. Gen. v. Curtis, supra, 319 Mo. loc. cit. 334, 4 S. W. (2d) loc. cit. 473.\* \* \* \*

While it is certain from the foregoing that "taxation" as used in the Constitution does not include special benefit assessment, still our problem is to determine whether or not the word "taxes" as used in this statutory enactment is to be construed to include drainage assessments. It is of course a cardinal rule of construction that words in any statute are to be used in their usual and ordinary sense. Betz vs. Kansas City Southern Railway Company, 314 Mo. 390-411:



"\* \* \* The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority.' And in 36 Cyc. 1114, it is furthermore said: 'In the interpretation of statutes, words in common use are to be construed in their natural, plain, and ordinary signification. It is a very well-settled rule that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the court to give it force and effect.'\* \* \*

If such be the case, there can be little doubt but that "taxes" when used in its ordinary and usual sense does not include special benefit, and therefore, in the instant act does not include special benefit assessments. Did not the Court in the Egyptian Levee case supra, place the interpretation upon the word "taxation" in its "usual, ordinary and received sense," and therefore held that it was "limited to taxation for general purposes alone?" We think then as a matter of construction this is clear, but refer to a few additional cases to fortify our position. We refer to the following quotation from Schwab vs. City of St. Louis, 274 S. W. 1058-1062:

"\* \* \* In approaching a discussion of the question in hand, it may be conceded as well settled and established in this state that, while assessments for special benefits and for local improvements in a broad sense are referable to the taxing power, yet they are not taxes in the general acceptation and use of that term, which usually applies to imposts levied for revenue or governmental purposes only. Such has been the uniform holding of this court.\* \* \*"



We also refer to the case of Commerce Trust Company vs. Syndicate Lot Company, 232 S. W. 1055. In this case the Court had for construction certain terms of the charter of the City of Kansas City. The following statement of Judge Bland of the Kansas City Court of Appeals affirms this position, l. c. 1056:

"A decision of this question rests upon the construction of the words 'special taxes or assessments' as used in this section and article of the charter. Ordinarily, the words, 'tax or taxes,' do not include local assessments, unless there be something in the language where the word is found to indicate such an intention.\* \* \* \* \*

"By the use of the word 'assessments' in connection with the words 'special taxes,' the framers of the charter must have meant something more than 'taxes,' as that word is usually construed to mean. In fact, it is clearly indicated in the charter that the words 'special taxes or assessments' refer to tax bills.\* \* \* \*

The law under discussion is short and therefore there is little ground to cover in our inquiry as to whether or not the other words of the statute indicate a different meaning. The terms "personal and real estate" clearly indicate an intention only to include ad valorem taxes. If any benefit is to be derived from the use of these various terms by the legislature in the construction of this act, it must be observed that the use of the terms "personal and real estate" indicate an intention to cover that field of taxation which may be commonly brought within the term as "ad valorem taxes." Certainly the term "real estate taxes" by itself does not indicate an intention to cover drainage assessment for throughout the statute these assessments are referred to as "drainage taxes" and are at no place designated as "real estate taxes." Therefore, if common nomenclature is to be considered, drainage assessments are not to be included in the term "personal and real estate taxes."

In concluding we wish to direct final attention to the case of Ranney vs. City of Cape Girardeau, 255 Mo. 514. In this case the court was considering the validity of benefit assessments for street improvements. Judge Lamm stated, l. c. 518:

November 12, 1934.

"The accepted doctrine is that special assessments for local improvements, while, in a broad sense, referable to the taxing power, are not taxes for public purposes or taxes at all within the purview and the sense of the constitutional provision invoked or within the sense and purview of other sections of the article on revenue and taxation." \* \* \* \*

It therefore appears that the foregoing case is direct authority for holding that "taxes" as used in the chapter on revenue and taxation, are not intended to and do not include benefit assessments for special or local improvements. It cannot be seriously argued that the bill under consideration is not a portion of the chapter of taxation and revenue as it will unquestionably take its place therein at the time of the next revision. Persuasive of this position is the heading as found on page 166, which reads as follows:

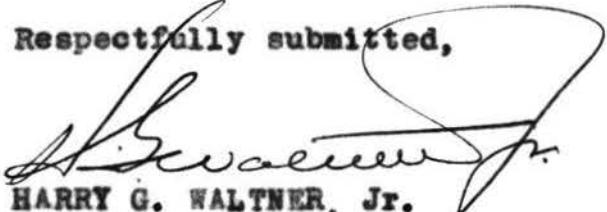
"Taxation And Revenue: Relating to Delinquent Taxes for the Year 1932 and Prior Years."

This definitely indicates its place as a part of the law on taxation and revenue of our state, and without question it would be entirely out of place in any other Chapter of our Revised Statutes.

CONCLUSION.

In view of the foregoing it is the opinion of this office that House Bill 124 of the Extra Session of the 57th General Assembly, as enacted, does not yet apply to or include what is commonly but erroneously termed as "drainage taxes."

Respectfully submitted,

  
HARRY G. WALTNER, Jr.  
Assistant Attorney General

APPROVED:

\_\_\_\_\_  
ROY McKITTRICK,  
Attorney General

HGW:MM